Sexual Assault Benchbook —Third Edition

Michigan Supreme Court

- The Honorable Elizabeth T. Clement, *Chief Justice*
- The Honorable Elizabeth M. Welch, *MJI Supervising Justice*
- The Honorable Brian K. Zahra, *Justice*
- The Honorable Richard Bernstein, *Justice*
- The Honorable Megan K. Cavanagh, *Justice*
- The Honorable Kyra Harris Bolden, *Justice*
- The Honorable Kimberly A. Thomas, *Justice*
- The Honorable Thomas P. Boyd, *State Court Administrator*
- Elizabeth Rios-Jones, *Deputy State Court Administrator*
- Alicia Moon, *Supreme Court General Counsel*
- Larry S. Royster, *Supreme Court Chief of Staff and Supreme Court Clerk*

Michigan Judicial Institute (MJI) Staff

- John R. Nizol, *Director*
- Amanda Clark, *Judicial Education Analyst*
- Anne M. DeMarco, *Program Assistant*
- Rachael Drenovsky, *Learning Center Coordinator*
- Amy Feinauer, *Program Assistant*
- Aaron D. Hanke, *Research Attorney*
- Michael Hennessy, *E-Learning Instructional Designer and LMS Administrator*
- Phoenix Hummel, *Publications Manager*
- Amanda Joseph, *Administrative Assistant*
- Heather Leidi, *Operations Specialist*
- Adam Pfau, *Education Analyst*
- Lindsay E. Poetz, *Research Attorney Specialist*
- Janaya Royal, *Administrative Specialist*
- Lisa Schmitz, *Research Attorney*
- Rebekah L. T. Sellers, *Research Attorney*
- Jonah Sjoquist, *Continuing Judicial Education Staff Attorney*
- Peter C. Stathakis, *Program Manager*
- Prestina Whitlow, *Administrative Assistant*

This third edition was initially published in 2012, and the text has been revised, reordered, and updated through January 24, 2025. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Note on Precedential Value

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

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

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

Acknowledgments

Work on the third edition of the *Sexual Assault Benchbook* was overseen by an Editorial Advisory Committee facilitated by Michigan Judicial Institute (MJI) Publications Manager Phoenix Hummel and former MJI Publications Manager Sarah Roth. Phoenix Hummel revised this third edition of the benchbook as well as the 2012 edition. Former MJI Publications Manager Sarah Roth served as editor of the revised and third editions of the benchbook. Amy Feinauer, MJI Program Assistant, also assisted in the publication of both the revised and third editions of the benchbook.

MJI gratefully acknowledges the time, helpful advice, and expertise contributed by the Committee members, who are as follows:

- Honorable Margaret Zuzich Bakker
  48th Circuit Court

- Stephanie Beyersdorf
  Management Analyst—Field Services
  State Court Administrative Office (SCAO)

- Ray Cassar
  Defense Attorney
  Law Offices of Raymond Cassar, PLC

- Honorable Gordon Gary Hosbein
  Berrien County Trial Court (Unified)

- Honorable Amy Ronayne Krause
  Michigan Court of Appeals

- Angela Povilaitis
  Staff Attorney, Division of Victim Services (DHHS)
  Michigan Domestic & Sexual Violence Prevention & Treatment Board (MDSVPTB)

- Honorable Karen Valvo
  15th District Court

- Jessica Zimbelman
  Managing Attorney
  State Appellate Defender Office

The first edition of the *Sexual Assault Benchbook* was financed by a grant administered by the Michigan Domestic Violence Prevention and Treatment Board (MDVPTB), now the Michigan Domestic & Sexual Violence Prevention & Treatment Board (MDSVPTB). MJI is grateful to the MDVPTB for their initial

financial support of this project. Thomas Smith, former MJI research attorney authored the first edition of this benchbook.

The **Michigan Judicial Institute (MJI)** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909,** or call **517.373.7171.**

Table of Contents

Chapter 3: Other Related Offenses

Chapter 4: Defenses to Sexual Assault Crimes

Chapter 5: Select Considerations in the Trial Process

Chapter 6: General Evidence

Chapter 7: Expert Testimony & Scientific Evidence

Chapter 8: Postconviction and Sentencing Matters

Chapter 9: Sex Offenders Registration Act (SORA)

Glossary

Chapter 1: Criminal Sexual Conduct in Michigan

1.1 Introduction

This benchbook contains comprehensive coverage of criminal sexual conduct and related subject matter. The discussion in this chapter does not provide a complete treatment of all subject matter introduced in it. Cross-references and other hyperlinks will direct the reader to locations in this benchbook's other chapters where the subject matter is discussed in greater detail. Where, however, another of the Michigan Judicial Institute's (MJI) publications discusses the same topic in detail, this chapter may summarizes the topic and refer the reader to the MJI publication where the topic is discussed in detail.

1.2 Overview of Benchbook

"Domestic [and Sexual] Violence . . . has devastating effects on victims, their children, and the entire society. It is criminal conduct that cannot be tolerated. A comprehensive community response to domestic [and sexual] violence through education, advocacy, and appropriate intervention is necessary to bring about change and end the violence. Battering [and sexual assault] stops only when assailants are held accountable for their abuse." Michigan Department of Health & Human Services, Domestic & Sexual Violence, *Mission and Philosophy Statement*.[1]

Sexual assault and domestic violence are offenses that are often discussed in tandem; that is, sexual assault may be the method by which domestic violence occurs. See the National Coalition Against Domestic Violence (NCADV) fact sheet about domestic violence in Michigan. NCADV defines *domestic violence* as "the willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior as part of a systematic pattern of power and control perpetrated by one intimate partner against another. It includes physical violence, sexual violence, threats, and emotional abuse." NCADV fact sheet, Domestic Violence in Michigan (2020). Sexual assault and domestic violence are often addressed together in a single source or intervention program. See *DHHS Mission and Philosophy Statement*; Michigan Legal Help, *What Is Domestic Violence?;* and National Network to End Domestic Violence, *Domestic Violence and Sexual Assault Fact Sheet*. For a comprehensive source of information about domestic violence and related legal issues and proceedings, see the Michigan Judicial Institute's *Domestic Violence Benchbook*.

In Michigan, criminal sexual conduct is generally punished under the Criminal Sexual Conduct Act (CSC Act), MCL 750.520a *et seq*.[2] The CSC Act prohibits a broad range of sexual misconduct, and distinguishes criminal sexual conduct by the method of assault and specific circumstances that might be involved in perpetrating the assault. The Michigan Legislature also enacted prohibitions against other crimes involving sexual misconduct that fall outside the provisions of the CSC Act.

Chapters 2 and 3 of the benchbook discuss offenses involving criminal sexual misconduct that are expressly prohibited by the CSC Act and offenses involving sexual misconduct that fall outside the provisions of the CSC Act.

---

[1] *Note:* The link to the DHHS Mission and Philosophy Statement and the links in this section to resources other than those published by the Michigan Judicial Institute were created using Perma.cc and directs the reader to an archived record of the page.

[2] Criminal sexual conduct is also punishable under federal law, however, a discussion on federal crimes related to sexual misconduct is beyond the scope of this benchbook.

- Chapter 2 focuses on the offenses found in the CSC Act, and defines the terms used in the CSC Act as well as discusses caselaw interpreting the definitions in actual practice. Chapter 2 also includes a brief discussion of the fines, costs, and crime victim assessment applicable to convictions under the CSC Act. Finally, Chapter 2 introduces information specific to student offenders and repeat offenders.

- Chapter 3 discusses other sex-related offenses prohibited under Michigan law but are not found in the CSC Act. These offenses include, but are not limited to, human trafficking offenses and offenses involving prostitution. Chapter 3 includes the statutory language defining each offense as well as caselaw addressing the offenses, where relevant caselaw exists.

Chapters 4 and 5 contain information about common defenses arising in sexual misconduct cases, and select pretrial considerations like nondomestic personal protection orders (PPOs) and discovery.

- Chapter 4 discusses the defenses an offender may raise to mitigate or eliminate liability for his or her conduct including consent and mistake of fact.

- Chapter 5 contains information related to an offender's pretrial release, including bond, victim notification, and conditions a court may place on an offender's pretrial release. Also included in Chapter 5 is a discussion about testing for sexually transmitted infections. For more information about the crime victim at trial, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

Chapters 6 and 7 address common evidentiary issues in cases of sexual misconduct, expert testimony, and scientific evidence that may arise in cases of sexual assault.

- Chapter 6 focuses on the evidence admitted against a defendant at trial. The chapter discusses the rape-shield statute and admission of a defendant's other crimes, wrongs, or acts. For a more detailed information about evidentiary issues, see the Michigan Judicial Institute's *Evidence Benchbook*.

- Chapter 7 includes a discussion of expert testimony including testimony specifically given by physicians and sexual assault nurse examiners. The chapter also includes a brief introduction to the admissibility of scientific evidence such as DNA profiles, blood type, and the results of sexual assault evidence collection kits.

Chapters 8 and 9 contain discussions of posttrial and postconviction issues, sentencing matters, and the content and requirements of the Sex Offenders Registration Act (SORA).

- Chapter 8 focuses on the sentencing hearing, probation, parole, and electronic monitoring. Setting aside or expunging a defendant's conviction, as well as brief discussions about other sentencing matters is also addressed in this chapter. For a comprehensive discussion about these topics, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*.

- Chapter 9 focuses solely on the SORA and contains a detailed and comprehensive discussion about registration under the SORA and the requirements of compliance with the SORA. Also addressed are the law enforcement's database of offenders and the public website database of offenders. Offenses subject to registration under the SORA are addressed, as are the penalties for an offender's failure to comply with the SORA.

1.3 General Definitions of Terms

The Glossary to this benchbook contains definitions of statutory terms applicable to specific offenses or to the statutes that involve sexual assault in general. The definitions in this section of the benchbook do not correspond to specific statutes; rather, the definitions in this section serve as an introduction to the subject matter in this chapter and the benchbook in general. The words found here appear on the State of Michigan's website under Sexual Assault & Abuse.[3]

- **Sexual assault**

  "is when a person forces or pressures another person into unwanted sexual contact. This can be unwanted sexual penetration of the body or unwanted touching of private parts of the body. Some, but not all perpetrators force unwanted sexual contact when a victim is asleep, unconscious, under the influence of alcohol or drugs or physically helpless. Michigan law refers to sexual assault as 'Criminal Sexual Conduct.'"

- **Child sexual abuse or molestation**

  "is when a person has sexual contact with a child. In most cases, children know their abusers. Perpetrators can be

[3] *Note:* The link to Michigan's website addressing sexual assault and abuse was created using Perma.cc and directs the reader to an archived record of the page.

> family members, neighbors, coaches, teachers, clergy members, caretakers, family friends, or other trusted adults. Examples of child sexual abuse might include sexual touching, penetration, manipulating the child to do something sexual, or taking graphic photos of children. Perpetrators use grooming behaviors to gain a child's trust and slowly introduce sexual contact."

- **Rape**

> "is sexual assault or sexual abuse that involves penetration of the body. This is when a perpetrator forces sexual penetration upon someone who does not want it, who is intoxicated, or who is not legally old enough to give consent. All of these examples are rape. The word rape [is no longer] used in Michigan law, but it is common for people to use this term."

- **Other forms of sexual abuse**

> "do not fit into neat categories. For example, sexual abuse includes a perpetrator having sex in front of children and making inappropriate comments to children. Another form of sexual abuse against adults and children is non-consensual pornography," which "is when one person posts or publishes explicit or sexual photos of someone else without their consent."

1.4 Development of Statutory Law Against Sexual Assault From 1808-1974

In 1808, two laws prohibiting sexual assault were enacted and appeared in *Laws of the Territory of Michigan*, Vol. IV., Supplemental.[4] One of those laws prohibited a man from raping a female *by force against her will*:

> "Sec. 9. *And be it enacted*, That if any man shall ravish or carnally know any woman, maid, or damsel, committing carnal copulation with her by force against her will, and being thereof convicted before the Supreme Court, he shall be fined not exceeding one thousand dollars, and be imprisoned or confined to hard labor during life."

[4] *Laws of the Territory of Michigan*, Vol. IV., Supplemental, Embracing all laws Enacted by the Legislative Authority of the Territory, not printed in Vols. I., II., and III., Territorial Laws, being Acts from 1806 to 1811, and also those Passed at the Special Session of the 6th Legislative Council, August 17th--25th, 1835 (W.S. George & Co., 1884), p 23.

A separate law enacted in 1808 prohibited a person over age 15 from sexually assaulting a female child under age 11:

> "Sec. 10. *And be it enacted*, That if any person over the age of fifteen years shall unlawfully and carnally know and abuse any woman child under the age of eleven years, with her will or against her will, and being thereof convicted before the Supreme Court, he shall suffer the same punishment as directed in the ninth section of this act [a fine of not more than $1,000 and imprisoned or confined to hard labor for life]."

A 1974 article in the University of Michigan Journal of Law Reform discusses the history of Michigan law against sexual assault from 1846 through the amendment and expansion of the law that occurred in 1974; the law against sexual assault that appears in 1975 as a result of the 1974 amendment is referred to by the authors of the article as the "new" sexual assault law. Cobb & Schauer, *Legislative Note: Michigan's Criminal Sexual Assault Law*,[5] 8 U. Mich. J. L. Reform 217, 217 (1974).

By 1846, 128 years before the "new" sexual assault law was enacted in 1974, the two existing laws against sexual assault[6] had been combined into a single law prohibiting "any person" from ravishing or carnally knowing any female aged 10 or older "by force and against her will[.]":[7]

> "Sec. 20. If any person shall ravish and carnally know any female of the age of ten years or more, by force and against her will, or shall unlawfully and carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the state prison for life, or for any term of years; and such carnal knowledge shall be deemed complete upon proof of penetration only."[8]

Additional laws on the books in 1846 were early enactments of the laws prohibiting specific sexual conduct under the conditions detailed in the statutory language. For example, in 1846 there was a law against taking or attempting to take a woman "unlawfully and against her will, and by force, menace or duress, compel her to marry him or any other person,"

---

[5]*Note:* The link to the Legislative note was created using Perma.cc and directs the reader to an archived record of the page.

[6]Sec. 9 and Sec. 10 of 1808 as they appeared in the *Laws of the Territory of Michigan*, Vol. IV., Supplemental, Embracing All Laws Enacted by the Legislative Authority of the Territory, not printed in Vols. I., II., and III., Territorial Laws, being Acts from 1806 to 1811, and also those Passed at the Special Session of the 6th Legislative Council, August 17th--25th, 1835, p 23.

[7]The Revised Statutes of the State of Michigan, Passed and Approved May 18, 1846, Rights of Persons Accused., Title XXX., Rights of Persons Accused., Of Crimes and the Punishments Thereof., Chapter 153, Of Offences Against the Lives and Persons of Individuals (Bagg & Harmon, 1846), p 660.

[8]*Id*. at p 660.

and a law against enticing a female under age 16 without her parent's or guardian's consent "for the purpose of prostitution, concubinage, or marriage[.]"[9]

By 1897, the age of consent had been established at age 16:

> "Sec. 20. If any person shall ravish and carnally know any female of the age of sixteen years, or more, by force and against her will, or shall unlawfully and carnally know and abuse any female under the full age of sixteen years, he shall be punished by imprisonment in the state prison for life, or for any such period as the court in its discretion shall direct, and such carnal knowledge shall be deemed complete upon proof of penetration only."[10]

The law remained substantially the same for decades. In 1915, the language was exactly the same as it appeared in 1897.[11] The Legislature enacted the Penal Code with the passage of 1931 PA 328, effective September 18, 1931. By then the Legislature had categorized the crime of rape as a felony and amended the language describing the evidence required for conviction of sexual assault. The commission of sexual assault required proof of sexual penetration, but the statute now stated that the offense was deemed complete if there was proof of sexual penetration "*however slight*."

> "Sec. 520. Punishment—Any person who shall ravish and carnally know any female of the age of sixteen years, or more, by force and against her will, or who shall unlawfully and carnally know and abuse any female under the full age of sixteen years, *shall be guilty of a felony*, punishable by imprisonment in the state prison for life or for any term of years. Such carnal knowledge shall be deemed complete upon proof of any sexual penetration *however slight*."[12] (Emphasis added.)

---

[9]*Id*. at Secs. 22, 23, and 24, p 660-661. See also Section 3.24 for a current law that similarly prohibits the conduct stated in the 1846 law.

[10]The Compiled Laws of the State of Michigan, Vol. III, 1897, Compiled and Arranged, with a Digest of Supreme Court Decisions and Other Annotations, and Published Under Authority of Acts 268 of 1895 and 26 of 1897, Title XIX of Crimes and the Punishment Thereof, Part One—Of Crimes and Misdemeanors, Chapter 319—Offences Against the Lives and Persons of Individuals (Robert Smith Printing Co, 1899), p 3423.

[11]The Compiled Laws of the State of Michigan, Vol. III, 1915: Compiled, Arranged and Annotated under Act 247 of 1913 and Act 232 of 1915, Title XV, Crimes and the Punishment Thereof, Part One—Crimes and Misdemeanors, Chapter 256.—Offenses Against the Lives and Persons of Individuals (Wynkoop H. Allenbeck Crawford Co, 1916), p 5275.

[12]See 1931 PA 328, effective June 16, 1931. Public Acts of the Legislature of the State of Michigan, passed at the Regular Session of 1931, Containing Joint Resolutions, Chapter LXXVI—Rape (Franklin DeKleine Company, 1931), p 727.

The language remained unchanged until 1952. In 1952, an offender's status as a sexually delinquent person had been added to the law against sexual assault and expressly provided a sentence for sexually delinquent offenders who were convicted of certain sexual misconduct crimes. See 1952 PA 73, effective April 9, 1952.

> "Sec. 520. Any person who shall ravish and carnally know any female of the age of 16 years, or more, by force and against her will, or who shall unlawfully and carnally know and abuse any female under the full age of 16 years, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years, or *if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life*. Such carnal knowledge shall be deemed complete upon proof of any sexual penetration however slight."[13] (Emphasis added.)

Sweeping changes were made to the law governing sexual assault by 1974 PA 266, effective April 1, 1975.[14] Cobb & Schauer, *Legislative Note: Michigan's Criminal Sexual Assault Law*, 8 U. Mich. J. L. Reform 217, 217 (1974).[15] According to the article, "[u]nder increasing pressure from women's rights groups and other reform organizations, the Michigan legislature has re-evaluated its centenarian rape statute, found it inadequate for the realities of the mid-twentieth century, and enacted a new sexual assault act." *Id*. This new sexual assault act appeared in 1974 PA 266, effective April 1, 1975. 1974 PA 266 repealed MCL 750.520 as it existed at the time and enacted a more comprehensive and detailed series of statutes penalizing different degrees of criminal sexual conduct. What had been formerly known as the law prohibiting rape, MCL 750.520, became first-degree criminal sexual conduct as part of the comprehensive statutory law dedicated to offenses involving sexual assault:[16]

> "Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration

---

[13]Public and Local Acts of the Legislature of the State of Michigan, passed at the Regular Session of 1952, Containing Joint Resolutions, Amendments to Constitution and Abstracts of Proceedings Relative to Change of Boundaries of Townships and Incorporation, etc., of Cities and Villages (Franklin DeKleine Company, 1932), p 82.

[14]Public and Local Acts of the Legislature of the State of Michigan, passed at the Regular Session of 1974, Also Other Matters Required by Law to be Published with the Public Acts (Department of Management and Budget), p 1025.

[15]*Note:* The link to Legislative note was created using Perma.cc and directs the reader to an archived record of the page.

[16]See Section 3.24 for the current statute and that is substantially similar to the one appearing here.

with another person and if any of the following circumstances exists:

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

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

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

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

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

(*ii*) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f) (*i*) to (*v*).

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

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

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

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

(*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, 'to retaliate' includes

> threats of physical punishment, kidnapping, or extortion.
>
> (*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
>
> (*v*) When the actor, through concealment or by the element of surprise, is able to overcome the victim.
>
> (g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.
>
> (2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years."

The new sexual assault law put in place by 1974 PA 266 abolished the offense of common-law rape and other sex offenses including assault with intent to commit rape,[17] sodomy, or gross indecency; attempted rape[18]; taking indecent liberties with a minor under age 16; offenses involving debauching—males against females under age 15, and males against males under age 15; ravishing a female patient in an institution for the insane; and carnal knowledge of a female ward by a guardian. *Legislative Note* at 219. Michigan's new criminal sexual assault law was formulated to distinguish among degrees of violence as motivated by hostility rather than passion, indicating that rape, like other crimes, is more heinous in certain contexts than others. *Id*. at 217. The new law set out "a hierarchy of degrees which relate to the severity of the criminal act involved." *Id*. at 220. "The new degree structure offer[ed] the courts objective guidelines for matching the crime with the offensiveness of the actor's conduct; the lower level offenses in the new law constitute[d] an appropriate mid-point between the old extremes of rape and mere assault." *Id*. at 220-221.

"The new law acknowledge[d] that criminal sexual conduct [was] generally a premeditated crime of violence rather than a crime provoked by the victim's behavior." *Legislative Note* at 217. "[T]he Legislative history reveals that the Legislature intentionally changed the name of the crime from 'sexual assault' to 'criminal sexual conduct' so that the established legal definition for 'assault' would not impede criminal sexual conduct prosecutions.[19] In our view, this history reveals a Legislative intent to make criminal sexual conduct a uniquely heinous

[17]Former MCL 750.85.

[18]Former content of MCL 767.82.

crime that is distinct from and far more invasive of human sanctity and dignity than common assault."[20] *People v Corbiere*, 220 Mich App 260, 265-266 (1996). The new law eliminated the requirement that a victim resist the assault. *Id*. In addition, the new criminal sexual conduct law was made "sex-neutral" so that men as well as women were protected under the law. *Legislative Note* at 220.

Importantly, "[t]he new law for the first time . . . codified definitions which may be determinative of the defendant's guilt or innocence—such as what constitutes 'intimate parts' of the body, when a person is 'mentally defective' or 'physically helpless,' what type of 'personal injury' may be grounds for a higher charge under the statute, and what 'sexual contact' and 'sexual penetration' entail. Some of these terms were alluded to under prior statutes, but it was left to the courts to construe such terms." *Legislative Note* at 218. Courts have not always been consistent over the years in their interpretation of terms relevant to sexual misconduct. *Id*. Even though some definitions of terms relevant to sexual assault may be challenged as ambiguous in some cases, the definitions included in the new law were necessary to determining the scope and defining the reach of the statutory language that prohibits the conduct. *Id*. at 219.

1.5 Statutory Rape

When it enacted 1974 PA 266, the Legislature "create[d] a system of definitions and punishments which considers the age of the victim, the type of sexual contact, and several limited situations in which the relationship of authority between victim and defendant warrant, in the legislative judgment, an increase in punishment." *People v Cash*, 419 Mich 230, 243 (1984). "These discrete choices made by the Legislature [in 1974 PA 266] evidence careful consideration of age and a deliberate determination to retain the law of statutory rape where the prohibited conduct occurred and the victim was within the protected age group." *Id*. at 244.

"'Statutory rape, a strict-liability offense, has been upheld as a matter of public policy because of the need to protect children below a specific age from sexual intercourse. The public policy has its basis in the presumption that the children's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their

[19]See Legislative Service Bureau Bill Analysis, House Substitute for Senate Bill No. 1207, July 12, 1974, Memorandum, Analysis of House Substitute SB 1207, from Don P. LeDuc, Office of Criminal Justice Programs, Department of Management and Budget, to Governor William G. Milliken, July 9, 1974.

[20]"Courts may examine the legislative history of an act to ascertain the reason for the act and the meaning of its provisions." *DeVormer v DeVormer*, 240 Mich App 601, 607-608 (2000).

conduct.'" *In re Tiemann*, 297 Mich App 250, 258 (2012), quoting *In re Hildebrant*, 216 Mich App 384, 386 (1996).

An individual who engages in sexual penetration with a person under the age of 13 is guilty of first-degree criminal sexual conduct. MCL 750.520b(1)(a). Similarly, a defendant's conviction of CSC-III under MCL 750.520d(1)(a) for engaging in sexual penetration with a person between the ages of 13 and 16 requires nothing more than that the victim's age be between 13 and 16. A defendant's reasonable mistake of a person's age is no defense against prosecution under MCL 750.520b(1)(a) or MCL 750.520d(1)(a).[21] *Cash*, 419 Mich at 243-244.

"'[T]here is no issue of consent in a statutory rape charge because a victim below the age of consent is conclusively presumed to be legally incapable of giving his or her consent to sexual intercourse.'" *People v Armstrong*, 490 Mich 281, 292 n 14 (2011), quoting *Cash*, 419 Mich at 247-248 (alteration in original).

1.6 Civil Remedy Available for Victims of Sexual Assault

A. Compensation for Damages Caused by the Assault

In 1982, in the first case of its kind in Michigan, a jury awarded a rape victim $2,000,000 in a civil suit the victim had brought against her assailant. Comment, *Civil Compensation for the Victim of Rape*, 7 Cooley L Rev 193 (1990). Rape victims may file civil suits against their assailant, and they may receive compensation "for both the immediate and long-term physical and psychological injuries they suffer as a result of this brutal act." *Id*. at 193-194. "While a criminal conviction may give the victim a sense of moral victory, it does not compensate her for the physical and emotional injuries that she suffered, and will continue to suffer, long after the rape." *Id*. at 198.

A sexual assault victim may recover civil damages for injury resulting from a crime punishable under the Penal Code even when the statute governing the crime does not specifically allow it. See MCL 750.4. MCL 750.4 states that "[t]he omission to specify or affirm in this act any liability to damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered, or enforced in any civil action or proceeding, for any act or omission declared punishable herein does not affect any right to recover or enforce the same."

[21] See Section 4.2 for more information about a mistaking the age of a victim and whether that affects how a defendant is charged or convicted of sexual misconduct.

"Although the same act may constitute both a crime and a tort, the crime is an offense against the public pursued by the sovereign, while the tort is a private injury which is pursued by the injured party." *People v Veenstra*, 337 Mich 427, 430 (1953) (quotation marks and citation omitted).

"Restitution awarded by a sentencing court is not a substitute for civil damages, but encompasses only those losses which are easily ascertained and measured and are a direct result of a defendant's criminal acts." *People v Tyler*, 188 Mich App 83, 89 (1991). See also *People v White*, 212 Mich App 298, 316 (1995) (restitution consists only of losses that are easy to determine and measure and directly result from a defendant's criminal acts).

B. Statutes of Limitations[22]

1. Action for Damages[23]

MCL 600.5805 provides the limitations periods for initiating various actions to recover damages to persons or property. "The period of limitations is 10 years for an action to recover damages sustained because of criminal sexual conduct." MCL 600.5805(6).

MCL 600.5851b, enacted in 2018, both extends the statute of limitations for individuals assaulted as minors to file an action for damages, and provides a statutory codification of a discovery rule that tolls the accrual date of a cause of action for individuals assaulted as minors.[24] *McLain v Roman Catholic Diocese of Lansing*, ___ Mich ___, ___ (2024) (*McLain II*), aff'g *McLain v Roman Catholic Diocese of Lansing*, ___ Mich App ___ (2023) (*McLain I*). "Notwithstanding [MCL 600.5805] and [MCL 600.5851[25]], an individual who, while a minor, is the victim of criminal sexual conduct may commence an action to recover damages sustained because of the criminal sexual conduct at any time before whichever of the following is later:

---

[22]Basic information about the limitations period applicable to the offenses discussed in this benchbook appears with the discussion of the offense.

[23]For additional discussion about civil actions filed by crime victims in general, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 10. Administrative remedies may also be available to victims of criminal sexual conduct through the Crime Victim Services Commission (CVSC). For additional discussion about the CVSC, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 9.

[24] "[MCL 600.5851b] does not limit an individual's right to bring an action under [MCL 600.5851]." MCL 600.5851b(4).

[25] MCL 600.5851 provides for an extension of time if the victim is under 18 years of age or insane at the time the claim accrues. See the content of MCL 600.5851 for more information.

> (a) The individual reaches the age of 28 years.
>
> (b) Three years after the date the individual discovers, or through the exercise of reasonable diligence should have discovered, both the individual's injury and the causal relationship between the injury and the criminal sexual conduct." MCL 600.5851b(1).

"For purposes of [MCL 600.5851b(1)], it is not necessary that a criminal prosecution or other proceeding have been brought as a result of the conduct or, if a criminal prosecution or other proceeding was brought, that the prosecution or proceeding resulted in a conviction or adjudication." MCL 600.5851b(2).

"MCL 600.5851b(1) is a hybrid"—a statute of limitations extension and a discovery rule that tolls the accrual date of a claim. *McLain II*, ___ Mich at ___.

- "[MCL 600.5851b(1)(a)] is a straightforward extension of the statute of limitations because it extends the time for a minor to file an action from until at least age 19 (i.e., one year after the disability of minority is removed, MCL 600.5851) to age 28." *McLain II*, ___ Mich at ___.

- "[MCL 600.5851b(1)(b)], however, is an unmistakable statutory codification of a discovery rule. It does not simply extend the statute of limitations an additional three years. Rather, it changes the date from which the three-year period begins to run. In other words, it tolls the accrual date." *McLain II*, ___ Mich at ___.

However, MCL 600.5851b(1)(b) does not apply retroactively to resurrect expired claims: "We agree with the Court of Appeals that '[n]othing in the plain language of MCL 600.5851b(1)(b) suggests that it was intended to apply retroactively.'" *McLain II*, ___ Mich at ___, quoting *McLain I*, ___ Mich App at ___ (alteration in original). The sexual misconduct on which plaintiff's claim was based occurred in 1999, before MCL 600.5851b was enacted, and when "a civil claim based on criminal sexual conduct of a minor accrued when the conduct occurred." *McLain II*, ___ Mich at ___, citing *Lemmerman v Fealk*, 449 Mich 56, 64 (1995). Consequently, plaintiff's claim was time-barred by the three-year personal injury statute of limitations in effect then (former MCL 600.5805(8), now MCL 600.5805(2)). *McLain II*, ___ Mich at ___.[26].

2. Indictment for Crime

MCL 767.24 governs the limitations period for filing an indictment for CSC and human trafficking offenses. MCL 767.24(1)-(4).

- For a violation of MCL 750.520b (CSC-I), an indictment "may be found and filed at any time[.]" MCL 767.24(1)(a).

- For a violation of a human trafficking statute described in MCL 750.462a to MCL 750.462h that is punishable by life imprisonment, an indictment "may be found and filed at any time[.]"[27] MCL 767.24(1)(c).

- For a violation or attempted violation of MCL 750.13 or a human trafficking statute described in MCL 750.462b to MCL 750.462e, an indictment "may be found and filed within 25 years after the offense is committed." MCL 767.24(2).

- For a violation or attempted violation of MCL 750.520c (CSC-II) when the victim is age 18 or older, MCL 750.520d (CSC-III) when the victim is age 18 or older, MCL 750.520e (CSC-IV), or MCL 750.520g (assault with intent to commit CSC involving penetration or CSC-II), an indictment "may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later," MCL 767.24(3)(a), unless DNA evidence is obtained, which would require application of the provisions in MCL 767.24(3)(b). MCL 767.24(3).

- For a violation or attempted violation of MCL 750.520c (CSC-II) when the victim is age 18 or older, MCL 750.520d (CSC-III) when the victim is age 18 or older, MCL 750.520e (CSC-IV), or MCL 750.520g (assault with intent to commit CSC involving penetration or CSC-II), when DNA evidence from an unidentified individual is obtained, "an indictment against that individual for the offense may be found and filed at any time after the offense is committed." MCL 767.24(3)(b). "However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by

[26]The 10-year period of limitations to recover damages sustained because of criminal sexual conduct was enacted by 2018 PA 183, effective June 12, 2018. See MCL 600.5805(6). "Plaintiff [did] not contend that the 10-year limitations period in MCL 600.5805(6) applie[d] to his claim." *McLain II*, ___ Mich at ___ n 8.

[27]See Section 3.28 and Section 3.29 for more information about human trafficking offenses.

the alleged victim's twenty-first birthday, whichever is later." *Id*.

- For a violation of MCL 750.520c (CSC-II) or MCL 750.520d (CSC-III) when the victim is under age 18, "an indictment may be found and filed within 15 years after the offense is committed or by the alleged victim's twenty-eighth birthday, whichever is later[,]" unless DNA evidence is obtained, which would require application of the provisions in MCL 767.24(4)(b). MCL 767.24(4)(a).

- For a violation of MCL 750.520c (CSC-II) or MCL 750.520d (CSC-III) when the victim is under age 18, when DNA evidence from an unidentified individual is obtained, "an indictment against that individual for the offense may be found and filed at any time after the offense is committed." MCL 767.24(4)(b). "However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim's twenty-eighth birthday, whichever is later." *Id*.

Indictments not specifically addressed by the provisions of MCL 767.24 "may be found and filed within 6 years after the offense is committed." MCL 767.24(10).

Tolling. "Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed." MCL 767.24(11). Tolling or an extension of the limitations period found in MCL 767.24 applies to a violation if the limitations period for that violation had not yet expired at the time the extension or tolling would begin. MCL 767.24(12).

1.7 Rape-Shield Statute[28]

The rape-shield statute, MCL 750.520j, limits the admissibility of evidence related to a complainant's past sexual conduct. With the exception of the two circumstances explained in MCL 750.520j(a)-(b),[29] the rape-shield statute limits the admission into evidence of all a complainant's past sexual conduct or reputation for sexual conduct. *People v Adair*, 452 Mich 473, 478 (1996).

[28]See Section 6.2 for a detailed discussion of the rape-shield statute.

[29]Evidence of the complainant's past sexual conduct with the defendant and evidence of specific sexual activity showing the source of semen, pregnancy, or disease may be admissible. MCL 750.520j(1)(a)-(b).

The rape-shield statute reflects the Legislature's determination that while a complainant's past sexual conduct or reputation for sexual conduct may be logically relevant, the information is not legally relevant. *People v Sharpe*, 502 Mich 313, 326 (2018). With the creation of the rape-shield statute, the Legislature noted that a complainant's sexual history or reputation is not likely to be a reliable way of measuring a victim's veracity or determining whether the sexual conduct was consensual. *People v Powell*, 201 Mich App 516, 519 (1993). In light of the danger of unfair prejudice, a complainant's sex history is only minimally relevant. *Sharpe*, 502 Mich at 326. Lastly, protecting a complainant's privacy may mitigate a complainant's hesitancy to report the assault. *Id*.

1.8 Documents Filed by Incarcerated Parties

A pleading or other document filed by an individual who is not represented by an attorney and who is incarcerated in a prison or jail "must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline." MCR 1.112. Proof that the document was timely filed "may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." *Id.*

1.9 Resources Available to Address Sexual Assault

The Michigan Domestic and Sexual Violence Prevention and Treatment Board (MDSVPTB),[30] and the Michigan Coalition to End Domestic and Sexual Violence (MCEDSV) are organizations operating at the statewide level to address the prevention and treatment of domestic and sexual violence. Although these agencies do not provide direct assistance to persons experiencing domestic and sexual abuse, the agencies can provide local referrals, information about domestic and sexual violence, training resources, and technical assistance. There is a comprehensive Michigan-specific list of resources available from the National Sexual Violence Resource Center (NSVRC).

A. Michigan Domestic and Sexual Violence Prevention and Treatment Board

"The Michigan Domestic and Sexual Violence Prevention and Treatment Board (MDSVPTB) was established in 1978 by state legislation that created a Governor-appointed Board responsible for

[30] *Note:* The link to MDSVPTB's website, and the links to the other resources cited in this section and its subsections, were created using Perma.cc and direct the reader to an archived record of the pages cited.

focusing state activity on domestic violence." Michigan Department of Health & Human Services (MDHHS), *About the Board*. In addition, the MDSVPTB is tasked with developing and recommending policy, providing training and technical assistance to the criminal justice and child welfare departments, and distributing state and federal funding to resources providing services to survivors of domestic and sexual violence. *Id*. See MCL 400.1504.[31] The MDSVPTB also coordinates statewide delivery of education to the justice system and other professionals. *Id*.

B. Michigan Coalition to End Domestic and Sexual Violence

The Michigan Coalition to End Domestic and Sexual Violence (MCEDSV) "is dedicated to the empowerment of all the state's survivors of domestic and sexual violence." MCEDSV, *Mission and Vision*. The MCEDSV develops and promotes efforts being made to eliminate all domestic and sexual violence. *Id*. The MCEDSV acknowledges that "[e]nding domestic and sexual violence against all survivors requires social change that promotes equality through individual, institutional and cultural changes." MCEDSV, *Goals and Values*.

To see a list of resources available to the public, see MCEDSV, *Public Resources*.

C. Other Available Services

Michigan domestic and sexual violence service agencies provide individuals who have been assaulted with help and support in the aftermath of an assault.[32] For additional information, including a list of local domestic and sexual violence service agencies, see Michigan Department of Health & Human Services, *Safety & Injury Prevention/Domestic& Sexual Violence*.

---

[31] 2018 PA 281, effective September 27, 2018, added *sexual violence* to the language of MCL 400.1504, where the language had previously been limited to *domestic violence*. MCL 400.1504 describes the MDSVPTB's structure, its duties and the scope of those duties, and the proper performance of the duties. See MCL 400.1504 for the list of the Board's duties prescribed by the Legislature. MCL 400.1504(a)-(j).

[32] Within 24 hours after an investigating law enforcement agency has had initial contact with a sexual assault victim, that agency must provide the victim with a written copy of, or access to, information for contacting a local community-based program that offers services to sexual assault victims when such services are available. MCL 752.953(1)(a). The sexual assault victim's access to justice act, MCL 752.951 *et seq*., contains a comprehensive list of information the law enforcement agency is required to provide to the victim as a matter of course, as well as information to which the victim is entitled upon request. MCL 752.953(1)-(2); MCL 752.955; MCL 752.956. Requirements governing a victim's request for information are set forth in MCL 752.954. Additionally, "[a] police officer or prosecuting attorney may provide a domestic or sexual violence service provider agency with the name, demographics, and other pertinent information of, and information to facilitate contact with, a victim of domestic or sexual violence for the purpose of offering supportive services to the victim." MCL 776.21b(1).

Michigan resources are also available from the State of Michigan's homepage under the topic of *Sexual Assault & Abuse*, including information about the VOICES4 hotline. Resources available there include a 24/7 Michigan hotline number, information concerning legal options and rights, health options for victims of sexual assault, and information about helping a survivor of sexual assault.

For information about services provided in each county throughout Michigan, see State of Michigan's, *Find Services in Your Area*. Select the county in which services are sought, and the names of organizations, their services, and their contact information will appear.

D. National Judicial Education Program Publication: *Judges Tell*

Legal Momentum, the Women's Legal Defense and Education Fund, as part of the National Judicial Education Program (NJEP), developed the publication *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case* from a nationwide survey of judges who had participated in NJEP's *Understanding Sexual Violence* programs. The publication covers twenty-five points ranging from basic information about the prevalence and impact of sexual assault to *pro se* defendants seeking to cross-examine their alleged victims. Legal Momentum offers many educational resources available from the Legal Momentum website, including a webinar titled *Intimate Partner Sexual Abuse Web Course: Adjudicating This Hidden Dimension of Domestic Violence Cases*.[33]

For additional information on NJEP and Legal Momentum, see Legal Momentum, *Courts, The Justice System, and Women*.

1.10 Judicial Participation in a Community's Efforts to Acknowledge and Prevent Sexual Assault

"[A] judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice."MCJC 4. In fact, judges are encouraged to make this type of contribution to the improvement of the law when time permits, but a judge must take care to regulate any extrajudicial activities so as to minimize any risk of conflict with the obligations of the judge. *Id*.

[33]Other resources available from Legal Momentum include *Human Trafficking*, *Violence Against Women and Girls*, and *Fairness in the Courts*.

No matter what involvement a judge is permitted to have in a charitable or civic organization, "[a] judge must avoid all impropriety and appearance of impropriety." MCJC 2(A). In addition, although "[a] judge may allow his or her name or title to be used in advertising the judge's involvement in an event," the judge must not "individually solicit funds." MCJC 4(D).

A. Judicial Integrity and Independence

"A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." MCJC 1.

B. Civic and Charitable Activities

Canon 4 governs a judge's engagement in extrajudicial activities, including those having to do with charitable or civic organizations, and a judge's participation in one or more of those organizations. MCJC 4. According to Canon 4(C), "[a] judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties." Further, "[a] judge may serve and be listed as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization." *Id*.

C. Committees and Commissions Related to Matters Other Than the Law

A judge may not be appointed to a governmental committee, commission, or any other position concerned with matters other than improvement of the law, the legal system, or the administration of justice. A judge may not participate in matters of fact or policy unrelated to improving the law, the legal system, or the administration of justice. MCJC 4(I).

D. Prohibition Against Individual Solicitation of Funds

"A judge should not individually solicit funds for any . . . organization or governmental agency devoted to the improvement of law, the legal system, or the administration of justice or use or permit the use of the prestige of the office for that purpose." MCJC 4(D).

E. General Appeal for Funds

"A judge may . . . serve as a member of an honorary committee or may join a general appeal on behalf of such an organization. MCJC 4(D). "A judge may speak or receive an award or other recognition in connection with an event of such an organization. *Id*.

Chapter 2: Criminal Sexual Conduct Offenses

2.1 Overview of Criminal Sexual Conduct Statutes

A. Purpose of Criminal Sexual Conduct Statutes

"The focus of the criminal sexual conduct [CSC] statute[s] is the prevention of sexual assaults." *People v Hack*, 219 Mich App 299, 307 (1996). The CSC's purpose is "to codify, consolidate, define, and prescribe punishment for a number of sexually assaultive crimes under one heading." *People v Cash*, 419 Mich 230, 234 n 1 (1984).

B. Offenses Involving Criminal Sexual Conduct

The Michigan Legislature created six substantive criminal offenses:

(1) first-degree criminal sexual conduct (CSC-I), MCL 750.520b.

(2) second-degree criminal sexual conduct (CSC-II), MCL 750.520c.

(3) third-degree criminal sexual conduct (CSC-III), MCL 750.520d.

(4) fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e

(5) assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1).

(6) assault with intent to commit criminal sexual conduct in the second degree, MCL 750.520g(2).

"One object of the Legislature in providing for degrees of criminal sexual conduct was to differentiate between sexual acts which affected only the body surfaces of the victim [sexual contact] and those which involved intrusion into the body cavities [sexual penetration] . . . ." *People v Bristol*, 115 Mich App 236, 238 (1982). Built within the degrees of criminal sexual conduct is an elevation process with which the presence of certain circumstances may escalate a sexual penetration offense from a CSC-III offense to a CSC-I offense and a sexual contact offense from a CSC-IV offense to a CSC-II offense. See *People v Petrella*, 424 Mich 221, 238-239 (1985); *People v Rogers*, 142 Mich App 88, 91 (1985).

C. Specific Intent and General Intent

Criminal sexual conduct is most often a general intent crime. *People v Nickens*, 470 Mich 622, 631 (2004). Notably, however, an attempt to commit a CSC offense under MCL 750.520g requires specific intent.

See *People v Cervi*, 270 Mich App 603, 617 (2006). "[T]he distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act." *People v Beaudin*, 417 Mich 570, 573-574 (1983). That is, specific intent requires the "[p]erformance of the physical act proscribed in the statute" *and* "an intent to bring about the particular result the statute seeks to prohibit." *Id*. at 575. On the other hand, a general intent crime requires only that the actor possess the intent to do the physical act prohibited by the statute. See *People v Anderson*, 330 Mich App 189, 203-204 (2019).

D. Rules on Age

1. Calculation of Age

"[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 464, quoting *In re Robinson*, 120 NC App 874, 877 (1995). *Woolfolk* held that the common-law rule of age calculation, under which an individual "'reaches his next year in age at the first moment of the day *prior to* the anniversary of his birth'" does not apply in Michigan. *Woolfolk*, 304 Mich App at 461, quoting *State v Brown*, 443 SW2d 805, 807 (Mo, 1969) (emphasis added). According to the *Woolfolk* Court, the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet 18 years of age when the shooting occurred." *Woolfolk*, 304 Mich App at 506.

2. Age of Offender

"If our state legislature had intended that courts consider the age differential between the offender and the victim, it could have included this consideration in the criminal sexual conduct statutes." *In re Hildebrant*, 216 Mich App 384, 386-387 (1996) ("The language of the third-degree criminal sexual conduct statute[, MCL 750.520d,] does not exclude any class of offenders on the basis of age. . . . Because the purpose of the statute is the protection of the minor victim, the age of the offender is not a relevant concern.").[1] "*Hildebrant* . . . stands for the proposition that there is no public policy bar to prosecution

[1] Although the *Hildebrant* Court did not address the other criminal sexual conduct statutes specifically, its finding would presumably extend to those statutes as well.

of one child who engages in sexual acts with another child when both children are within the same protected age group." *In re Tiemann*, 297 Mich App 250, 259, 263 (2012) ("*Hildebrant* establishes that a minor engaged in a consensual sexual act with another minor within the same age range can be regarded as an offender subject to prosecution."). See *People v Wilson*, 196 Mich App 604, 609 (1992) ("[MCL 750.520b] specifies no age of culpability, and . . . the minors could have been criminally charged in juvenile court.").

But see MCL 750.520e(1)(a), which specifically considers the age differential between the offender and the victim by finding "[a] person . . . guilty of criminal sexual conduct in the fourth degree if the person engages in sexual contact with another person and . . . [t]hat other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person." MCL 750.520e(1)(a). Note that the rest of the circumstances listed in MCL 750.520e(1)(b)-(h) do not consider the age differential between the offender and the victim.

E. Lesser Included Offenses

"Lesser offenses are divided into necessarily included lesser offenses and cognate lesser offenses. An offense is considered a necessarily included offense if it is impossible to commit the greater offense without first having committed the lesser offense. *People v Nyx*, 479 Mich 112, 118 n 13 (2007), citing *People v Cornell*, 466 Mich 335, 345 (2002). "A cognate lesser offense is one that shares elements with the charged offense but contains at least one element not found in the higher offense." *Nyx*, 479 Mich at 118 n 14 (2007), citing *Cornell*, 466 Mich at 345. This subsection contains a brief discussion of lesser included offenses as they relate to criminal sexual conduct offenses. For a detailed discussion of lesser included offenses in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 12.

"Pursuant to th[e] language[of MCL 768.32(1)], when a defendant is charged with an offense 'consisting of different degrees,' the fact-finder may acquit the defendant of the charged offense and find the defendant 'guilty of a degree of that offense inferior to that charged in the indictment . . . .' There is no dispute that criminal sexual conduct is a crime the Legislature has divided into degrees." *Nyx*, 479 Mich at 117. However, "MCL 768.32(1) precludes a judge or a jury from convicting a defendant of a cognate lesser offense even if the crime is divided into degrees . . . because the word 'inferior' in MCL 768.32(1) is best understood as meaning an offense that is necessarily included in the greater charge." *Nyx*, 479 Mich at 121.

1. Necessarily Included Lesser Offense

Assault with intent to commit CSC and CSC-I. Assault with intent to commit CSC involving penetration, MCL 750.520g(1), is a necessarily included lesser offense of CSC-I involving personal injury and the use of force or coercion, MCL 750.520b(1)(f) because "one cannot commit CSC-I involving personal injury and the use of force or coercion to accomplish sexual penetration without first committing an assault with intent to commit CSC involving sexual penetration[.]" *People v Nickens*, 470 Mich 622, 629-630 (2004).

CSC-I involving commission of another felony. For a charge of CSC-I where the sexual penetration occurred under circumstances involving the commission of a felony, "the underlying felony is a necessarily included lesser offense" of the CSC-I charge because a jury cannot convict a defendant "of CSC-I under MCL 750.520b(1)(c) without determining that defendant[] also committed the underlying felony[.]" *People v Lockett*, 295 Mich App 165, 182 (2012).

2. Cognate Lesser Offense

CSC-II and CSC-I. CSC-II is a cognate lesser offense of CSC-I because "it is possible to commit CSC I without first having committed CSC II, and the elements of CSC II are not 'completely subsumed' in the greater offense of CSC I. *People v Nyx*, 479 Mich 112, 136 (2007) (plurality opinion).[2]

CSC-III and CSC-I. CSC-III (sexual penetration of a person aged 13-15, MCL 750.520d(1)(a)) is a cognate lesser offense of CSC-I (sexual penetration while armed with a weapon/ instrument reasonably believed to be a weapon, MCL 750.520b(1)(d), or with multiple actors where defendant uses force or coercion, MCL 750.520b(1)(e)) "[b]ecause, [as applied in this case,] both offenses require the act of sexual penetration and are of the same category of crimes[.]" *People v Apgar*, 264 Mich App 321, 327 (2004), overruled in part on other grounds by *People v White*, 501 Mich 160 (2017).[3]

[2] "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding on [courts] under the doctrine of stare decisis." *Negri v Slotkin*, 397 Mich 105, 109 (1976).

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

F. Statutes of Limitations

The statutes of limitations applicable to the offenses contained in this chapter are indicated in the text discussing each offense. See MCL 767.24.

A tolling provision applies to each period of limitations discussed in this chapter. See MCL 767.24(11). The tolling provision states that "[a]ny period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed." *Id*.

G. Procedural Requirements When Registration Under SORA Is Mandatory

SORA registration is required when a defendant is convicted of a listed offense, and MCL 28.724 prescribes the specific procedure to be followed when a defendant is convicted of a listed offense. *People v Nunez*, 342 Mich App 322, 327, 328 (2022).

When registration under the SORA is mandatory, a defendant must be registered before he or she is sentenced; in addition, MCR 6.427(9) provides that when SORA registration is mandatory for the conviction, that fact must be made part of the judgment of sentence. *Nunez*, 342 Mich App at 330.

The notice a defendant must be given after conviction of a listed offense must also be given before a court accepts a defendant's guilty plea to a listed offense. *Nunez*, 342 Mich App at 334. "Because SORA is a punitive collateral consequence of the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea. For the same reason, the registration requirement must be included in the judgment of sentence." *Id*. at 334. In *Nunez*, the defendant was not required to register under the SORA after he was convicted of a listed offense because the court failed to adhere to the instructions prescribed in MCL 28.724(5) and MCR 6.427(9), and the period during which a trial court could sua sponte correct an invalid sentence had expired. See MCR 6.429(A). *Nunez*, 342 Mich App at 334, 335.

2.2 First-Degree Criminal Sexual Conduct

First-degree criminal sexual conduct (CSC-I) is the most serious criminal sexual conduct offense. It involves sexual penetration coupled with certain circumstances set out in MCL 750.520b.

A. Elements of Offense

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

(a) That other person is under 13 years of age.[4]

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

(*i*) The actor is a member of the same household[5] as the victim.

(*ii*) The actor is related to the victim by blood or affinity[6] to the fourth degree.

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

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

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

(*vi*) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual

[4] For caselaw discussing sexual penetration with a person under the age of 13, see Section 2.2.

[5] See Section 2.2(A)(3) for caselaw discussing what constitutes a "household".

[6] See Section 2.2(A)(4) for caselaw discussing CSC-I committed by a relative.

> penetration occurs during the period of that other person's residency. . . . .
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.[7]
>
> (d) The actor is aided or abetted by 1 or more other persons[8] and either of the following circumstances exists:
>
> > (*i*) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.[9]
> >
> > (*ii*) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (f).
>
> (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.[10]
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. . . .
>
> (g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.
>
> (h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:
>
> > (*i*) The actor is related to the victim by blood or affinity to the fourth degree.
> >
> > (*ii*) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit." MCL 750.520b(1).

---

[7] See Section 2.2(A)(5) for caselaw discussing CSC-I perpetrated by committing another felony.

[8] See Section 2.2(A)(6) for caselaw discussing the elements of aiding and abetting.

[9] See Section 2.2(A)(8) for caselaw discussing the reasonable person standard.

[10] See Section 2.2(A)(7) for caselaw discussing the use of a weapon or other instrument while committing CSC-I.

1. Aggravating Circumstances

a. Multiple Aggravating Circumstances for a Single Act of Penetration

"'Although [MCL 750.520b] is not explicitly phrased in the alternative, . . . the Legislature intended that the various aggravating circumstances be alternative ways of proving criminal sexual conduct in the first degree.' . . . The fact that a sexual penetration happens to be accompanied by more than one of the aggravating circumstances enumerated in the statute may well ease the burden on the prosecution in attaining a conviction under MCL 750.520b, but it may give rise to only one criminal charge for purposes of trial, conviction, and sentencing." *People v Johnson*, 406 Mich 320, 331 (1979), aff'g 75 Mich App 221, 226-227 (1977).

Although jury unanimity is required with respect to certain aspects of a verdict, the jurors do not have to agree on which aggravating circumstance the defendant used in committing CSC-I. *People v Gadomski*, 232 Mich App 24, 31-32 (1998). Accordingly, a defendant may be "properly convicted of CSC I even if some of the jurors believed that he committed the offense solely on the basis of one aggravating circumstance, while the rest of the jurors believed that he committed the offense solely on the basis of another one of the aggravating circumstances. *Id*. "[I]t is well settled that when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories." *Id*. at 30-31 (rejecting defendant's argument that "he was entitled to a special unanimity instruction in this case because the separate aggravating circumstances on which the jury was instructed involved alternative factual situations (i.e., a home invasion, aiding and abetting, or a personal injury)").

b. Single Aggravating Circumstance for Multiple Acts of Penetration

One aggravating circumstance may support multiple acts of penetration. *People v Martinez*, 190 Mich App 442, 444-445 (1991) (affirming defendant's conviction for two counts of CSC-I where defendant's initial beating of the victim was "sufficient to supply the personal injury element for the count involving fellatio," as well as "the

personal injury element for the count involving cunnilingus"; both acts "occurred within ten minutes of the assault and there was no indication of the defendant's intention to discontinue the attack during the entire episode"). See also *People v Hunt*, 170 Mich App 1, 8-9 (1988) ("The beating visited upon the complainant immediately prior to the series of sexual penetrations [was] sufficient to supply the element of personal injury with respect to each of the subsequent penetrations so as to support multiple convictions under MCL 750.520b(1)(f)."), rejecting the Court's holding in *People v Payne*, 90 Mich App 713, 717-719 (1979). [11]

2. Sexual Penetration With a Person Under 13

"'[T]he question is not whether there was conflicting evidence, but rather whether there was evidence that the jury, sitting as the trier of fact, could choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant.'"[12] *People v Bailey*, 310 Mich App 703, 714 (2015) (finding that defendant's convictions of four counts of CSC-I were supported by sufficient evidence where "[e]ach complainant testified that defendant penetrated her vagina with his fingers, and the jury was free to believe their testimony despite the delay in reporting defendant's conduct[, and] . . . [e]ach victim offered an explanation for why they did not report defendant's conduct when it occurred"), quoting *People v Smith*, 205 Mich App 69, 71 (1994). See also *People v Solloway*, 316 Mich App 174, 181 (2016) (defendant's conviction of CSC-I was supported by sufficient evidence where the victim testified that he woke up to defendant on top of him, 'shaking up and down[,]' . . . that defendant then flipped him over and 'put his [penis] in [the victim's] butt,' [and he] explained that he could feel defendant's [penis] in his body").

[11] Noting no distinction between a beating where "[t]here was never any indication of the defendant's intention to discontinue the attack during the entire episode" and "an ongoing criminal act such as the use of a deadly weapon during multiple penetrations or, for that matter, any other felony committed in close temporal proximity with the acts of penetration." *Hunt*, 170 Mich App at 8-9 ("The evidence in this case show[ed] that the beating inflicted upon the [victim], which caused physical injury and was used by the defendant to force or coerce his accomplishment of multiple sexual penetrations, was part of a continuing series of sexual assaults.").

[12] "'[T]he prosecutor 'is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury "in the face of whatever contradictory evidence the defendant may provide."' Further, '"[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."'" *People v Bailey*, 310 Mich App 703, 713 (2015), quoting *People v Nowack*, 462 Mich 392, 400 (2000) and *People v Carines*, 460 Mich 750, 757 (1999).

Defendant's "guilt is not dependent . . . on whether the minor child can be considered criminally culpable. Rather, each child is merely the instrumentality by which defendant was able to achieve a sexual penetration (fellatio)." *People v Hack*, 219 Mich App 299, 303-304 (1996) ("by causing the three-year-old girl to perform fellatio on the one-year-old boy" the defendant was guilty of CSC-I "as a principal for using one child as the instrumentality to perform a sexual penetration with the other").

See also *People v Niemi*, 344 Mich App 25 (2022), for a different result in a case in which the defendant did not himself penetrate the victim. In *Niemi*, the Court affirmed the lower courts' refusal to bind the defendant over for trial for CSC-I with a victim under the age of 13, because the circumstances at the time the victim was penetrated did not involve "one person penetrat[ing] another" as required by MCL 750.520b(1)(a). *Niemi*, 344 Mich App at 32. *Niemi* involved a defendant and a 12-year-old victim who communicated with each other by using an online program accessible by computer, and later, by using a messaging application and its video features. *Id*. at 27. The charges against the defendant arose from a video showing the victim stuffing her underwear in her vagina; according to the victim, the defendant told her to do it "as a consequence for failing to do certain sexual acts." *Id*. at 33. The prosecution argued that as in *Hack*, 219 Mich App at 304, the victim was guilty "as a principal for using [the victim] as the instrumentality to perform a sexual penetration . . . ." *Niemi*, 344 Mich App at 30. According to the prosecution, the defendant was guilty of the charges against him under the innocent-agent doctrine, which would conclude that the defendant was guilty because the victim was "an innocent agent whom defendant used to commit the sexual penetration." *Id*. at 30. The Court disagreed. *Id*. at 32-33. The Court decided against "extend[ing] the innocent-agent doctrine to the facts of [*Niemi*]." *Id*. In contrast to *Hack*, the victim in *Niemi* had never met the defendant, the defendant was not present at the time the penetration occurred, and in fact, there was a complete absence of any interaction between the defendant and the victim when the penetration occurred. *Id*.

3. What Constitutes a *Household* for CSC-I Offenses

"[T]he term 'household' has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in [MCL

750.520b(1)(b)(*i*)]. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit. The 'same household' provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure." *People v Garrison*, 128 Mich App 640, 642-643, 646-647 (1983) (13-year-old victim was a member of the same household as the defendant under MCL 750.520b(1)(b) where "[o]n the day school recessed for summer vacation, [the victim] went to live with her mother and the defendant in their home pursuant to court-ordered extended visitation over the summer months" and while living with her mother and the defendant, "the defendant had sexual intercourse with her on a number of occasions").

Garrison does not require "proof of a [subordinating relationship or that defendant is a] 'coercive authority figure' . . . because the 'household' requirement assumes such a link between the victim and the defendant by virtue of 'the fact that people in the same household, those living together, bear a special relationship to one another,'" and because MCL 750.520b(1)(b)(*i*) "does not, by its plain language, require such proof." *People v Phillips*, 251 Mich App 100, 103-105 (2002) (defendant and victim were members of the same household where the victim had been living with the defendant and his wife for approximately four months while they were in the process of adopting the victim), quoting *Garrison*, 128 Mich App at 645.

4. CSC-I Committed by a Relative

Blood or affinity. The term *blood* means "'a relationship between persons arising by descent from a common ancestor' or a relationship 'by birth rather than marriage.'" *People v Zajaczkowski*, 493 Mich 6, 13 (2012). The term *affinity* means "'the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. 'A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband.'" *Id*. at 13-14 ("[T]he context in which the term 'by blood' is used in the statute indicates that it is meant as an alternative to the term 'by affinity.'") (citations omitted).

Adoption. The CSC Act is silent on whether adopted children are related by blood or affinity to their parents or stepparents

or to other extended family members for purposes of the CSC Act. However, the Michigan Supreme Court has determined that "persons who are related by adoption but who otherwise do not share an ancestor in common are not related 'by blood' for purposes of MCL 750.520d(1)(d)." *People v Moss (Moss II)*, 509 Mich 253, 267 (2022), overruling in part *People v Moss (Moss I)*, 333 Mich App 515 (2020).[13] In *Moss*, "[d]efendant and the complainant [did] not have a birth parent in common, but they were both adopted by the same woman." *Moss II*, 509 Mich at 257.

Civil presumption of legitimacy. The civil presumption of legitimacy does not extend to MCL 750.520b. *Zajaczkowski*, 493 Mich at 15. Accordingly, it was error to conclude that the defendant and victim were related by blood where conclusive DNA evidence indicated that they were not biologically related. *Id*. at 12-13, 15 (further concluding that the defendant did not "share[] a common ancestor with the victim . . . merely because defendant may be considered the issue of his mother's marriage to the victim's father for legitimacy purposes" because "[s]uch a conclusion would require [an extension of] the civil presumption of legitimacy to [MCL 750.520b] when the Legislature clearly has not done so").

5. CSC-I Involving Underlying Felony

Defining felony for purposes of this offense. "[F]elony, as construed in the phrase 'any other felony', refers to any felony other than criminal sexual conduct. . . . Accordingly, the language of [MCL 750.520b(1)(c)], 'any other felony', is satisfied by proof of the felony[.]" *People v Pettway*, 94 Mich App 812, 815, 817-818 (1980) (the "other felony" that defendant committed was breaking and entering an occupied dwelling with the intent to commit CSC, which "is a separate and distinct offense from the completed act of sexual penetration"). However, "criminal sexual conduct upon a second person can be the 'other felony' supporting first degree criminal sexual conduct under MCL 750.520b(1)(c)[.]" *People v White*, 168 Mich App 596, 604 (1988) ("read[ing] 'any other felony' [under MCL 750.520b(1)(c)] as meaning a felony other than the one committed," and finding that "the prohibition against double jeopardy does not bar the use of evidence of criminal sexual

[13]The Supreme Court "[left] undisturbed the Court of Appeals' conclusion that defendant and the complainant are not related by affinity." *Moss II*, 509 Mich at 257 n 1. The Court of Appeals had concluded that the relationship between the adopted individuals in *Moss* did not arise from marriage, and therefore, for purposes of MCL 750.520b–MCL 750.520e, the two adopted individuals in *Moss* were not related by affinity. *Moss*, 333 Mich App at 526.

conduct upon another victim as the 'other felony' which elevates the criminal sexual conduct committed upon the first person to first degree"). But see *People v Lockett*, 295 Mich App 165, 178 (2012) (conclud[ing] that, in enacting MCL 750.520b(1)(c), the Legislature intended that the 'circumstances involving the commission of [the] other felony' directly impact a 'victim', or recipient, of the sexual penetration.").

Direct interrelationship between CSC-I and felony. "Applying the plain and unambiguous language of MCL 750.520b(1)(c), . . . the prosecution [is] required to submit evidence sufficient to establish probable cause to believe that defendant sexually penetrated the victim, that defendant committed the underlying felony, and that there existed a direct interrelationship between the felony and the sexual penetration, which does not necessarily require that the penetration occur during the commission of the felony." *People v Waltonen*, 272 Mich App 678, 693-694 (2006). "The key language of the statute is 'occurs under circumstances involving,' which does not necessarily demand that the sex occur during the commission of the felony, although this generally will be the case." *Id*. at 692-693 ("[T]he delivery of controlled substances technically occurred after the sexual acts; however, the sexual acts were directly related to the delivery of the drugs because the only reason the victim engaged in sexual penetration was to acquire the drugs.").

Necessarily included offense.[14] Disseminating sexually explicit matter to a minor under MCL 722.675(1)(b) is a necessarily included offense of CSC-I "[b]ecause a jury could not have convicted defendants on the charged counts of CSC-I under MCL 750.520b(1)(c) without determining that defendants also committed the underlying felony[.]" *People v Lockett*, 295 Mich App 165, 182 (2012).

6. Aiding and Abetting a CSC-I Offense

"A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement which aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement." *People v Wilson*, 196 Mich App 604, 609 (1992) (quotation marks and citation omitted).

[14] See Section 2.1(E) for more information on lesser included offenses.

Two cases involving the same actors, victims, and defendants were consolidated in *Wilson*, 196 Mich App 604 (the other case was captioned as *People v Sanford*[15]). *Wilson*, 196 Mich App at 607. The defendant-mothers in the consolidated cases, Wilson and Sanford, forced their children (Wilson's son and Sanford's daughter) to engage in sexual intercourse with each other. *Id*. In addition, both defendants were present and "allow[ed] unknown men to commit sexual acts with the children." See *id*. at 613. However, "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor. . . . To be convicted of aiding and abetting, a person must either have possessed the required intent or have participated while knowing that the principal had the requisite intent. Such intent may be inferred from circumstantial evidence." *Id*. at 614 (citations omitted).

Compare *People v Hack*, 219 Mich App 299, 304 (1996), where the Court determined that a defendant may be guilty of a crime by using a child to facilitate the crime but not by aiding and abetting the crime. In such a case, a "[d]efendant is not guilty because he aided and abetted one child in committing a sexual penetration with the other, but as a principal for using one child as the instrumentality to perform a sexual penetration with the other." *Id*.

"[N]othing in [MCL 750.520b] hints at its exemption from the aiding and abetting statute[, MCL 767.39 (abolishing the distinction between an accessory and principal)]. *People v Pollard*, 140 Mich App 216, 221 (1985) (affirming defendants' convictions for three counts of CSC-I where "there were three rapes: each defendant raped the complainant, then aided and abetted while the other two raped her"; thus, "[e]ach defendant committed three criminal acts and was rightly prosecuted for them").

7. Using a Weapon or Other Instrument During CSC-I

To be "armed with a weapon", an "actor need not have the weapon in his hands while committing the [CSC-I] offense [under MCL 750.520b(1)(e)], so long as he has knowledge of the weapon's location and the weapon is reasonably accessible to the actor." *People v Davis*, 101 Mich App 198, 201-203 (1980)

[15]The defendant in *Sanford* asserted that her culpability depended on "whether a parent has a duty to prevent the commission of a criminal act upon the parent's child where that crime takes place in the parent's presence[.]" *Wilson*, 196 Mich App at 614. The Court of Appeals affirmed the trial court without addressing that issue because the case was fairly decided by the jury on the evidence presented. *Id*. at 615.

("defendant had constructive possession of the weapon when penetration occurred" where the weapon was "[l]ying but six feet away, with no persons present other than the two victims and the codefendant"). See also *People v Flanagan*, 129 Mich 786, 797-798 (1983) (there was sufficient evidence "for the jury to find beyond a reasonable doubt that defendant was armed with a knife" where "the testimony showed that the knife was located on the seat next to the defendant during the assaults[, and] . . . that, after the initial assaults, defendant retrieved the knife from the seat beside him and held it in his teeth during further assaults"). *People v Proveaux*, 157 Mich App 357, 362-363 (1987) (disarming the defendant does not negate the fact that he or she was armed to begin with; although "the testimony showed that defendant's knife had been thrown outside the house before sexual penetration occurred inside the house[, t]he knife was not within defendant's reach and it [was] unclear if defendant knew where the knife landed", the "defendant was armed with a weapon" for purposes of CSC-I because "[i]t [was] enough that defendant began the assault with a knife, putting the victim in fear and traumatizing her," and the sexual penetration that occurred after the victim disarmed the defendant was part of a continuing event"). But see *People v Benard*, 138 Mich App 408, 411 (1984) ("[w]here a weapon is actually in the hands of a second party, . . . possession is [not] held by a first person even though the first person is acting in concert with the second person"; accordingly, defendant could not be convicted of CSC-I while using a weapon—though under the facts, he was appropriately charged with CSC-I involving the commission of another felony).

"There is no requirement that the weapon [used in the sexual assaults] be admitted into evidence where there is testimony describing the weapon and establishing it was used." *Flanagan*, 129 Mich App at 797.

8. Reasonable Person Standard for CSC-I Offense

"[T]he Legislature's inclusion of the 'knows or has reason to know' language in the statute was intended to "'protect[] individuals who have sexual relations with a partner who appears mentally sound, only to find out later that this is not the case.'" *People v Cox*, 268 Mich App 440, 446 (2005), quoting *People v Davis*, 102 Mich App 403, 407 (1980) ("[B]y the plain language of MCL 750.520d(1)(c), an individual who did not know of his partner's mental defect[16] and who would never have engaged in the act of penetration had he known of said defect could nonetheless be convicted of third-degree criminal

sexual conduct[17] if he had reason to know of the mental incapacity."). *Davis*, 102 Mich App at 406-407 ("the Legislature did not desire to excuse a defendant who is unreasonable in his conclusion that the victim could consent to the sexual penetration"; instead, "the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons").

"[T]he material issue [is] not the defendant's subjective perception of the victim's mental capacity but whether the victim's incapacity [is] apparent to a reasonable person." *People v Baker*, 157 Mich App 613, 615-616 (1986).

9. Anal Penetration

"[I]ntrusion into the crease of the buttocks, but not into the anal cavity itself, [is] sufficient to satisfy the penetration element of CSC-I[.]" *People v Anderson*, 331 Mich App 552, 560, 561 (2020) ("the Legislature intended the term 'anal opening' to be read broadly to include both the anal canal and the crease of the buttocks or, in laymen's terms, as the victim explained, the void between the 'butt cheeks'").

10. Timing of Offense Involving a School Employee

The status of a substitute teacher at the time of the offense determines whether the alleged criminal sexual conduct can be prosecuted under MCL 750.520b(1)(b)(*iv*); the substitute teacher is not required to be "actively performing" the role of substitute teacher at the time of the offense. *People v Hofman*, 339 Mich App 65, 72 (2021) (holding that, at the time of the alleged sexual misconduct, the defendant did not qualify as the student's substitute teacher because at the time of the offense, the defendant was not employed by the school attended by the complainant; the defendant qualified only as the complainant's *former* substitute teacher). "[T]here was no temporal requirement [in the plain language of CSC-III[18]] regarding the timing of the sexual penetration." *Hofman*, 339 Mich App at 70; *People v Lewis*, 302 Mich App 338, 347 (2013) (finding that

---

[16] A former version of the statute referenced *mental defect*, which was replaced with *mental incapability*. See 1983 PA 158, effective March 29, 1984.

[17] The Court of Appeals extended the *Davis* Court's interpretation of MCL 750.520d(1)(c) "as requiring a reasonable person standard" to MCL 750.520b(1)(g). *People v Baker*, 157 Mich App 613, 615-616 (1986). **Note:** In addition to the requirement that "the actor knows or has reason to know" of the victim's mental or physical condition, a conviction under MCL 750.520b(1)(g) also requires that "[t]he actor causes personal injury to the victim[.]" See also MCL 750.520b(d)(*i*) where a CSC-I conviction involving an actor's knowledge of a victim's mental or physical condition requires the additional fact that the actor be "aided or abetted by 1 or more other persons . . . ." MCL 750.520b(1)(d)(*i*).

prosecution under MCL 750.520d(1)(e)(*i*) was not foreclosed "if a sexual penetration by a substitute teacher occur[red] before school or after the school bell [rang] at the end of the day, or on a weekend, or during the summer"). According to *Hofman*, the *Lewis* Court "clearly focused on the distinction between *being* a substitute teacher and *acting as* a substitute teacher." *Hofman*, 339 Mich App at 71. The Legislature intended to punish a defendant's misconduct when "the actor's occupation as a substitute teacher allowed the actor access to the student of the relevant age group in order to engage in sexual penetration[.]" *Id*., citing *Lewis*, 302 Mich App at 347.

B. Intent Crime

CSC-I is a general intent crime. *People v Langworthy*, 416 Mich 630, 645 (1982).

C. Statute of Limitations

1. Criminal Action

A defendant may be indicted for CSC-I at any time. MCL 767.24(1)(a).[19]

2. Civil Action

A victim of criminal sexual conduct may file a civil action to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6); MCL 600.5851b. The period of limitations depends on the age of the victim at the time of the offense. See *id*. For additional discussion of civil actions, see Section 1.6.

D. Punishment

1. Imprisonment

"[CSC-I] is a felony punishable as follows:

---

[18]The statutory language in MCL 750.520b(1)(b)(*iv*) "clearly address[es] the same subject or share[s] a common purpose [with MCL 750.520d(1)(e)(*i*) and the statutes] should be read together as a whole." *People v Hofman*, 339 Mich App 65, 71 (2021).

[19]The statute of limitations was changed in 2001 to allow indictment for CSC-I at any time rather than within the six-year period of limitations existing at the time of the amendment. See 2001 PA 6. However, "[t]he extension of the period of limitations with respect to victims of CSC-I to more than six years . . . could not revive a charge for which the limitations period had already run." *People v Blackmer*, 309 Mich App 199, 201 (2015).

> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age[20] by imprisonment for life or any term of years, but not less than 25 years.[21]
>
> (c) For a violation that is committed by an individual 18 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or [MCL 750.520c], [MCL 750.520d], [MCL 750.520e], or [MCL 750.520g] committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or [MCL 750.520c], [MCL 750.520d], [MCL 750.520e], or [MCL 750.520g] committed against an individual less than 13 years of age." MCL 750.520b(2).

MCL 750.520b(2) sets out the minimum statutorily authorized punishment a defendant is to serve for a CSC-I offense, and a "trial court is without authority to impose" a punishment against the defendant that is less than the statutorily required minimum. See *People v Kreiner*, 497 Mich 1024, 1024-1025 (2015) (finding error and remanding to the Court of Appeals to address the appropriate remedy where the trial court "ordered the prosecutor to re-offer [a] plea" agreement offering a ten-year minimum sentence in exchange for a guilty plea to CSC-I because the trial court was "without authority to impose" that sentence).

See also *People v Roy*, 346 Mich App 244, 253 (2023) (a defendant aged 17 or older who is convicted of CSC-I involving a victim under the age of 13 must be sentenced to a mandatory-minimum sentence of 25 years as provided in MCL 750.520b(2)(b)). "[B]ut not less than 25 years" in MCL 750.520b(2)(b) modifies the minimum number of years that

---

[20] For a discussion of the calculation of age, see Section 2.1(D).

[21] For information on mandatory sentences, including information on constitutionality and departing from the mandatory minimum, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 7; and for information on sentencing a juvenile as an adult, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

must be imposed on a defendant aged 17 or older who is convicted of CSC-I involving a victim under the age of 13. *Roy*, 346 Mich App at 253. The phrase does not limit to 25 years of imprisonment the maximum sentence a sentencing court can impose. *Id*. at 253.

2. Probation

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

3. Lifetime Electronic Monitoring

In addition to a penalty imposed under MCL 750.520b(2)(a) or MCL 750.520b(2)(b),[22] the court must sentence the offender to lifetime electronic monitoring as provided under MCL 791.285.[23] MCL 750.520b(2)(d); MCL 750.520n.

A judgment of sentence is invalid if the trial court is required to impose lifetime electronic monitoring, but fails to do so. *People v Comer*, 500 Mich 278, 292 (2017).[24] A court may correct an invalid sentence on its own initiative after having given the parties an opportunity to be heard, or it may correct an invalid sentence on the motion of either party. *People v Pendergrass*, ___ Mich App ___, ___ (2023). See MCR 6.429(A). A court's correction of an invalid sentence on the court's own initiative must occur within six months of the invalid judgment's entry. *Pendergrass*, ___ Mich App at ___; MCR 6.429(A).

---

[22] "[L]ifetime electronic monitoring must be imposed for all defendants convicted of CSC-I except where the defendant has been sentenced to life without the possibility of parole under [MCL 750.520b(2)(c)]." *People v Comer*, 500 Mich 278, 292 (2017) (finding that, contrary to lower court opinions, the ages of the defendant and victim are irrelevant to the imposition of lifetime electronic monitoring).

[23] Before accepting a plea of guilty or nolo contendere, the trial court must advise the defendant of, and determine that he or she understands, "any . . . requirement for mandatory lifetime electronic monitoring under MCL 750.520b[.]" MCR 6.302(B)(2). Advising the defendant of a requirement for mandatory lifetime electronic monitoring is required because "mandatory lifetime electronic monitoring is part of the sentence itself." *People v Cole*, 491 Mich 325, 327 (2012). "Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring." *Id.* at 337.

[24] Under *Comer*, 500 Mich at 301, the Court held that once the judgment of sentence was entered "the trial court lacked the authority to correct defendant's invalid sentence absent a motion from one of the parties." After *Comer* was decided, MCR 6.429(A) was amended to allow a court to sua sponte correct an invalid sentence within six months of its entry after giving the parties an opportunity to be heard. ADM File No. 2015-04, effective September 1, 2018.

a. Not Cruel or Unusual Punishment

Lifetime electronic monitoring was not cruel or unusual punishment as applied to a defendant convicted of CSC-II[25] where "[a]lthough he had no prior record, . . . evidence of improper sexual acts involving 13 women or children . . . suggest[ed] that lifetime monitoring would help to protect potential victims from defendant, who in turn would likely be deterred from engaging in such acts if he were closely monitored."[26] *People v Hallak*, 310 Mich App 555, 577 (2015), rev'd in part on other grounds 499 Mich 879 (2016).[27]

b. Not an Unreasonable Search

"[P]lacement of an electronic monitoring device to monitor defendant's movement constitutes a search for purposes of the Fourth Amendment. But . . . lifetime electronic monitoring for a defendant 17 years or older convicted of CSC-II[28] involving a minor under 13 is not unreasonable." *People v Hallak*, 310 Mich App 555, 579, 581 (2015) (finding that "strong public interest in the benefit of monitoring those convicted of CSC-II against a child under the age of 13 outweigh[ed] any minimal impact on defendant's reduced privacy interest"), rev'd in part on other grounds 499 Mich 879 (2016)[29] and citing *Grady v North Carolina*, 575 US 306 (2015).

4. Court-Ordered Payments

The authority to impose fines, costs, and assessments on defendants convicted of criminal offenses is governed by statute. This sub-subsection provides a brief overview of court-ordered payments as it specifically relates to CSC-I

---

[25] Although unpublished opinions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), see *People v McNees*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2018 (Docket No. 337426) and *People v Simon*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2016 (Docket No. 326149), which extended the *Hallak* decision to CSC-I offenses.

[26] "For these same reasons, defendant [could not] succeed on his facial challenge under the state Constitution, nor [could] he prevail on his federal constitutional claim." *Hallak*, 310 Mich App at 577 (citations omitted).

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

[28] Although unpublished opinions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), see *Simon*, unpub op at 11, which applied the *Hallak* decision to CSC-I.

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

convictions. For more information on costs in general and costs authorized for felony offenses, see the Michigan Judicial Institute's Quick Reference Materials: *Table of General Costs* and *Table of Felony Offenses for Which Costs are Authorized*.

a. Fines

MCL 769.1k(1)(b)(*i*) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted, and "MCL 750.520b does not authorize a fine." *People v Escobedo*, 504 Mich 893, 893 (2019) ("vacat[ing] that part of the . . . judgment of sentence imposing a $500 fine" for violating MCL 750.520b).

b. Costs

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.520b to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child . . . [under MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

Additionally, a defendant convicted of CSC-I who is not sentenced to life without parole must be sentenced to lifetime electronic monitoring. See MCL 750.520b(2)(d); MCL 750.520n(1); *People v Comer*, 500 Mich 278, 289 (2017). "An individual who is sentenced to lifetime electronic monitoring . . . shall reimburse the department or its agent for the actual cost of electronically monitoring the individual."[30] MCL 791.285(2).

c. Crime Victim Assessment

MCL 769.1k(1)(b)(*v*) permits the court to impose "[a]ny assessment authorized by law" at the time sentence is imposed or delayed or at the time a judgment of guilt is entered. A defendant convicted of CSC-I must pay a crime victim assessment of $130. See MCL 780.905(1)(a). Only one crime victim assessment per case may be

[30] For additional information on lifetime electronic monitoring for CSC-I convictions, see Section 2.2(D)(3).

ordered, even when the case involves multiple offenses. MCL 780.905(2).

d. Restitution

When sentencing a defendant for committing CSC-I, the court must order full restitution. See MCL 769.1a(2); MCL 769.34(6); MCL 771.3(1)(e); MCL 780.766; MCR 6.425(E)(1)(f). For more information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

5. Consecutive Sentencing

"In Michigan, concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute." *People v DeLeon*, 317 Mich App 714, 721 (2016) (quotation marks and citations omitted). However, MCL 750.520b(3) provides that when a defendant is convicted of a charge of CSC-I, "the trial 'court may order a term of imprisonment . . . to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.'" *DeLeon*, 317 Mich App at 721-722, quoting MCL 750.520b(3). "MCL 750.520b(3) does not mandate consecutive sentencing. Rather, it provides that a court 'may' impose consecutive sentences, making the decision discretionary." *People v Ryan*, 295 Mich App 388, 401 n 8 (2012).

"[T]he Sixth Amendment does not prohibit the use of judicial fact-finding to impose" a consecutive sentence under MCL 750.520b(3).[31] *DeLeon*, 317 Mich App at 723, 726 (although the jury's verdict "did not necessarily incorporate a finding that [defendant's] CSC-I conviction 'ar[ose] from the same transaction' as did his CSC-II conviction, . . . defendant ha[d] no Sixth Amendment right to have a jury make that determination" before the trial court could impose a consecutive sentence), quoting MCL 750.520b(3) (second alteration in original).

For more information on consecutive sentencing in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7.

[31] "Although consecutive sentencing lengthens the total period of imprisonment, it does not increase the penalty for any specific offense," and neither *Apprendi v New Jersey*, 530 US 466 (2000), *Alleyne v United States*, 570 US 99 (2013), nor *People v Lockridge*, 498 Mich 358 (2015), "compels the conclusion that consecutive sentencing in Michigan violates a defendant's Sixth Amendment protections." *DeLeon*, 317 Mich App at 723, 726.

a. Same Transaction

MCL 750.520b(3) does not define the term *same transaction*, "[b]ut it has a temporal requirement"; in order for two or more separate offenses to be seen as part of the same transaction within the meaning of MCL 750.520b(3), the court should determine whether the acts "grew out of a continuous time sequence" and whether the acts "sprang one from the other and had a connective relationship that was more than incidental." *People v DeLeon*, 317 Mich App 714, 722 (2016); see *People v Ryan*, 295 Mich App 388, 403 (2012). ("[t]he evidence in this case reflected that the sexual penetrations forming counts 3 [(fellatio of a victim under age 13)] and 9 [(vaginal intercourse of a victim under age 13)] grew out of a continuous time sequence in which the act of vaginal intercourse was immediately followed by the act of fellatio," and "[t]hese two particular sexual penetrations sprang one from the other and had a connective relationship that was more than incidental").

"[A]n ongoing course of sexually abusive conduct involving episodes of assault does not in and of itself render the crimes part of the same transaction. For multiple penetrations [in a CSC case] to be considered as part of the same transaction, they must be part of a 'continuous time sequence,' not merely part of a continuous course of conduct." *People v Bailey*, 310 Mich App 703, 725-726 (2015) ("the trial court did not possess the statutory authority to impose consecutive sentences and . . . doing so was plain error" where "[a]lthough a brief time overlap exist[ed]" between defendant's molestation of three victims over a course of several years, there was no evidence in the record that any of the offenses occurred during the same transaction), citing *People v Brown*, 495 Mich 962, 963 (2014), and *Ryan*, 295 Mich App at 402-403.

b. Any Other Criminal Offense

Within the meaning of MCL 750.520b(3), "the phrase 'any other criminal offense' "can encompass additional violations of the same CSC-1 statute"; it simply "means a different sentencing offense, and offenses, for purposes of sentencing, are always reduced or broken down into individual counts. Sentences or terms of imprisonment are imposed for each count of a crime on which a defendant is convicted, including counts arising from the

same transaction." *People v Ryan*, 295 Mich App 388, 405-406 (2012) (holding that a trial court has discretion to order that the sentence for one CSC-I conviction be served consecutively to the sentence imposed for another CSC-I conviction as long as the conduct forming the basis for each conviction is distinct or different from the other).

E. Sex Offender Registration

CSC-I is a tier III offense under the Sex Offenders Registration Act (SORA) for which registration is required unless "the court determines that the victim consented to the conduct constituting the violation, that the victim was at least age 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim." MCL 28.722(v)(*iv*).

For more information on the SORA's registration requirements, see Chapter 9.

2.3 Second-Degree Criminal Sexual Conduct

Second-degree criminal sexual conduct (CSC-II) is the most serious contact offense. It involves sexual contact coupled with certain circumstances set out in MCL 750.520c.

A. Elements of Offense

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

(a) That other person is under 13 years of age.[32]

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

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

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

[32] For a discussion of the calculation of age, see Section 2.1(D). For caselaw discussing sexual contact with a person under the age of 13, see Section 2.3(A)(5).

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

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

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

(*vi*) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home in which that other person is a resident, and the sexual contact occurs during the period of that other person's residency. . . . .

(c) Sexual contact occurs under circumstances involving the commission of any other felony.[33]

(d) The actor is aided or abetted by 1 or more other persons[34] and either of the following circumstances exists:

(*i*) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.[35]

(*ii*) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but

[33] See Section 2.3(A)(5) for caselaw discussing CSC-II perpetrated while committing another felony.

[34] See Section 2.3(A)(2) for caselaw discussing the elements of aiding and abetting.

[35] See Section 2.3(A)(2) for caselaw discussing the reasonable person standard.

is not limited to, any of the circumstances listed in [MCL 750.520b(1)(f)].

(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.[36]

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in [MCL 750.520b(1)(f)].

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

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

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

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

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

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

(k) That other person is a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor is an employee or a contractual

[36] See Section 2.3(A)(2) for caselaw discussing the use of a weapon or other instrument while committing CSC-II.

employee of or a volunteer with the county or the department of corrections who knows that the other person is under the county's jurisdiction.

(l) The actor knows or has reason to know that a court has detained the victim in a facility while the victim is awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor is an employee or contractual employee of, or a volunteer with, the facility in which the victim is detained or to which the victim was committed." MCL 750.520c(1).

1. Sexual Contact With a Person Under 13

"It is a well-established rule that a jury may convict on the uncorroborated evidence of a CSC victim,[and] . . . because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Hallak*, 310 Mich App 555, 565 (2015), rev'd in part on other grounds 499 Mich 879 (2016)[37] ("there was sufficient evidence to convict defendant of CSC-II based on sexual contact with a person under the age of 13" where "the evidence was sufficient to allow a jury to conclude that defendant did more than just touch [the minor-victim's] breast during a medical examination, and that it was for a sexual purpose[; the minor-victim's] testimony that defendant 'cupped' her breast, coupled with [the minor-victim's mother's] witnessing of the event and [the prosecution expert's] testimony that it would not be medically ethical or acceptable to touch a patient's breast while examining her throat, was sufficient for the jury to conclude that the touching was not for a legitimate medical purpose" and thus "was sufficient to give rise to an inference that it was for a sexual purpose, particularly in light of defendant's various explanations for the situation when confronted by [the minor-victim's mother]") (citations and quotation marks omitted). See also *People v DeLeon*, 317 Mich App 714, 720-721 (2016) (defendant's conviction of CSC-II was supported by sufficient evidence where the victim "testified to multiple instances in which defendant used his hands and fingers to touch her 'from [her] vagina to [her] butt' before penetrating her with his penis").

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

2. What Constitutes a *Household* for CSC-II Offenses[38]

"[T]he term 'household' has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in [MCL 750.520b(1)(b)(*i*)].[39] Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit. The 'same household' provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure." *People v Garrison*, 128 Mich App 640, 642-643, 646-647 (1983) (13-year-old victim was a member of the same household as the defendant under MCL 750.520b(1)(b) where "[o]n the day school recessed for summer vacation, [the victim] went to live with her mother and the defendant in their home pursuant to court-ordered extended visitation over the summer months" and while living with her mother and the defendant, "the defendant had sexual intercourse with her on a number of occasions").

Garrison does not require "proof of a [subordinating relationship or that defendant is a] 'coercive authority figure' . . . because the 'household' requirement assumes such a link between the victim and the defendant by virtue of 'the fact that people in the same household, those living together, bear a special relationship to one another,'" and because MCL 750.520c(1)(b)(*i*)[40] "does not, by its plain language, require such proof." *People v Phillips*, 251 Mich App 100, 103-105, 105 n 2 (2002) (defendant and victim were members of the same household where the victim had been living with the defendant and his wife for approximately four months while they were in the process of adopting the victim), quoting *Garrison*, 128 Mich App at 645.

---

[38]No caselaw has been issued concerning the definition of *household* for purposes of CSC-II. The information here expressly refers to CSC-I but may be helpful should the issue arise in CSC-II cases.

[39]A later panel of the Court of Appeals indicated that the "same analysis applies [to CSC-II] convictions because [MCL 750.520c(1)(b)(*i*)] . . . contains the same language concerning the 'household.'" *People v Phillips*, 251 Mich App 100 (2002).

[40] The *Phillips* Court analyzed *Garrison* in response to the defendant's argument with respect to his CSC-I conviction. However, the Court indicated that the "same analysis applies [to CSC-II] convictions because [MCL 750.520c(1)(b)(*i*)] . . . contains the same language concerning the 'household.'"

B. Intent

CSC-II is a general intent crime. *People v Brewer*, 101 Mich App 194, 195 (1980).

C. Statute of Limitations

1. Criminal Action

a. Victim Age 18 or Older

If the victim is 18 years old or older, an indictment for a violation or attempted violation of CSC-II "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

b. Victim Under Age 18

If the victim is under 18 years of age, an indictment for a violation or attempted violation of CSC-II "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 15 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified

individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(4).

2. Civil Action

A victim of criminal sexual conduct may file a civil action to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6); MCL 600.5851b. The period of limitations depends on the age of the victim at the time of the offense. See *id*.

D. Punishment

1. Imprisonment

"[CSC-II] is a felony punishable . . . [b]y imprisonment for not more than 15 years." MCL 750.520c(2)(a). For information on felony sentencing in Michigan, including scoring CSC-II offenses, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*.

2. Probation

CSC-II is a probationable offense for adult offenders. See MCL 771.1(1). A defendant convicted of CSC-II is not eligible for reduced probation under MCL 771.2(2). MCL 771.2(10)(e).

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

3. Lifetime Electronic Monitoring

In addition to the prison sentence imposed under MCL 750.520c(2)(a), the court must sentence the offender to lifetime electronic monitoring as provided under MCL 791.285 "if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age."[41] MCL 750.520c(2)(b); MCL 750.520n(1). See also *People v Johnson*, 298 Mich App 128, 136 (2012) ("a person convicted

under [MCL 750.520c] is to be sentenced to lifetime [electronic] monitoring only if the defendant was 17 or older at the time of the crime and the victim was less than 13").

"Considering MCL 750.520c, MCL 750.520n, and MCL 791.285 together, . . . lifetime electronic monitoring applies only to persons who have been released on parole or from prison, or both[.]" *People v Kern*, 288 Mich App 513, 519 (2010) (because MCL 791.285 contemplates lifetime electronic monitoring only for persons who have been released on parole or from prison; a defendant sentenced to serve time in jail is not subject to lifetime monitoring).

a. Not Cruel or Unusual Punishment

Lifetime electronic monitoring was not cruel or unusual punishment as applied to a defendant convicted of CSC-II where "[a]lthough he had no prior record, . . . evidence of improper sexual acts involving 13 women or children . . . suggest[ed] that lifetime monitoring would help to protect potential victims from defendant, who in turn would likely be deterred from engaging in such acts if he were closely monitored."[42] *People v Hallak*, 310 Mich App 555, 560, 576 (2015), rev'd in part on other grounds 499 Mich 879 (2016).[43]

b. Not an Unreasonable Search

"[P]lacement of an electronic monitoring device to monitor defendant's movement constitutes a search for purposes of the Fourth Amendment. But . . . lifetime electronic monitoring for a defendant 17 years or older convicted of CSC-II involving a minor under 13 is not unreasonable."*People v Hallak*, 310 Mich App 555, 579, 581 (2015) (finding that "strong public interest in the benefit

[41]Before accepting a plea of guilty or nolo contendere, the trial court must advise the defendant of, and determine that he or she understands, "any . . . requirement for mandatory lifetime electronic monitoring under . . . [MCL] 750.520c[.]" MCR 6.302(B)(2). Advising the defendant of a requirement for mandatory lifetime electronic monitoring is required because "mandatory lifetime electronic monitoring is part of the sentence itself." *People v Cole*, 491 Mich 325, 327 (2012). "Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring." *Id.* at 337.

[42] "For these same reasons, defendant [could not] succeed on his facial challenge under the state Constitution, nor [could] he prevail on his federal constitutional claim." *Hallak*, 310 Mich App at 577 (citations omitted).

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

of monitoring those convicted of CSC-II against a child under the age of 13 outweigh[ed] any minimal impact on defendant's reduced privacy interest"), rev'd in part on other grounds 499 Mich 879 (2016)[44] and citing *Grady v North Carolina*, 575 US 306 (2015).

c. No Double Jeopardy Violation

"Because the Legislature intended that both defendant's prison sentence and the requirement of lifetime monitoring be sanctions for [CSC-II committed by a defendant who is 17 years of age or older against a victim less than 13 years of age], there [is] no double jeopardy violation." *People v Hallak*, 310 Mich App 555, 583 (2015), rev'd in part on other grounds 499 Mich 879 (2016).[45]

4. Court-Ordered Payments

The authority to impose fines, costs, and assessments on defendants convicted of criminal offenses is governed by statute. This sub-subsection provides a brief overview of court-ordered payments as it specifically relates to CSC-II convictions. For more information on costs in general and costs authorized for felony offenses, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1, *Table of General Costs* and *Table of Felony Offenses for Which Costs are Authorized*.

a. Fines

MCL 769.1k(1)(b)(*i*) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted, and MCL 750.520c does not specifically authorize the imposition of a fine for a CSC-II conviction. See *People v Johnson*, 315 Mich App 163, 198-199 (2016) (because MCL 750.520c(1)(a), does not authorize the imposition of a fine, the trial court erred in ordering a $100 fine).

b. Costs

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL

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

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

750.520c to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child . . . [under MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

Additionally, a defendant who is 17 years of age or older convicted of CSC-II against a victim less than 13 years of age, must be sentenced to lifetime electronic monitoring. See MCL 750.520c(2)(b); MCL 750.520n(1); *People v Johnson*, 298 Mich App 128, 136 (2012). "An individual who is sentenced to lifetime electronic monitoring . . . shall reimburse the department or its agent for the actual cost of electronically monitoring the individual."[46] MCL 791.285(2).

c. Crime Victim Assessment

At the time a defendant is sentenced, at the time sentence is delayed, or at the time of entry of a judgment of guilt is deferred, MCL 769.1k(1)(b)(*v*) permits the court to impose "[a]ny assessment authorized by law." A defendant convicted of CSC-II must pay a crime victim assessment of $130. See MCL 780.905(1)(a). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

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

d. Restitution

When sentencing a defendant for committing CSC-II, the court must order full restitution. See MCL 769.1a(2); MCL 769.34(6); MCL 771.3(1)(e); MCL 780.766; MCR 6.425(E)(1)(f). For more information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

[46] For additional information on lifetime electronic monitoring for CSC-II convictions, see Section 2.3(D)(3).

E. Sex Offender Registration

Registration is required. CSC-II is a tier II offense under the Sex Offenders Registration Act (SORA) when the victim is at least 13 years old but less than 18 years old. MCL 28.722(t)(*x*)-(*xi*).CSC-II is a tier III offense under the SORA when the victim is under the age of 13. MCL 28.722(v)(*v*).

For more information on the SORA's registration requirements, see Chapter 9.

2.4 Third-Degree Criminal Sexual Conduct

Third-degree criminal sexual conduct (CSC-III) involves sexual penetration coupled with certain circumstances set out in MCL 750.520d.

A. Elements of Offense

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

> (a) That other person is at least 13 years of age and under 16 years of age.[47]
>
> (b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in [MCL 750.520b(1)(f)(*i*)-(*v*)].
>
> > [**Note:** "Although consent . . . precludes conviction of criminal sexual conduct in the third degree by force or coercion, the prosecution is not required to prove nonconsent as an independent element of the offense."[48] *People v Jansson*, 116 Mich App 674, 683 (1982).]
>
> (c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.[49]

---

[47] For a discussion of the calculation of age, see Section 2.1(D).

[48] "The express language of [MCL 750.520i] precludes any . . . requirement" "that the victim resisted the actor or . . . expressed an intent to resist." *People v Jansson*, 116 Mich App 674, 681-683 (1982). For additional discussion of protections under the criminal sexual conduct statutes, including MCL 750.520i, see Section 2.9.

[49] See Section 2.4(A)(2) for caselaw discussing the reasonable person standard.

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter.[50] It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

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

(*i*) The actor is a teacher, substitute teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district.[51] This subparagraph does not apply if the other person is emancipated at the time of the alleged violation.

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

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

(*i*) The actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of the public school, nonpublic school,

[50] See Section 2.4(A)(3) for caselaw discussing CSC-III committed by a relative.

[51] See Section 2.4(A)(4) for caselaw discussing the timing of this offense, specifically as it relates to school employees.

> school district, or intermediate school district from which that other person receives the special education services. This subparagraph does not apply if both persons are not less than 18 years of age and were lawfully married to each other at the time of the alleged violation.
>
> (*ii*) The actor is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses the actor's employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.
>
> (g) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home, in which that other person is a resident, that other person is at least 16 years of age, and the sexual penetration occurs during that other person's residency. . . ." MCL 750.520d(1).

"The language of [MCL 750.520d] does not exclude any class of offenders on the basis of age"; "[b]ecause the purpose of [MCL 750.520d] is the protection of the minor victim, the age of the offender is not a relevant concern." *In re Hildebrant*, 216 Mich App 384, 386 (1996) (a 16-year-old defendant who engaged in a consensual act with her 14-year-old adopted brother was subject to prosecution for committing). "*Hildebrant* . . . stands for the proposition that there is no public policy bar to prosecution of one child who engages in sexual acts with another child when both children are within the same protected age group." *In re Tiemann*, 297 Mich App 250, 257, 259 (2012) (rejecting 15-year-old respondent's contention "that MCL 750.520d violates public policy as applied to consenting minors in the same age class"), citing *Hildebrant*, 216 Mich App at 386-387.

1. Force or Coercion During CSC-III

> "[T]he force contemplated in MCL 750.520d(1)(b) does not mean 'force' as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor . . . does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that

force the penetration would not have occurred. In other words, the requisite 'force' for a violation of MCL 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited 'force' encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." *People v Carlson*, 466 Mich 130, 140 (2002) (it was error for the trial court to require "'some evidence of actual physical force to overcome' the complainant to support a charge of CSC III").

2. Reasonable Person Standard for CSC-III Offense

"[B]y the plain language of MCL 750.520d(1)(c), an individual who did not know of his partner's mental defect[52] and who would never had engaged in the act of penetration had he known of said defect could nonetheless be convicted of third-degree criminal sexual conduct if he had reason to know of the mental incapacity." *People v Davis*, 102 Mich App 403, 406-407 (1980) ("by including the 'knows or has reason to know' language, the Legislature did not desire to excuse a defendant who is unreasonable in his conclusion that the victim could consent to the sexual penetration"; instead, "the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons").

"[T]he material issue [is] not the defendant's subject perception of the victim's mental capacity but whether the victim's incapacity [is] apparent to a reasonable person." *People v Baker*, 157 Mich App 613, 615-616 (1986). See *People v Cox*, 268 Mich App 440, 446-447 (2005) ("a rational trier of fact could find that defendant knew or had reason to know that the victim was mentally incapable of consenting to a sexual relationship" where several witnesses testified that the victim's mental deficiency was "readily noticeable after only a short period of interaction" and "[t]here was also evidence that defendant had ample opportunity to notice these limitations.").

3. CSC-III Committed by Relative

MCL 750.520d(1)(d) "punishes what is commonly known as incest without regard to the parties' consent to the sexual activity." *People v Goold*, 241 Mich App 333, 335 n 1 (2000).

---

[52] A former version of the statute referenced *mental defect*, which was replaced with *mental incapability*. See 1983 PA 158, effective March 29, 1984.

Circumstances not otherwise prohibited by chapter. For purposes of MCL 750.520d(1)(d), the phrase *under circumstances not otherwise prohibited by this chapter* does not limit the prosecutor's ability to file charges against a defendant with CSC; rather, it focuses on whether a defendant can be *convicted* of CSC-III when those circumstances exists. *Goold*, 241 Mich App at 339, 341. Accordingly, "the prosecutor may present the factfinder with a CSC III charge relying on evidence of affinity as well as other CSC charges and theories. In that situation, if the factfinder determines that the evidence establishes a factual basis on which to convict the defendant of CSC III on that basis of familial affinity, the factfinder may return a guilty verdict on that charge only if it does not convict the defendant of any other CSC charge involving penetration." *Id*. at 335, 341 ("conclud[ing] that [MCL 750.520d] permits filing multiple [CSC] charges as alternative theories in the same count in criminal information, but that the district court erred in permitting the prosecutor to charge [the defendant] with two theories of CSC III in separate counts").

Adoption. The CSC Act is silent on whether adopted children are related by blood or affinity to their parents or stepparents or to other extended family members for purposes of the CSC Act. However, the Michigan Supreme Court has determined that "persons who are related by adoption but who otherwise do not share an ancestor in common are not related 'by blood' for purposes of MCL 750.520d(1)(d)." *People v Moss (Moss II)*, 509 Mich 253, 267 (2022), overruling in part *People v Moss (Moss I)*, 333 Mich App 515 (2020).[53] In *Moss*, "[d]efendant and the complainant [did] not have a birth parent in common, but they were both adopted by the same woman." *Moss II*, 509 Mich at 257.

4. Timing of CSC-III Offense Involving School Employee

"[T]here is no temporal requirement in the plain language of the statute regarding the commission of the sexual penetration. Consequently, if a sexual penetration by a substitute teacher occurs before school or after the school bell rings at the end of the day, or on a weekend, or during the summer, prosecution pursuant to MCL 750.520d(1)(e)(*i*) is not foreclosed. Rather, if the actor's occupation as a substitute teacher allowed the actor

[53]The Supreme Court "[left] undisturbed the Court of Appeals' conclusion that defendant and the complainant are not related by affinity." *Moss II*, 509 Mich at 257 n 1. The Court of Appeals had concluded that the relationship between the adopted individuals in *Moss* did not arise from marriage, and therefore, for purposes of MCL 750.520b–MCL 750.520e, the two adopted individuals in *Moss* were not related by affinity. *Moss I*, 333 Mich App at 526.

access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct." *People v Lewis*, 302 Mich App 338, 347 (2013).

The *status* of a substitute teacher at the time of the offense determines whether the alleged criminal sexual conduct can be prosecuted under MCL 750.520d(1)(e)(*i*); the substitute teacher is not required to be "actively performing" the role of substitute teacher at the time of the offense. *People v Hofman*, 339 Mich App 65, 72 (2021) (holding that, at the time of the alleged sexual misconduct, the defendant did not qualify as the student's substitute teacher because at the time of the offense, the defendant was not employed by the school attended by the complainant; at the time of the offense, the defendant qualified only as the complainant's *former* substitute teacher). According to *Hofman*, the *Lewis* Court "clearly focused on the distinction between *being* a substitute teacher and *acting as* a substitute teacher." *Hofman*, 339 Mich App at 71.

B. Intent

CSC-III "is a general intent crime proved by showing that the defendant committed a proscribed sexual act." *People v Corbiere*, 220 Mich App 260, 266 (1996).

C. Statute of Limitations

1. Criminal Action

a. Victim Age 18 or Older

If the victim is 18 years old or older, an indictment for a violation or attempted violation of CSC-III "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is

committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

b. Victim Under Age 18

If the victim is under 18 years of age, an indictment for a violation or attempted violation of CSC-III "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 15 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(4).

2. Civil Action

A victim of criminal sexual conduct may file a civil action to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6); MCL 600.5851b. The period of limitations depends on the age of the victim at the time of the offense. See *id*. For additional discussion of civil actions, see Section 1.6.

D. Punishment

1. Imprisonment

"[CSC-III] is a felony punishable by imprisonment for not more than 15 years." MCL 750.520d(2). For information on felony sentencing in Michigan, including scoring CSC-III

offenses, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*.

2. Probation

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

3. Court-Ordered Payments

The authority to impose fines, costs, and assessments on defendants convicted of criminal offenses is governed by statute. This sub-subsection provides a brief overview of court-ordered payments as it specifically relates to CSC-III convictions. For more information on costs in general and costs authorized for felony offenses, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 8, *Table of General Costs* and *Table of Felony Offenses for Which Costs are Authorized*.

a. Fines

MCL 769.1k(1)(b)(*i*) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted, and MCL 750.520d does not specifically authorize the imposition of a fine for a CSC-III conviction.

b. Costs

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.520d to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child . . . [under MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

c. Crime Victim Assessment

At the time a defendant is sentenced, at the time sentence is delayed, or at the time of entry of a judgment of guilt is

deferred, MCL 769.1k(1)(b)(*v*) permits the court to impose "[a]ny assessment authorized by law." A defendant convicted of CSC-III must pay a crime victim assessment of $130. See MCL 780.905(1)(a). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

d. Restitution

When sentencing a defendant for committing CSC-III, the court must order full restitution. See MCL 769.1a(2); MCL 769.34(6); MCL 771.3(1)(e); MCL 780.766; MCR 6.425(E)(1)(f). For more information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

E. Sex Offender Registration

CSC-III is a tier III offense under the SORA for which registration is required unless "the court determines that the victim consented to the conduct constituting the violation, that the victim was at least age 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim." MCL 28.722(v)(*iv*).

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

For more information on the SORA's registration requirements, see Chapter 9.

2.5 Fourth-Degree Criminal Sexual Conduct

Fourth-degree criminal sexual conduct (CSC-IV) involves sexual contact coupled with certain circumstances set out in MCL 750.520e.

A. Elements of Offense

"A person is guilty of criminal sexual conduct in the fourth degree if the person engages in sexual contact with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age but less than 16 years of age,[54] and the actor is 5 or more years older than that other person.

(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:

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

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

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

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

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

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

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

[54] For a discussion of the calculation of age, see Section 2.1(D).

married to each other at the time of the alleged violation.

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

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

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

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

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

(*i*) The actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of the public school, nonpublic school, school district, or intermediate school district from which that other person receives the special education services. This subparagraph does not apply if both persons are not less than 18 years of age and were lawfully married to each other at the time of the alleged violation.

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

(h) The actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home, in which that other person is a resident, that other person is at least 16 years of age, and the sexual contact occurs during that other person's residency. . . ." MCL 750.520e(1).

Constitutional issue—statute not vague on its face."MCL 750.520e(1)(d) is not vague on its face because it clearly and plainly sets forth the elements that the prosecutor must prove beyond a reasonable doubt and does not leave the jury with unstructured and unlimited discretion in finding guilt." *People v Russell*, 266 Mich App 307, 311-312 (2005) ("reject[ing] defendant's argument that MCL 750.520e(1)(d) gives the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed" because "MCL 750.520e(1)(d) requires that the fact-finder find that a sexual contact occurred" and "clearly defines 'sexual contact'"; "while defendant is correct in his assertion that MCL 750.520e(1)(d) precludes sexual conduct between two consenting adults under some circumstances when the adults are related by affinity, this is irrelevant to whether the statute is unconstitutionally vague").

B. Intent

CSC-IV is a general intent crime. *People v Lasky*, 157 Mich App 265, 272 (1987).

C. Statute of Limitations

1. Criminal Action

An indictment for a violation or attempted violation of CSC-IV "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

2. Civil Action

A victim of criminal sexual conduct may file a civil action to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6); MCL 600.5851b. The period of limitations depends on the age of the victim at the time of the offense. See *id*. For additional discussion of civil actions, see Section 1.6.

D. Punishment

1. Imprisonment

"[CSC-IV] is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both." MCL 750.520e(2). For information on district court sentencing, see the Michigan Judicial Institute's *Criminal Proceedings, Vol. 2*, Chapter 6.[55]

2. Probation

CSC-IV is a probationable offense for adult offenders. See MCL 771.1(1). A defendant convicted of CSC-IV is not eligible for reduced probation under MCL 771.2(2). MCL 771.2(10)(f). For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

---

[55] In some jurisdictions, the circuit court will sentence a defendant convicted of CSC-IV after the defendant has had a preliminary examination and been bound over from the district court. See, e.g., MCR 6.008.

3. Court-Ordered Payments

The authority to impose fines, costs, and assessments on defendants convicted of criminal offenses is governed by statute. This sub-subsection provides a brief overview of court-ordered payments as it specifically relates to CSC-IV convictions. For more information on costs in general and costs authorized for misdemeanor offenses,[56] see the Michigan Judicial Institute's *Table of General Costs* and *Table of Misdemeanor Offenses for Which Costs are Authorized*.

a. Fines

MCL 769.1k(1)(b)(*i*) permits the court to order a defendant to pay a fine that is specifically authorized by the penal statute under which he or she was convicted. For a CSC-IV conviction, MCL 750.520e(2) specifically authorizes the imposition of "a fine of not more than $500.00[.]"

b. Costs

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.520e to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child . . . [under MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

c. Crime Victim Assessment

At the time a defendant is sentenced, at the time sentence is delayed, or at the time of entry of a judgment of guilt is deferred, MCL 769.1k(1)(b)(*v*) permits the court to impose "[a]ny assessment authorized by law." A defendant convicted of CSC-IV must pay a crime victim assessment of $75.[57] See MCL 780.905(1)(b). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

---

[56] While MCL 750.520e(2) provides that CSC-IV is a "misdemeanor punishable by imprisonment for not more than 2 years", MCL 761.1(f) defines a felony as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year[.]"

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

d. Restitution

When sentencing a defendant for committing CSC-IV, the court must order full restitution.[58] MCL 769.1a(2); MCL 771.3(1)(e). For more information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

E. Sex Offender Registration

Registration is required. If the victim is:

- 18 years old or older, CSC-IV is a tier I offense under the Sex Offenders Registration Act (SORA), MCL 28.722(r)(*v*).
- at least 13 years old but less than 18 years old, CSC-IV is a tier II offense under the SORA, MCL 28.722(t)(*x*).
- under 13 years old and the actor is 17 years old or older, CSC-IV is a tier III offense under the SORA, MCL 28.722(v)(*vi*).

For more information on the SORA's registration requirements, see Chapter 9.

2.6 Assault With Intent to Commit Criminal Sexual Conduct Involving Sexual Penetration

An assault with intent to commit criminal sexual conduct involving sexual penetration is a necessarily included lesser offense of CSC-I and CSC-III.[59] See *People v Starks*, 473 Mich 227, 236 (2005); *People v Nickens*, 470 Mich 622, 624 (2004); *People v Love*, 91 Mich App 495, 502-503 (1979).

---

[57] While MCL 750.520e(2) provides that CSC-IV is a "misdemeanor punishable by imprisonment for not more than 2 years", MCL 780.901(d) defines a felony as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year[.]"

[58] While MCL 750.520e(2) provides that CSC-IV is a "misdemeanor punishable by imprisonment for not more than 2 years", MCL 761.1(f) defines a felony as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year[.]"

[59] For additional discussion of necessarily included lesser offenses, see See Section 2.1(E).

A. Elements of Offense

A person is guilty of assault with intent to commit criminal sexual conduct involving sexual penetration under MCL 750.520g(1) if:

> (a) the person committed an assault, and
>
> (b) had the intent to commit criminal sexual conduct involving sexual penetration. *People v Nickens*, 470 Mich 622, 627 (2004).

"Nothing in MCL 750.520g(1) requires the existence of an aggravating circumstance or that the assault is made with an improper sexual purpose or intent." *Nickens*, 470 Mich at 627.

1. Defining *Assault*

"[A]n assault can occur in one of two ways." *People v Nickens*, 470 Mich 622, 628 (2004). One way is often called an *attempted-battery assault* where there is an attempt to commit a battery (intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person). *Id*. The other way is often called an *apprehension-type assault* where there is an illegal act that places another person in reasonable apprehension of being immediately battered. *Id*. (also noting that if an attempt fails, the act constitutes an assault only, and if the attempt is successful, it constitutes an assault and battery; accordingly, "an attempted-battery assault is a necessarily lesser included offense of a completed battery because it is impossible to commit a battery without first committing an attempted-battery assault").

2. Caselaw Addressing Assault

Consent. An assault under MCL 750.520g(1) always occurs "when the actor commits CSC-I under MCL 750.520b(1)(f) [(involving force or coercion)]" because a victim who is coerced into agreeing to sexual penetration "cannot be said to have lawfully consented and, thus, a battery has occurred," which by definition means that "an assault has also occurred." *People v Nickens*, 470 Mich 622, 630-631 (2004) (further noting that the fact that CSC-I is a general intent crime and assault with intent to commit sexual penetration is a specific intent crime "is a distinction without a difference"). See also *People v Starks*, 473 Mich 227, 237 (2005) (consent is not always a defense to the crime of assault with intent to commit sexual penetration; accordingly, bindover on a charge of assault with intent to commit sexual penetration was proper where the complainant "could not consent to the attempted touching in

this case-fellatio-and defendant's attempt to commit fellatio" because she was 13 year old, and "if proven, [the conduct] would amount to an attempt to commit an intentional, *unconsented*, and harmful or offensive touching, which by definition, is an assault").

B. Intent

Assault with intent to commit CSC involving sexual penetration is a specific intent crime. *People v Nickens*, 470 Mich 622, 631 (2004). The prosecution must prove that "(1) defendant committed an assault (2) with the intent to commit sexual penetration. There is no requirement that one prove an intent to commit criminal sexual conduct, as that is necessarily established by proof of the other elements." *People v Love*, 91 Mich App 495, 502 (1979). "[P]roof of intent to commit [CSC-III, MCL 750.520d,] is established by proof of the intention to commit a forcible sexual penetration. This intention will necessarily be established by proof of assault plus proof of the intent to sexually penetrate. The intention to use force in effectuating the sexual penetration is established by the assault itself[.]" *Love*, 91 Mich App at 502-503. See *People v McFall*, 224 Mich App 403, 409-410 (1997) (there was sufficient evidence to support "a reasonable trier of factfinder to conclude that defendant intended to sexually penetrate the complainant" where "the complainant testified that after defendant had touched her genitalia, he choked her and told her to take her pants all the way down[, and] . . . that, at one point, defendant, 'was found fumbling with his hand down his pants'").

C. Statute of Limitations

1. Criminal Action

An indictment for a violation of MCL 750.520g(1) "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is

identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

2. Civil Action

A victim of criminal sexual conduct may file a civil action to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6); MCL 600.5851b. The period of limitations depends on the age of the victim at the time of the offense. See *id*. For additional discussion of civil actions, see Section 1.6.

D. Punishment

1. Imprisonment

Assault with intent to commit CSC involving sexual penetration is a felony "punishable by imprisonment for not more than 10 years." MCL 750.520g(1). For information on felony sentencing in Michigan, including scoring assault with intent to commit CSC involving sexual penetration offenses, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*.

2. Probation

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

3. Court-Ordered Payments

The authority to impose fines, costs, and assessments on defendants convicted of criminal offenses is governed by statute. This sub-subsection provides a brief overview of court-ordered payments as it specifically relates to assault with intent to commit CSC involving sexual penetration convictions. For more information on costs in general and costs authorized for felony offenses, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 8, *Table of General Costs* and *Table of Felony Offenses for Which Costs are Authorized*.

a. Fines

MCL 769.1k(1)(b)(*i*) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted, and MCL 750.520g(1) does not specifically authorize the imposition of a fine for an assault with intent to commit CSC involving sexual penetration conviction. See *People v Johnson*, 314 Mich App 422, 423 (2016) ("vacat[ing] the portion of the judgment of sentence imposing a fine" for violating MCL 750.520g(1)).

b. Costs

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.520e to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child . . . [under MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

c. Crime Victim Assessment

At the time a defendant is sentenced, at the time sentence is delayed, or at the time of entry of a judgment of guilt is deferred, MCL 769.1k(1)(b)(*v*) permits the court to impose "[a]ny assessment authorized by law." A defendant convicted of violating MCL 750.520g(1) must pay a crime victim assessment of $130. See MCL 780.905(1)(a). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

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

d. Restitution

When sentencing a defendant for committing assault with the intent to commit sexual penetration, the court must order full restitution. See MCL 769.1a(2); MCL 769.34(6);

MCL 771.3(1)(e); MCL 780.766; MCR 6.425(E)(1)(f). If ordered to pay restitution under the Code of Criminal Procedure or the CVRA at sentencing, upon parole, a parolee's parole order must contain a condition to pay restitution. MCL 791.236(5). For more information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

E. Sex Offender Registration

Assault with intent to commit CSC involving sexual penetration is a tier III offense under the SORA for which registration is required unless "the court determines that the victim consented to the conduct constituting the violation, that the victim was at least age 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim." MCL 28.722(v)(*iv*).

For more information on the SORA's registration requirements, see Chapter 9.

2.7 Assault With Intent to Commit Criminal Sexual Conduct in the Second Degree

An assault with intent to commit criminal sexual conduct in the second degree is a necessarily included lesser offense of CSC-II.[60] See *People v Lasky*, 157 Mich App 265, 270-271 (1987).

A. Elements of Offense

A person is guilty of assault with intent to commit criminal sexual conduct in the second degree under MCL 750.520g(2) if:

> (a) the person committed an assault,
>
> (b) that involved an aggravating circumstance or the person "*intended* to do some act which would have given rise to an aggravating circumstance,"
>
> (c) there was a "specific intent to touch the victim's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas," and
>
> (d) the touching was "for the purpose of sexual arousal or sexual gratification." *People v Evans*, 173 Mich App

[60] For additional discussion of necessarily included lesser offenses, see Section 2.1(E).

631, 634 (1988); *People v Lasky*, 157 Mich App 265, 270-271 (1987).

B. Caselaw Addressing Assault

Assault with a sexual purpose. "To support a conviction of assault with intent to commit criminal sexual conduct in the second degree there must be assault with a sexual purpose." *People v Fairbanks*, 165 Mich App 551, 554-555 (1987). See also *Evans*, 173 Mich App 631, 636-637 (1988), where the evidence was sufficient to support defendants' convictions for assault with intent to commit CSC-II and aiding and abetting theory where the trial court "clearly inferred the principal's intent from the circumstances" when it found that both defendants testified to "'grabb[ing] the [complainant] around the neck and . . . pull[ing] his pants down and . . . while they [were] doing it they grabbed [the complaint's] buttocks and spread[] the grease around. The specific intent which is necessary for any type of specific intent has to be gleaned from expressions made by the defendants which was testified to by the one individual who testified as to what they were going to do or it has to be determined by circumstantial evidence. In this case there being no doubt whatsoever that the[defendants] were in the [complainant's] cell . . . . They were taking advantage of an opportunity and they did and they both testified that they wanted to horseplay. If they wanted to horseplay there are ways to do it, but you don't go take a person's pants down and spread grease on their buttocks.'"

C. Intent

Assault with intent to commit CSC-II is a specific intent crime. See *People v Evans*, 173 Mich App 631, 634 (1988); *People v Reese*, 114 Mich App 644, 645 (1982).

D. Statute of Limitations

1. Criminal Action

An indictment for a violation of MCL 750.520g(2) "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.

> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

2. Civil Action

A victim of criminal sexual conduct may file a civil action to recover damages sustained because of the criminal sexual conduct. See MCL 600.5805(6); MCL 600.5851b. The period of limitations depends on the age of the victim at the time of the offense. See *id*. For additional discussion of civil actions, see Section 1.6.

E. Punishment

1. Imprisonment

Assault with intent to commit CSC-II is a felony "punishable by imprisonment for not more than 5 years." MCL 750.520g(2). For information on felony sentencing in Michigan, including scoring assault with intent to commit CSC-II offenses, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*.

2. Probation

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

3. Court-Ordered Payments

The authority to impose fines, costs, and assessments on defendants convicted of criminal offenses is governed by statute. This sub-subsection provides a brief overview of court-ordered payments as it specifically relates to assault with intent to commit CSC-II convictions. For more information on costs in general and costs authorized for felony offenses, see

the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1, *Table of General Costs* and *Table of Felony Offenses for Which Costs are Authorized*.

a. Fines

MCL 769.1k(1)(b)(*i*) does not allow a court to order a defendant to pay a fine that is not specifically authorized by the penal statute under which he or she was convicted, and MCL 750.520g(2) does not specifically authorize the imposition of a fine for an assault with intent to commit CSC-II conviction. See *People v Johnson*, 314 Mich App 422, 423 (2016) ("vacat[ing] the portion of the judgment of sentence imposing a fine" for violating MCL 750.520g(1)).[61]

b. Costs

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.520e to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child . . . [under MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

c. Crime Victim Assessment

At the time a defendant is sentenced, at the time sentence is delayed, or at the time of entry of a judgment of guilt is deferred, MCL 769.1k(1)(b)(*v*) permits the court to impose "[a]ny assessment authorized by law." A defendant convicted of violating MCL 750.520g(2) must pay a crime victim assessment of $130. See MCL 780.905(1)(a). Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

Assessments authorized by MCL 769.1k(1)(b)(*v*) apply even if a defendant is placed on probation, a defendant's

[61] Although the *Johnson* Court did not address MCL 750.520g(2) specifically, similar to MCL 750.520g(1), that portion of the statute does not authorize imposition of a fine and has been included here for that reason. This holding has not been explicitly extended to a violation under MCL 750.520g(2).

probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

d. Restitution

When sentencing a defendant for committing assault with intent to commit CSC-II, the court must order full restitution. See MCL 769.1a(2); MCL 769.34(6); MCL 771.3(1)(e); MCL 780.766; MCR 6.425(E)(1)(f). For more information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

F. Sex Offender Registration

Registration is required for the following offenses:

- If the victim is 18 years old or older, assault with intent to commit CSC-II is a tier I offense under the SORA, MCL 28.722(r)(*v*).
- If the victim is at least 13 years old but less than 18 years old, assault with intent to commit CSC-II is a tier II offense under the SORA, MCL 28.722(t)(*x*).
- If the victim is under 13 years old, assault with intent to commit CSC-II is a tier III offense under the SORA, MCL 28.722(v)(*v*).

For more information on the SORA's registration requirements, see Chapter 9.

2.8 Double Jeopardy Issues

This section contains a brief discussion of double jeopardy issues as they relate to the criminal sexual conduct offenses. For a detailed discussion of double jeopardy issues in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9.

"Both federal and Michigan double jeopardy provisions afford three related protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same offense after conviction, and (3) against multiple punishments for the same offense. [*People v Nutt*, 469 Mich 565, 574 (2004); *North Carolina v Pearce*, 396 US 711 (1969)]." *People v Ford*, 262 Mich App 443, 447 (2004).

A. Second Prosecution for Same Offense

"The rule against successive prosecutions does not apply where a defendant requests separate trials on related offenses." *People v Matuszak*, 263 Mich App 42, 49-50 (2004) (where defendant pleaded guilty on one count and stated no objection to proceeding to trial on another count, the guilty plea was treated as a request for separate proceedings on the two related charges). Accordingly, defendant's trial-based conviction of CSC-I did not violate double jeopardy principles even though it was preceded by his plea-based conviction of CSC-III. *Id*. at 49.

B. Multiple Punishments for Same Offense

"To determine whether a defendant has been subjected to multiple punishments for the 'same offense,' [courts] must first look to determine whether the Legislature expressed a clear intention that multiple punishments be imposed. . . . Where the Legislature has not clearly expressed an intention to impose multiple punishments, the elements of the offenses must be compared using the *Blockburger* test." *People v Garland*, 286 Mich App 1, 4-5 (2009), quoting *People v Smith*, 478 Mich 292, 316 (2007). "Nowhere in the CSC chapter, MCL 750.520 *et seq*., does the Legislature clearly express its intention to impose multiple punishments. Thus, the *Blockburger* test must be applied." *Garland*, 286 Mich App at 5. "Under the *Blockburger* test, if each offense 'requires proof of a fact which the other does not' then there is no violation of double jeopardy." *Garland*, 286 Mich App at 5.

Because CSC-I and CSC-III each require proof of a fact that the other does not, a defendant's convictions of two counts of CSC-I and two counts of CSC-III based on two acts of sexual penetration did not violate double jeopardy. *Garland*, 286 Mich App at 3, 5-6 ("although CSC I and CSC III both require a sexual penetration, the commission of CSC I does not necessarily require commission of CSC III and vice versa"; MCL 750.520b(1)(c) requires proof that the sexual penetration occurred 'under circumstances involving the commission of any other felony,'" which "is not an element of MCL 750.520d(1)(c)"; "MCL 750.520d(1)(c) requires proof that the sexual penetration occurred and was accompanied by the actor knowing or having 'reason to know that the victim [was] . . . physically helpless,'" which "is not an element of MCL 750.520b(1)(c)).

"Because CSC-I and CSC-II each require proof of a fact that the other does not, [a] defendant's convictions of both on the same facts does not violate double jeopardy." *People v Duenaz*, 306 Mich App 85, 107, 115 (2014) ("'[s]exual penetration' is an element of CSC-I but not CSC-II," and "CSC-II requires that 'sexual contact' be done for a

'sexual purpose,' an element not included in CSC-I) (citation omitted).

A defendant's conviction of twelve counts of CSC-I violated double jeopardy protection against multiple punishment for the same offense where the "prosecutor alleged that defendant committed six acts of sexual penetration, charged him with six counts of CSC I, and set forth alternative theories to support each," and "the jury convicted defendant twice for each instance of sexual penetration." *People v Mackle*, 241 Mich App 583, 601 (2000) (directing the trial court to vacate six of the twelve sentences) (citations omitted). But see *People v Rogers*, 142 Mich App 88, 90 (1985) (rejecting "defendant['s] claims that his conviction of multiple counts of criminal sexual conduct violate[d] the prohibition against double jeopardy" because the defendant was not convicted of multiple counts of CSC-I based upon a single act of penetration; "[r]ather this case involve[d] multiple penetrations and multiple actors" where "[d]efendant . . . himself engaged in sexual penetration with the complainant, . . . [and a]ccording to the victim, [his] co-defendant[s] . . . engaged in [three additional] acts of penetration"; because "[d]efendant was present throughout the entire episode and, in its early stages, struck and threatened the complainant, . . . displayed a weapon to the victim, pointed it at her, and loaded the weapon in her presence, . . . defendant's convictions [were] not for the 'same offense' but are for the separate acts of penetration in which he was involved") (citations omitted).

2.9 Protections Under Criminal Sexual Conduct Statutes

A. Victim Need Not Resist

"A victim need not resist the actor in prosecution under [MCL 750.520b] to [MCL 750.520g]." MCL 750.520i.

"The express language of [MCL 750.520i] precludes any . . . requirement" "that the victim resisted the actor or . . . expressed an intent to resist." *People v Jansson*, 116 Mich App 674, 681-683 (1982) (rejecting defendant's argument that "some manifestation of nonconsent by the victim" be required, and finding that "[a]lthough consent . . . precludes conviction of criminal sexual conduct in the third degree by force or coercion, the prosecution is not required to prove nonconsent as an independent element of the offense).

B. Victim's Past Sexual Conduct

Evidence of a victim's sexual conduct (specific instances, opinion, and reputation evidence) is generally inadmissible in all CSC prosecutions, unless, and then only to the extent that (1) the evidence is material to a fact at issue; (2) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (3) the evidence involves either the victim's past sexual conduct with the actor or specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. See MCL 750.520j(1); MRE 404(a)(2)(C). For a detailed discussion of MCL 750.520j, the rape-shield statute, see Section 6.2.

C. Legal Spouse as Victim

"A person may be charged and convicted under [MCL 750.520b] to [MCL 750.520g] even though the victim is his or her legal spouse. However, a person may not be charged or convicted solely because his or her legal spouse is mentally incapable." MCL 750.520*l*.

D. Suppression of Names and Details

If the victim, defendant, or counsel requests suppression of names and details in a prosecution under MCL 750.520b–MCL 750.520g, the court must suppress the name of the victim, the name of the actor, and the details of the alleged offense until arraignment, dismissal of the charge, or the case is otherwise concluded, whichever occurs first. MCL 750.520k. "The statute, by its explicit terms, imposes no restraints on any person." *I n re Midland Pub Co*, 420 Mich 148, 158 (1984). Accordingly, it does not violate the First Amendment. *Id*. Rather, for an event-terminable time, it directs" suppression of the information, and "[a] suppression order, as the term is commonly understood in the State of Michigan, contemplates only a direction to the court personnel to prevent public disclosure of the official files." *Id*. at 157. Although MCL 750.520k necessarily requires "the closing of the preliminary examination to the public and the press, since the first event upon which the termination of this suppression order is conditioned on is the arraignment on the information, unless the case is concluded without bind-over to the circuit court," . . . the statute does not constitute a restraint against publication, since it contemplates no sanctions against non-parties publishing information, no matter how acquired." *Midland Pub Co*, 420 Mich at 157 (quotation marks and citation omitted).

E. DNA Collection

A person must provide a blood, saliva, or tissue sample for chemical testing for DNA identification profiling (or a determination of the sample's genetic markers) if the person is "arrested for committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult" or "convicted of, or found responsible for, a felony or attempted felony, or . . . [certain] misdemeanors." MCL 750.520m(1).

2.10 Student Offenders

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

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

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

2.11 Repeat Criminal Sexual Conduct Offender

CSC offenders with previous convictions may be subject to sentence enhancements. See MCL 750.520f (providing for a "mandatory minimum sentence of at least 5 years"[62] for a second or subsequent offense violation of CSC-I, CSC-II, or CSC-III); MCL 769.10-MCL 769.12 (governing sentencing for habitual offenders). Note that MCL 750.520b(2)(c) imposes a *mandatory* sentence of imprisonment for life without the possibility of parole for a conviction of CSC-I, if committed against an individual less than 13 years of age by a defendant 18 years of age or older and if the defendant was previously convicted of an enumerated sex crime against an individual less than 13 years of age.[63]

---

[62] "[T]he legislative sentencing guidelines apply to minimum sentences in excess of 5 years that are imposed under MCL 750.520f." *People v Wilcox*, 486 Mich 60, 73 (2010). "Although MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it;"; therefore, "for purposes of applying MCL 769.34(2)(a)[(governing sentence departures)], the 'mandatory minimum' sentence referred to in MCL 750.520f(1) is a flat 5-year term." *Wilcox*, 486 Mich at 69, 73.

[63] For additional discussion of CSC-I, see Section 2.2.

Because the habitual offender statutes, MCL 769.10–MCL 769.12, address a defendant's *maximum* possible sentence and the subsequent offense provisions of MCL 750.520f address a defendant's *minimum* possible sentence, concurrent application of the statutes is permitted. *People v VanderMel*, 156 Mich App 231, 234-237 (1986). A defendant's habitual offender status and the applicability of MCL 750.520f to a defendant's conviction may be based on the same previous felony conviction. *People v James*, 191 Mich App 480, 482 (1991). In contrast to the habitual offender statutes, no additional notice has to be filed to proceed against defendants charged as subsequent offenders under MCL 750.520f. *People v Bailey*, 103 Mich App 619, 627-628 (1981).

For information on the Michigan's statutory sentencing guidelines, including sentencing enhancements for repeat CSC offenders, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*.

Chapter 3: Other Related Offenses

Part I—Introduction

3.1 Information Applicable to Offenses in This Chapter

This chapter discusses other sex offenses specific to Michigan that fall outside the provisions of the Criminal Sexual Conduct Act (CSC Act), MCL 750.520a *et seq.*, and that involve or have the potential to involve sexual misconduct. For a discussion of the CSC Act, see Chapter 2. A discussion of federal sex offenses is beyond the scope of this benchbook.

This chapter begins with some general information about sex offenses falling outside the CSC Act. Unless otherwise specified in the discussion of the specific offenses in this chapter, the general information below applies to all the related offenses found in this chapter. Additional information specific to an individual offense is found in the content addressing that particular offense.

A. Intent

"Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself." *People v Davenport*, 230 Mich App 577, 579 (1998). Words such as "knowingly," "willfully," "intentionally," and "purposefully" indicate a *mens rea* beyond that of general intent. *Id*.; see also *People v Zitka*, 325 Mich App 38, 50-51 (2018). However, a jury need only be instructed with regard to the knowledge element stated in the offense; no additional "specific-intent" instruction need be given when the language of the statute requires that the offender do an action knowingly, willfully, intentionally, or purposefully, and the jury is so instructed. See *People v Maynor*, 470 Mich 289, 295-296 (2004). If relevant, whether an offense requires general or specific intent will be indicated in the discussion of that offense.

"Because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Alexander*, ___ Mich App ___, ___ (2024) (cleaned up) (stating that "the jury could conclude beyond a reasonable doubt that defendant intended to cause [the child] cruel or extreme physical or mental pain and suffering by repeatedly binding [the child's] extremities with zip ties").

B. Determining Age of Victim and Defendant

Michigan determines the age of a person according to the "birthday rule." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). A person reaches his or her age on the anniversary of that person's birth—his or her *birth*day. *Woolfolk*, 304 Mich App at 464. That is, a 17-year-old turns 18 on the anniversary of his or her birth, not on the day before the anniversary of his or her birth.

C. Civil Remedies for Criminal Damages

Except as otherwise provided in MCL 600.5805, the statute of limitations for a civil action to recover damages for the death of a person or for injury to a person or property is three years. MCL 600.5805(2). MCL 750.4 preserves a person's right to pursue civil remedies for acts or omissions punishable under the Michigan Penal Code.

D. Jurisdiction Over the Prosecution of Crimes

MCL 762.2 addresses general jurisdictional requirements applicable to the prosecution of criminal offenses committed within or outside of this state:

> "(1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist:
>
> (a) He or she commits a criminal offense wholly or partly within this state.
>
> (b) His or her conduct constitutes an attempt to commit a criminal offense within this state.
>
> (c) His or her conduct constitutes a conspiracy to commit a criminal offense within this state and an act in furtherance of the conspiracy is committed within this state by the offender, or at his or her instigation, or by another member of the conspiracy.
>
> (d) A victim of the offense or an employee or agent of a governmental unit posing as a victim resides in this state or is located in this state at the time the criminal offense is committed.
>
> (e) The criminal offense produces substantial and detrimental effects within this state.
>
> (2) A criminal offense is considered under subsection (1) to be committed partly within this state if any of the following apply:
>
> (a) An act constituting an element of the crime is committed within this state.
>
> (b) The result or consequences of an act constituting an element of the criminal offense occur within this state.
>
> (c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed."

E. Statutes of Limitations

Most indictments for the offenses contained in this chapter "may be found and filed within 6 years after the offense is committed." MCL 767.24(10). If a different limitations period applies to an offense discussed in this chapter, it will be noted.

A tolling provision applies to each period of limitations discussed in this chapter. See MCL 767.24(11).

F. Jury Instructions

Jury instructions specific to an offense will be identified.

G. Sentencing Guidelines

For information on scoring offenses under Michigan's statutory sentencing guidelines, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 2.

H. Probation

All the offenses in this chapter are probationable offenses for adult offenders. See MCL 771.1(1). For information about the scope of probation and permissible conditions of probation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9. For further information regarding probation in juvenile delinquency, designation, and waiver proceedings, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*.

I. Fines

MCL 769.1k(1)(b)(*i*) permits the court to order a defendant to pay a fine that is specifically authorized by the penal statute under which the defendant was convicted. A fine imposed for a felony or misdemeanor conviction or an ordinance violation may not be waived unless costs—other than the minimum state cost—are waived. MCL 769.1j(5).

J. Crime Victim Assessment

At the time a defendant is sentenced, at the time sentence is delayed, or at the time entry of a judgment of guilt is deferred, MCL 769.1k(1)(b)(*v*) permits the court to impose "[a]ny assessment authorized by law." The court *must* order a defendant convicted of a felony, misdemeanor, or ordinance violation to pay a crime victim assessment. MCL 780.905(1). A defendant assigned to youthful

trainee status, or whose charge is resolved by a delayed sentence or deferred entry of judgment or guilt, or in another way that does not result in acquittal or unconditional dismissal, must also pay a crime victim assessment. *Id*. Only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

Crime victim assessments apply even if a defendant is placed on probation, a defendant's probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3).

1. Felony

A defendant must pay a crime victim assessment of $130 for a felony conviction. MCL 780.905(1)(a).

2. Misdemeanor or Ordinance Violation

A defendant must pay a crime victim assessment of $75 for a misdemeanor conviction or an ordinance violation. MCL 780.905(1)(b).

K. Minimum State Cost

Whenever a defendant pleads guilty or nolo contendere, or the court determines that a defendant is guilty after a hearing or trial, and the court orders the defendant to pay any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost set forth in MCL 769.1j. MCL 769.1j(1)(a); MCL 769.1k(1)(a). The court must impose the minimum state cost at the time of sentencing or at the time judgment is deferred or sentencing is delayed by statute. MCL 769.1k(1). Payment of the minimum state cost is a condition of probation. MCL 769.1j(3).

1. Felony

The minimum state cost for a felony conviction must not be less than $68. MCL 769.1j(1)(a).

2. Misdemeanor or Ordinance Violation

The minimum state cost for a misdemeanor conviction or an ordinance violation must not be less than $50. MCL 769.1j(1)(b).

L. Other Costs

MCL 769.1k provides a court with general authority to impose on a defendant who has pleaded guilty or nolo contendere, or who has been adjudged guilty after a hearing or trial, the costs and fines that are otherwise authorized by the statute describing the defendant's offense. MCL 769.1k(1)(b)(*i*)-(*ii*).

Until December 31, 2026, MCL 769.1k(1)(b)(*iii*) provides a court with authority to impose

> "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following:
>
> (A) Salaries and benefits for relevant court personnel.
>
> (B) Goods and services necessary for the operation of the court.
>
> (C) Necessary expenses for the operation and maintenance of court buildings and facilities."

"In addition to any fine, cost, or assessment imposed under [MCL 769.1k(1)], the court may order the defendant to pay any additional costs incurred in compelling the defendant's appearance." MCL 769.1k(2).

MCL 769.1k(1)(b)(*iii*) is not unconstitutional on its face, nor does it violate the separation-of-powers doctrine. *People v Johnson*, 336 Mich App 688, 705 (2021). In *Johnson*, the defendant failed to establish "that MCL 769.1k(1)(b)(*iii*) encroaches on the judiciary's impartiality by creating financial incentives and pressure for judges to ensure that criminal defendants are convicted and assessed court costs so as to fund the trial courts." *Johnson*, 336 Mich App at 700.

Although MCL 769.1k(1)(b)(*iii*) is a revenue-generating statute, nothing in its statutory language authorizes a court to increase the amount of revenue collected, a portion of which will ultimately benefit the court, by increasing the amount of costs it imposes. *Johnson*, 336 Mich App at 701-702. Further, MCL 769.1k(1)(b)(*iii*) does not authorize the court from which the revenue is generated to administer the revenue or to direct its distribution. *Johnson*, 336 Mich App at 702.

For more information on costs in general and costs authorized for felony and misdemeanor offenses, see the Michigan Judicial Institute's *Table of General Costs*, *Table of Felony Offenses for Which*

Costs are Authorized, and *Table of Misdemeanor Offenses for Which Costs are Authorized*.

M. Restitution

Generally, when sentencing a defendant for any offense in this chapter, the court must order full restitution. See MCL 769.1a(2)[1]; MCL 769.34(6); MCL 771.3(1)(e); MCL 780.766(2); MCL 780.794(2); MCL 780.826(2); MCR 6.425(E)(1)(f). However, "[t]he court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action." MCL 769.1a(8); MCL 780.766(8); MCL 780.794(8); MCL 780.826(8). Additional restitution may be ordered in human-trafficking cases; that information appears in Section 3.28(L).

For more information on restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8.

N. Sex Offender Registration

Not all offenses in this chapter require the defendant to register as a sex offender under the Sex Offenders Registration Act (SORA). Offenses characterized as tier I, II, or III offenses require a defendant to register under the SORA and will be noted. For more information on SORA's registration requirements, see Chapter 9.

Michigan's SORA is largely similar to the federal Sex Offender Registration and Notification Act (SORNA).[2] For a detailed summary of SORNA's requirements and content, see *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed Reg 69856 (December 8, 2021).[3]

---

[1] "The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss[.]" MCL 769.1a(8).

[2]The content of Michigan's SORA closely mirrors, but does not exactly duplicate, the federal Sex Offender Registration and Notification Act (SORNA). See *People v Betts*, 507 Mich 527 (2021). See also MCL 28.721 *et seq*; 34 USC 20911 *et seq*. "[SORNA] establishes national standards for sex offender registration and notification in the United States. SORNA has a dual character, imposing registration obligations on sex offenders as a matter of Federal law that are federally enforceable under circumstances supporting Federal jurisdiction, see 18 U.S.C. 2250, and providing minimum national standards that non-Federal jurisdictions are expected to incorporate in their sex offender registration and notification programs . . . ." *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed Reg 69856 (December 8, 2021). The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

O. Procedural Requirements When Registration Under SORA Is Mandatory

SORA registration is required when a defendant is convicted of a listed offense, and MCL 28.724 prescribes the specific procedure to be followed when a defendant is convicted of a listed offense. *People v Nunez*, 342 Mich App 322, 327, 328 (2022).

When registration under the SORA is mandatory, a defendant must be registered before he or she is sentenced; in addition, MCR 6.427(9) provides that when SORA registration is mandatory for the conviction, that fact must be made part of the judgment of sentence. *Nunez*, 342 Mich App at 330.

The notice a defendant must be given after conviction of a listed offense must also be given before a court accepts a defendant's guilty plea to a listed offense. *Nunez*, 342 Mich App at 334. "Because SORA is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea. For the same reason, the registration requirement must be included in the judgment of sentence." *Id*. at 334. In *Nunez*, the defendant was not required to register under the SORA after he was convicted of a listed offense because the court failed to adhere to the instructions prescribed in MCL 28.724(5) and MCR 6.427(9), and the period during which a trial court could sua sponte correct an invalid sentence had expired. See MCR 6.429(A). *Nunez*, 342 Mich App at 334, 335.

Part II—Offenses Involving Child Sexually Abusive Activity or Child Sexually Abusive Material

3.2 Introduction to Offenses Involving Child Sexually Abusive Activity or Child Sexually Abusive Material

"The offense of engaging a child in sexually abusive activity [under MCL 750.145c] . . . focuses on protecting children from sexual exploitation, assaultive or otherwise. The purpose of the statute is to combat the use of

[3] Federal guidelines discussing in detail the application and scope of SORNA requirements were published in the federal register for December 8, 2021 and became effective on January 7, 2022. *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed Reg 69856 (December 8, 2021). The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. Some provisions included in these federal guidelines for SORNA differ from similar such provisions in the SORA, and it is unknown how those federal guidelines might affect the content or application of the SORA.

children in pornographic movies and photographs, and to punish the production and distribution of child pornography." *People v Ward*, 206 Mich App 38, 42-43 (1994).

MCL 750.145c specifically prohibits a person from doing any of the following or engaging in certain behaviors or actions designed to accomplish any of the following:

- producing, making, copying, or financing child sexually abusive activity or material, MCL 750.145c(2).
- distributing or promoting child sexually abusive material, MCL 750.145c(3).
- possessing child sexually abusive material, MCL 750.145c(4).

"[O]nce it is determined that an image constitutes child sexually abusive material, it must then be determined into which of the statute's three tiers the defendant's conduct falls." *People v Hill*, 486 Mich 658, 677 (2010). "The three tiers of offenses and punishments in MCL 750.145c compellingly indicate the Legislature did not intend to impose the same maximum penalty on a person who downloads a prohibited image from the Internet and burns it to a CD–R for personal use as on a person who is involved in the creation or origination of child sexually abusive material." *Hill*, 486 Mich at 683.

A. Age of the Child

1. Expert Testimony

"Expert testimony as to the age of the child used in a child sexually abusive material or a child sexually abusive activity is admissible as evidence in court and may be a legitimate basis for determining age, if age is not otherwise proven." MCL 750.145c(6).

2. Emancipation

"It is an affirmative defense to a prosecution under this section that the alleged child is a person who is emancipated by operation of law under [MCL 722.4(2)], as proven by a preponderance of the evidence." MCL 750.145c(7).

3. Depiction Not of Actual Child

"If a defendant in a prosecution under this section proposes to offer in his or her defense evidence to establish that a depiction that appears to include a

child was not, in fact, created using a depiction of any part of an actual person under the age of 18, the defendant shall at the time of the arraignment on the information or within 15 days after arraignment but not less than 10 days before the trial of the case, or at such other time as the court directs, file and serve upon the prosecuting attorney of record a notice in writing of his or her intention to offer that defense. The notice must contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called on behalf of the defendant to establish that defense. The defendant's notice must include specific information as to the facts that establish that the depiction was not, in fact, created using a depiction of any part of an actual person under the age of 18. Failure to file a timely notice in conformance with this subsection precludes a defendant from offering this defense." MCL 750.145c(8).

B. Reporting to Law Enforcement Agency

"If a commercial film or photographic print processor reports to a law enforcement agency having jurisdiction his or her knowledge or observation, within the scope of his or her professional capacity or employment, of a film, photograph, movie film, videotape, negative, or slide depicting a person that the processor has reason to know or reason to believe is a child engaged in a listed sexual act; furnishes a copy of the film, photograph, movie film, videotape, negative, or slide to a law enforcement agency having jurisdiction; or keeps the film, photograph, movie film, videotape, negative, or slide according to the law enforcement agency's instructions, both of the following apply:

(a) The identity of the processor must be confidential, subject to disclosure only with his or her consent or by judicial process.

(b) If the processor acted in good faith, he or she is immune from civil liability that might otherwise be incurred by his or her actions. This immunity extends only to acts described in this subsection." MCL 750.145c(9).

"If a computer technician reports to a law enforcement agency having jurisdiction his or her knowledge or

observation, within the scope of his or her professional capacity or employment, of an electronic visual image, computer-generated image or picture or sound recording depicting a person that the computer technician has reason to know or reason to believe is a child engaged in a listed sexual act; furnishes a copy of that image, picture, or sound recording to the law enforcement agency; or keeps the image, picture, or sound recording according to the law enforcement agency's instructions, both of the following apply:

(a) The identity of the computer technician must be confidential, subject to disclosure only with his or her consent or by judicial process.

(b) If the computer technician acted in good faith, he or she is immune from civil liability that might otherwise be incurred by his or her actions. This immunity extends only to acts described in this subsection." MCL 750.145c(10).

C. Reproduction of Photographic or Other Pictorial Evidence

"In any criminal proceeding regarding an alleged violation or attempted violation of this section, the court shall deny any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any photographic or other pictorial evidence of a child engaging in a listed sexual act if the prosecuting attorney makes that evidence reasonably available to the defendant. Evidence is considered to be reasonably available to the defendant under this subsection if the prosecuting attorney provides an opportunity to the defendant and his or her attorney, and any person the defendant may seek to qualify as an expert witness at trial, to inspect, view, and examine that evidence at a facility approved by the prosecuting attorney." MCL 750.145c(11).

D. Statutory Ambiguity

The Supreme Court questioned the Legislature's intent with regard to the age of consent in two different statutory schemes when it denied leave to appeal in *People v Willis (Willis I)*, 322 Mich App 579 (2018). *People v Willis (Willlis II)*, 504 Mich 905, 906 (2019). The Court noted that the age of consent for conduct under the criminal sexual conduct statutes, MCL 750.520b–MCL 750.520e, is 16 years of age,

while the age of consent for the child sexually abusive activity/material is 18 years of age. The Court acknowledged that the defendant in *Willis* "raise[d] a reasonable argument that MCL 750.145c(2), as written, elevates the age of consent in Michigan from 16 years old to 18 years old, effectively nullifying several otherwise important and often-employed criminal statutes of our state." *Id*. at 906. For example,

> "The relevant age of consent under the criminal sexual conduct statutes is 16 years old. See MCL 750.520b to MCL 750.520e. Specifically, '[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age.' MCL 750.520d(1). Revisiting the previous example, the 18-year-old would not have violated MCL 750.520d if he or she had not engaged in sexual intercourse with his or her 17-year-old partner. Nonetheless, the 18-year-old could still be convicted under MCL 750.145c(2) because he or she had 'arranged[d] for . . . child sexually abusive activity . . . .' In effect, then, the age of consent is no longer 16 years old, but 18 years old, as any sexually listed act with an individual under 18 years old could result in criminal liability under MCL 750.145c(2)." *Willis II*, 504 Mich at 906-907 (alterations in original).

Further,

> "the relevant age for purposes of the solicitation statute is 16 years old. Therefore, one who entices a 17-year-old to engage in sexual intercourse would not be criminally liable under MCL 750.145a. Under MCL 750.145c(2), however, one who 'arranges for' that same 17-year-old to engage in sexual intercourse could be held criminally liable." *Willis II*, 504 Mich at 907.

The Court went on to acknowledge that "defendant has highlighted concerns regarding the breadth of MCL 750.145c(2). The Legislature may, or may not, wish to assess these concerns and possibly clarify and harmonize our child sexual abuse statutory scheme." *Willis II*, 504 Mich at 907.

E. Double Jeopardy Issues

"Both federal and Michigan double jeopardy provisions afford three related protections: (1) against a second prosecution for the same offense after acquittal, (2) against a second prosecution for the same

offense after conviction, and (3) against multiple punishments for the same offense." *People v Ford*, 262 Mich App 443, 447 (2004) (citations omitted).

1. Multiple Offenses During Same Transaction

"To determine what constitutes a single crime or offense under [MCL 750.145c], [courts] must . . . examine legislative intent." *People v Hack*, 219 Mich App 299, 306 (1996). MCL 750.145c(2) "provides that a person commits a felony when, inter alia, he induces 'a child' to engage in 'child sexually abusive activities.' We find this language to clearly provide that a felony has been committed when a person induces one child to perform prohibited acts. Because it is undisputed that two children were involved in this case, we conclude that defendant was properly charged and convicted of two counts of this crime." *Hack*, 219 Mich App at 302, 307 ("conclud[ing] that defendant's rights against double jeopardy were not violated" when he was convicted of two counts of child sexually abusive activity under MCL 750.145c(2) for "videotaping . . . a three-year-old female victim who was forced to perform fellatio on her one-year-old male cousin") (citation omitted). See also *People v Harmon*, 248 Mich App 522, 526 (2001) ("four photographs [depicting] erotic nudity . . . two of each [15-year-old] victim, could support four convictions under MCL 750.145c(2), even though the four photographs were from one photography session").

2. Legislatively Linked Compound and Predicate Crimes

"Multiple convictions for legislatively linked compound and predicate crimes, such as the offenses [of producing child sexually abusive activity in violation of MCL 750.145c(2), and CSC-I, engaging in sexual penetration while producing the child sexually abusive activity in violation of MCL 750.520b(1)(c), or CSC-II, engaging in sexual contact while producing the child sexually abusive activity in violation of MCL 750.520c(1)(c)], do not necessarily violate the double jeopardy protection against multiple punishments." *People v Ward*, 206 Mich App 38, 42-43 (1994). "[T]he criminal sexual conduct statutes and the child sexually abusive activity statute prohibit conduct that is violative of distinct social norms. The criminal sexual conduct statutes involve sexual assaults on all persons of all ages"; "[t]he offense of engaging a child in sexually abusive activity, on the other hand, focuses on protecting children from sexual exploitation, assaultive or otherwise." *Id*. at 42. "Further, while the punishments for the

criminal sexual conduct offenses and for the underlying predicate felony of child sexually abusive activity are not identical, . . . neither are they part of a hierarchy of crimes that build upon a single base statute." *Id.* at 43. "Because the Legislature intended to punish conduct violative of distinct social norms and did not authorize punishments based on a continuum of culpability, it is apparent that the Legislature intended that the crimes of criminal sexual conduct and child sexually abusive activity be punished separately." *Id.*

3.3 Allows, Produces, or Conspires to Arrange for, Finance, or Engage a Child in Child Sexually Abusive Activity or Child Sexually Abusive Material

A. Elements of Offense

1. People Who Cause or Allow a Child to Engage in Child Sexually Abusive Activity For the Purpose of Producing Child Sexually Abusive Material

"A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . for personal, distributional, or other purposes if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child is guilty of a crime[.]" MCL 750.145c(2).

2. People Who Arrange For, Produce, Make, or Finance Child Sexually Abusive Activity or Material

"[A] person who arranges for, produces, makes, copies, reproduces, or finances . . . any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child is guilty of a crime[.]" MCL 750.145c(2).

3. People Who Attempt, Prepare, or Conspire to Facilitate Child Sexually Abusive Activity or Material

"[A] person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child is guilty of a crime[.]" MCL 750.145c(2).

B. Intent

"[T]he language of [MCL 750.145c(2)] clearly and unambiguously imposes criminal liability on three distinct groups of 'person[s],' provided that at the time of their actions, the persons met the requisite knowledge element." *People v Adkins*, 272 Mich App 37, 41 (2006). "[T]he first category of persons . . . pursue involvement in child sexually abusive activity *for the purpose of creating child sexually abusive material*." *Id*. "The Legislature . . . omitted from the second and third groups subject to criminal liability any requirement that the individuals therein must have acted for the ultimate purpose of creating any child sexually abusive material, a specific requirement applicable to the first group of criminals." *Id*. at 42.[4]

C. Statute of Limitations

An indictment for a violation or attempted violation of MCL 750.145c(2) "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the

[4] Note, however, that MCL 750.145c(2) was amended after *Adkins* was decided. It now requires that the second and third groups of persons act "for personal, distributional, or other purposes[.]" It is unclear if or how this additional language impacts the *Adkins* analysis.

individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

D. Jury Instructions

M Crim JI 20.38, *Child Sexually Abusive Activity—Causing or Allowing*, and M Crim JI 20.38a, *Child Sexually Abusive Activity—Producing*.

E. Penalties

1. Imprisonment and Fines

Generally, producing child sexually abusive activity or material is "a felony punishable by imprisonment for not more than 20 years or a fine of not more than $100,000.00, or both." MCL 750.145c(2)(a). However, if the child sexually abusive activity or material "involves a prepubescent child, sadomasochistic abuse or bestiality, or includes a video or more than 100 images of child sexually abusive material," then it is "a felony punishable by imprisonment for not more than 25 years or a fine of not more than $125,000.00, or both." MCL 750.145c(2)(b).

2. Crime Victim Assessment

A defendant convicted of producing child sexually abusive activity or material must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

F. Sex Offender Registration

If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723. MCL 750.145c(2) is a tier II offense under the Sex Offenders Registration Act (SORA). MCL 28.722(t)(*iii*).

For more information on the SORA's registration requirements, see Chapter 9.

G. Caselaw

1. Knowingly Allows

"Nothing in [MCL 750.145c(2)] suggests that the term 'knowingly allows' should be construed as applying only to a class of persons responsible for the care of the child." *People v Pitts*, 216 Mich App 229, 232 (1996). "Even though the Child Protection Law[, MCL 722.622,] refers to MCL 750.145c when defining sexual exploitation, . . . it should [not] be consulted for the purpose of construing 'knowingly allows' under MCL 750.145c." *Pitts*, 216 Mich App at 233.

2. Producing

The term *produce* as used in MCL 750.145c(2) means "'to bring into existence,' or 'to create.'" *People v Hack*, 219 Mich App 299, 305 (1996) (where the "defendant admit[ted] that a videotape of the children performing acts of a sexual nature was created[,] . . . any argument that defendant did not 'produce' child sexually abusive material is wholly without merit"), quoting *The Random House College Dictionary, Revised Edition* (1984) (citations omitted).

"[A] rational juror could find that the prosecution proved beyond a reasonable doubt that defendant knowingly videotaped the child while she was engaged in a listed sexual act, i.e. masturbation," where the evidence included videos of the child-victim grinding her genitals against a couch, showing defendant asking the child in the videos "why she was engaging in the act," and the child responding "because it's comfortable [and] it felt good," the detective's characterization that "the child's act [in the videos] entailed manual manipulation of the genitals," seizure of a CD from the defendant's home depicted "nude images of the child in the bathtub and bathroom," the child's mother's testimony "to having once observed the child with 'her hands between her legs and . . . gyrating on the bed,'" and "expert testimony about normal sexual behavior by children." *People v Sardy*, 313 Mich App 679, 689-690, 715 (2015), vacated in part on other grounds 500 Mich 887 (2016).[5]

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

3. Creating Child Sexually Abusive Activity

a. Downloading and Copying Electronic Images

"While simply viewing an image on the Internet does not amount to 'making' content because the individual has not actually copied the image yet, copying an image that is either stored on a computer hard drive or burned to a CD-ROM or other digital media storage device is considered 'making' content." *People v Seadorf*, 322 Mich App 105, 111 (2017).

b. Editing Videotape

"[T]he act of editing a videotape of otherwise nonoffensive child nudity can give rise to the creation of child sexually abusive activity" under MCL 750.145c(2). *People v Riggs*, 237 Mich App 584, 588 (1999). "[T]he use of an otherwise benign image of a child exhibiting ordinary nudity to create what could fall within the definition of erotic nudity, is conduct proscribed by [MCL 750.145c(2), which]. . . does not require that the children actually be engaging in sexual activity at the time the activity is memorialized on tape. Rather, the statute prohibits the making of a visual image that is a likeness or representation of a child engaging in one of the listed sexual acts." *Riggs*, 237 Mich App at 587, 590-592 ("[defendant's] conduct, if proved, would constitute the making of images depicting erotic nudity of a child, in violation of MCL 750.145c(2)" where defendant videotaped two ten-year-old girls playing, focusing the camera "exclusively on the girls' crotch areas," and when one of the girl's vaginal area was exposed, "defendant edited the tape to slow down and stop the taped images to display a closeup scene of the child's nude genital area, keeping the scene displayed on the edited tape for over two minutes and then repeating the scene twice more in slow motion").

c. Innocent Child Nudity

A tape that "merely shows innocent child nudity" does not constitute child sexually abusive material. *People v Riggs*, 237 Mich App 584, 587, 593 (1999) (where defendant videotaped "two sisters aged eight and ten watching themselves on a television monitor[, and o]ne child lift[ed] her shirt . . . then expose[d] her vaginal area[,] . . . [and t]he child's full body [was] observed on

the tape" defendant's conduct did not constitute the making of images depicting erotic nudity of a child in violation of MCL 750.145c(2) when there was "[n]othing [to] suggest[] the child acted at defendant's request[, and n]o editing of th[e] scene occurred except that it was replayed twice more on the tape at regular speed").

4. Arranging For or Attempting or Preparing to Arrange For Child Sexually Abusive Activity

Evidence that is "factually sufficient to show that defendant arranged for, or attempted to arrange or prepare for, child sexually abusive activity" is enough to support a violation of MCL 750.145c(2). *People v Willis (Willis I)*, 322 Mich App 579, 586 (2018). "[T]he evidence was factually sufficient to show that defendant arranged for, or attempted to arrange or prepare for, child sexually abusive activity with the 16-year-old victim[where t]he evidence showed that the 52-year-old defendant invited the 16-year-old victim into his apartment, showed the victim a pornographic video of two men engaging in sexual intercourse, offered the victim $25 to allow defendant to insert his fingers into the victim's anus while he masturbated, and later offered the victim $100 to engage in sexual intercourse." *Id*.

"Because the child sexually abusive activity statute requires only mere preparation, rather than actual abusive activity," "it is [not] legally significant that [an undercover sheriff deputy posing as a fourteen-year-old girl] was an adult rather than a child in determining whether defendant made preparations to engage in child sexually abusive activity. It does not change the fact that defendant was endeavoring to find a child, to entice a child to engage in sexual activity, or to arrange to meet a child for sexual activity." *People v Thousand (Thousand I)*, 241 Mich App 102, 115-116 (2000) (where "defendant was preparing to arrange for child sexually abusive activity by chatting with and enticing someone he believed to be a child[, t]he fact that [the person] was not a child merely means that defendant would not ultimately be successful in engaging in child sexually abusive activity[; his] . . . criminal responsibility, however, [was] not premised on his success, but on his preparations"), aff'd in part, rev'd in part 465 Mich 149 (2001).[6]

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

5. Reasonable Precautions to Determine Age of Child

"[T]here was sufficient evidence for the jurors to conclude that defendant failed to take reasonable precautions to determine the age of the victims" where he took nude photographs of two fifteen-year-old victims without "ask[ing] either victim about their ages before taking photographs," "[o]ne victim testified that she told defendant at one of the two photography sessions that she was fifteen years old," the other victim "testified that she signed a model release form indicating she was over eighteen but did not sign the document until after the nude photographs were taken," and "defendant admitted that he proceeded to take nude photographs, regardless of the lack of identification, on the promise from the victims that they would supply identification within seven days." *People v Harmon*, 248 Mich App 522, 528-529 (2001).

3.4 Distribution or Promotion of Child Sexually Abusive Activity or Child Sexually Abusive Material

A. Elements of Offense

"Except as provided in subsection (14), a person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child is guilty of a crime[.]" MCL 750.145c(3).

Under MCL 750.145c(14), MCL 750.145c(3) "does not apply to the persons described in . . . MCL 752.367," which exempts:

> "(a) An individual who disseminates obscene material in the course of his or her duties as an employee of, or as a member of the board of directors of, any of the following:
>
> > (*i*) A public or private college, university, or vocational school.
> >
> > (*ii*) A library established by this state or a library established by a county, city, township, village, or

> other local unit of government or authority or combination of local units of government and authorities or a library established by a community college district.
>
> (*iii*) A public or private not for profit art museum that is exempt from taxation under section 501(c)(3) of the internal revenue code.
>
> (b) An individual who disseminates obscene material in the course of the individual's employment and does not have discretion with regard to that dissemination or is not involved in the management of the employer.
>
> (c) Any portion of a business regulated by the federal communications commission.
>
> (d) A cable television operator that is subject to the communications act of 1934, chapter 652, 48 Stat. 1064."

B. Intent

"MCL 750.145c(3) requires that an accused be shown to have had criminal intent to distribute or promote." *People v Tombs*, 472 Mich 446, 448 (2005). "No *mens rea* with respect to distribution or promotion is explicitly required in MCL 750.145c(3). Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature's intent not to eliminate *mens rea* in MCL 750.145c(3)."[7] *Tombs*, 472 Mich at 456-457.

C. Statute of Limitations

An indictment for a violation or attempted violation of MCL 750.145c(3) "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the

[7] For additional information on *mens rea* and criminal liability, in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

D. Jury Instructions

M Crim JI 20.38b, *Child Sexually Abusive Activity—Distributing*.

E. Penalties

1. Imprisonment and Fines

Generally, distributing or promoting child sexually abusive activity or material is "a felony punishable by imprisonment for not more than 7 years or a fine of not more than $50,000.00, or both." MCL 750.145c(3)(b). However, if the distribution or promotion of child sexually abusive activity or material "involves a prepubescent child, sadomasochistic abuse or bestiality, or includes a video or more than 100 images of child sexually abusive material," then it is "a felony punishable by imprisonment for not more than 15 years or a fine of not more than $75,000.00, or both." MCL 750.145c(3)(b).

2. Crime Victim Assessment

A defendant convicted of distributing or promoting child sexually abusive activity or material must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

F. Sex Offender Registration

If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723 MCL 750.145c(3) is a tier II offense under the Sex Offenders Registration Act (SORA). MCL 28.722(t)(*iii*).

For more information on the SORA's registration requirements, see Chapter 9.

G. Caselaw

1. Possession Is Not the Same as Promotion

"Possession is not the same as promotion." *People v Tombs*, 472 Mich 446, 464 (2005). MCL 750.145c "on its face makes the mere possession of child sexually abusive material a different and less severe offense than either distribution or promotion of the material." *Tombs*, 472 Mich at 463, 465 (rejecting prosecutor's contention that "possessing the material is the legal equivalent of promoting it for purposes of MCL 750.145c(3)," and "hold[ing] that the mere obtaining and possessing of child sexually abusive material using the Internet d[id] not constitute a violation of MCL 750.145c(3)").

2. Distribute, Promote, Finance, or Receive For the Purpose of Distributing or Promoting

For purposes of MCL 750.145c(3), "[t]he most applicable dictionary definition of 'distribute' implies putting items in the hands of others as a knowing and intentional act. Likewise, the terms 'promote' and 'finance,' and the phrase 'receives for the purpose of distributing or promoting' contemplate knowing, intentional conduct on the part of the accused." *People v Tombs*, 472 Mich 446, 457 (2005).

"[T]o convict a defendant of distribution or promotion under MCL 750.145c(3), the prosecution must prove that (1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal intent. *Tombs*, 472 Mich at 459-461, 465 ("insufficient evidence existed from which the jury could draw an inference beyond a reasonable doubt that, when returning the laptop, defendant distributed child sexually abusive material with criminal intent" where "[a]lthough defendant intended to distribute the laptop containing child sexually abusive material to his former employer, no evidence suggests that he distributed the material with a criminal intent").

3.5 Possession of Child Sexually Abusive Material

A. Elements of Offense

"A person who knowingly possesses or knowingly seeks and accesses any child sexually abusive material if that person knows,

has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child is guilty of a crime[.]" MCL 750.145c(4).

Under MCL 750.145c(5), MCL 750.145c(4) "does not apply to any of the following:

> (a) A person described in . . . MCL 752.367 [providing exemptions for certain persons[8]], a commercial film or photographic print processor acting under subsection (9), or a computer technician acting under subsection (10).[9]
>
> (b) A police officer acting within the scope of his or her duties as a police officer.
>
> (c) An employee or contract agent of the department of health and human services acting within the scope of his or her duties as an employee or contract agent.
>
> (d) A judicial officer or judicial employee acting within the scope of his or her duties as a judicial officer or judicial employee.
>
> (e) A party or witness in a criminal or civil proceeding acting within the scope of that criminal or civil proceeding.
>
> (f) A physician, psychologist, limited license psychologist, professional counselor, or registered nurse licensed under . . . MCL 333.1101 to [MCL] 333.25211, acting within the scope of practice for which he or she is licensed.
>
> (g) A social worker registered in this state under . . . MCL 333.16101 to [MCL] 333.18838, acting within the scope of practice for which he or she is registered." MCL 750.145c(5).

[8] For a list of persons exempt under MCL 752.367, see Section 3.5(A).

[9] MCL 750.145c(9) and MCL 750.145c(10) create immunity from civil liability and protect as confidential the identity of a commercial film or photographic print processor or a computer technician who reports to a law enforcement agency information about a depiction of a child engaged in a listed sexual act.

B. Intent

MCL 750.145c(4) requires "a specific *mens rea* or knowledge element as a prerequisite for establishing criminal culpability[.]"[10] *People v Flick*, 487 Mich 1, 13 (2010). "[U]nless one knowingly has actual physical control or knowingly has the power and the intention at a given time to exercise dominion or control over a depiction of child sexually abusive material, including an 'electronic visual image' or 'computer image,' either directly or through another person or persons, one cannot be classified as a 'possessor' of such material." *Id*. at 13-14.

C. Statute of Limitations

An indictment for a violation or attempted violation of MCL 750.145c(4) "may be found and filed as follows:

> (a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.
>
> (b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later." MCL 767.24(3).

D. Jury Instructions

M Crim JI 20.38c, *Child Sexually Abusive Activity—Possessing or Accessing*.

E. Penalties

1. Imprisonment and Fines

Possessing child sexually abusive material is "a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both" unless this is defendant's

[10]For additional information on *mens rea* and criminal liability, in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

second or subsequent offense under MCL 750.145c or the sexually abusive activity or material "involves a prepubescent child, sadomasochistic abuse or bestiality, or includes a video or more than 100 images of child sexually abusive material." MCL 750.145c(4)(a)-(b); MCL 750.145g.

A defendant convicted of a second or subsequent offense under MCL 750.145c is subject to "a mandatory minimum sentence of not less than 5 years." MCL 750.145g. For purposes of MCL 750.145g, "an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the person has been convicted under [MCL 750.145c] or of another crime involving a sexual offense against a minor."

If the possession of child sexually abusive material "involves a prepubescent child, sadomasochistic abuse or bestiality, or includes a video or more than 100 images of child sexually abusive material," then it is "a felony punishable by imprisonment for not more than 10 years or a fine of not more than $50,000.00, or both." MCL 750.145c(4)(b).

2. Crime Victim Assessment

A defendant convicted of possessing child sexually abusive material must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

F. Sex Offender Registration

If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723. MCL 750.145c(4) is a tier I offense under the Sex Offenders Registration Act (SORA). MCL 28.722(r)(*i*).

For more information on the SORA's registration requirements, see Chapter 9.

G. Caselaw

1. Possession and Knowing Possession

"The Legislature reasonably selected the verb 'possesses' to communicate that only a person who has the power to exercise a degree of dominion or control over 'any child sexually abusive material' is sufficiently culpable to fall within the scope of MCL 750.145c(4). That is, the possessor holds the power or authority to control or exercise dominion over child sexually abusive material at a given time." *People v Flick*, 487 Mich 1, 13 (2010).

"[I]t is not the initial viewing that amounts to knowing possession. Rather, it is the many intentional affirmative steps taken by the defendant to gain actual physical control, or to knowingly have the power and the intention at a given time to exercise dominion or control over the contraband either directly or through another person or persons, that distinguishes mere viewing from knowing possession." *Flick*, 487 Mich at 18.

2. Vagueness

MCL 750.145c(4) is not unconstitutionally vague in permitting multiple charges for "both a single image of child sexually abusive material and a collection of images of child sexually abusive material." *People v Loper*, 299 Mich App 451, 460-461 (2013) (a "distinction between the number of images and the number of collections of images is irrelevant: the number of images (over 100) or the number of disks (four) were sufficient to find that defendant possessed three or more different child sexually abusive materials").

3. Distinction Between Downloading Prohibited Material on Computer and Possessing Prohibited Material Obtained by Other Methods

MCL 750.145c(4) (criminalizing the possession of child sexually abusive material) and MCL 752.796 (criminalizing the use of a computer to download child sexually abusive material) are not *in pari materia*. *People v Loper*, 299 Mich App 451, 466-467 (2013). "The object and purpose of MCL 752.796 is to preclude the use of a computer to commit any crime while the object and purpose of MCL 750.145c(4) is to preclude the possession of child pornographic material regardless of how it is produced. Accordingly, based on their plain language, MCL

750.145c(4) and MCL 752.796 do not address the same subject or share a common purpose." *Loper*, 299 Mich App at 466.

Part III—Prostitution Offenses

MCL 750.448 *et seq.*, the chapter in the Michigan Penal Code titled *Prostitution*, proscribes the following conduct:

- Soliciting, accosting, or inviting another person to commit prostitution, MCL 750.448.
- Receiving or admitting or offering to receive or admit a person into a place for the purpose of prostitution, MCL 750.449.
- Engaging or offering to engage the services of another person by payment of money or other consideration for the purpose of prostitution, MCL 750.449a.
- Aiding, assisting, or abetting another person to commit certain prostitution offenses, MCL 750.450.
- Keeping, maintaining, or operating a house for the purpose of prostitution, MCL 750.452.
- Leasing a dwelling house knowing that the lessee intends to use the house for the purpose of prostitution, MCL 750.454.
- Procuring an inmate for a house of prostitution, MCL 750.455.
- Placing one's spouse, using force, fraud, intimidation, or threat, in a house of prostitution, MCL 750.456.
- Accepting earnings, without consideration, from a person engaged in prostitution, MCL 750.457.
- Attempting to detain a person in a house of prostitution because of debt the person has contracted, MCL 750.458.
- Transporting, or aiding or assisting in obtaining transportation for, a person for the purpose of prostitution, MCL 750.459.
- Selling or offering to sell travel services to facilitate travel for a person to engage in prostitution, MCL 750.459.
- Allowing, for a purpose other than prostitution, a person age 16 or under to remain in a house of prostitution, MCL 750.462.

The discussion in this part of the benchbook is limited to the crimes of prostitution, soliciting or accosting, and procuring a person for prostitution.

3.6 Prostitution

A. Elements of Offense

MCL 750.449a states:

> "(1) Except as provided in [MCL 750.449a(2)], a person who engages or offers to engage the services of another person, not his or her spouse, for the purpose of prostitution, lewdness, or assignation, by the payment in money or other forms of consideration, is guilty of a misdemeanor. A person convicted of violating this section is subject to . . . MCL 333.5201 to [MCL 333.5210 (serious communicable disease procedures)].
>
> (2) A person who engages or offers to engage the services of another person, who is less than 18 years of age and who is not his or her spouse, for the purpose of prostitution, lewdness, or assignation, by the payment in money or other forms of consideration, is guilty of a crime punishable as provided in [MCL 750.451]."

Except as provided in MCL 750.451b, MCL 750.449a does not apply to a law enforcement officer while performing his or her duties as a law enforcement officer. MCL 750.451a. Under MCL 750.451b, the exemption in MCL 750.451a does not apply "if the officer engages in sexual penetration as that term is defined in [MCL 750.520a] while in the course of his or her duties."

Whether a victim had worked as a prostitute in the past is not an element of the offense of prostitution. *People v Francis*, ___ Mich App ___, ___ (2023). "MCL 750.449a(2) does not require any of the parties to have a prior experience working as a prostitute." *Id*. at ___. "[A] defendant's solicitation of a sexual act for money is sufficient to demonstrate the conduct prohibited under the statute." *Id*. at ___. The defendant's *offer* of money is what is important; "the actual exchange of money" is not required. *Id*. at ___.

B. Penalties

1. Imprisonment and Fines

a. Violation of MCL 750.449a(1)

A first violation of MCL 750.449a(1) is a misdemeanor punishable by imprisonment for not more than 93 days, or a maximum fine of $500, or both. MCL 750.451(1). Enhanced penalties apply for repeat offenders. See MCL 750.451(2)-(4).

A defendant aged 16 or older who violates MCL 750.449a(1) and who has one prior conviction is guilty of a misdemeanor punishable by imprisonment for not more than one year, or a maximum fine of $1,000, or both. MCL 750.451(2).

A defendant who violates MCL 750.449a(1) and who has two or more prior convictions is guilty of a felony punishable by imprisonment for not more than two years, or a maximum fine of $2,000, or both. MCL 750.451(3).

b. Violation of MCL 750.449a(2)

A violation of MCL 750.449a(2) is a felony punishable by imprisonment for not more than 5 years, or a maximum fine of $10,000, or both. MCL 750.451(4).

c. Enhanced Sentence

Under MCL 750.451(5), a prosecutor who intends to seek an enhanced sentence based on a defendant's prior conviction(s) must include on the complaint and information a statement listing the prior conviction(s). At sentencing or at a separate hearing before sentencing, the court, without a jury, must determine the existence of the defendant's prior conviction(s). *Id.* The existence of a prior conviction may be established by any relevant evidence, including, but not limited to, one or more of the following:

> "(a) A copy of the judgment of conviction.
>
> (b) A transcript of a prior trial, plea-taking, or sentencing.
>
> (c) Information contained in a presentence report.

(d) The defendant's statement." MCL 750.451(5).

2. Crime Victim Assessment

Defendants convicted of violating MCL 750.449a(1) for the first time, or defendants aged 16 or older who have a prior conviction must pay a crime victim assessment of $75. See MCL 780.905(1)(b).

Defendants convicted of violating MCL 750.449a(1) who have two or more prior convictions or a defendant convicted of violating MCL 750.449a(2) must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

For a first conviction of MCL 750.449a or a conviction of MCL 750.449a(1) with a prior conviction, if the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $50. See MCL 769.1j(1)(b); MCL 769.1k(1)(a).

For a conviction of MCL 750.449a(1) with two or more prior convictions or a first violation of MCL 750.449a(2),if the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

C. Sex Offender Registration

MCL 750.449a(2) is a tier I offense under the Sex Offenders Registration Act (SORA), and if the defendant meets the domicile, residence, employment, or student status, registration is required. MCL 28.722(r)(*iv*); see also MCL 28.723.

However, registration is not required for a conviction of MCL 750.449a(1) because it is not designated as a tier I, tier II, or tier III offense under the SORA. See MCL 28.722(r); MCL 28.722(t); MCL 28.722(v).

For more information on the SORA's registration requirements, see Chapter 9.

D. Prosecution of Person Under Age 18

1. Presumption of Coercion

"In any prosecution of a person under 18 years of age for an offense punishable under this section or a local ordinance substantially corresponding to an offense punishable under this section, it shall be presumed that the person under 18 years of age was coerced into child sexually abusive activity or commercial sexual activity in violation of [MCL 750.462e] or otherwise forced or coerced into committing that offense by another person engaged in human trafficking in violation of [MCL 750.462a] to [MCL 750.462h]. The prosecution may overcome this presumption by proving beyond a reasonable doubt that the person was not forced or coerced into committing the offense." MCL 750.451(6).

The state may also petition the court to find the person under age 18 "to be dependent and in danger of substantial physical or psychological harm under [MCL 712A.2(b)(3)]." MCL 750.451(6). If the person under age 18 "fails to substantially comply with court-ordered services under [MCL 712A.2(b)(3)], [he or she] is not eligible for the presumption under [MCL 750.451(6)]." MCL 750.451(6).

2. Mandatory Reporting of Suspected Human Trafficking

"Excluding any reasonable period of detention for investigation purposes, a law enforcement officer who encounters a person under 18 years of age engaging in any conduct that would be a violation of [MCL 750.448, MCL 750.449, MCL 750.450, or MCL 750.462], or a local ordinance substantially corresponding to [MCL 750.448, MCL 750.449, MCL 750.450, or MCL 750.462], if engaged in by a person 16 years of age or over shall immediately report to the department of health and human services a suspected violation of human trafficking involving a person under 18 years of age in violation of [MCL 750.462a] to [MCL 750.462h]." MCL 750.451(7).

"The department of health and human services shall begin an investigation of a human trafficking violation reported to the department of health and human services under [MCL 750.451(7)] within 24 hours after the report is made to the department of health and human services, as provided in . . . MCL 722.628. The investigation shall include a determination as to whether the person under 18 years of age is dependent

and in danger of substantial physical or psychological harm under [MCL 712A.2(b)(3)]." MCL 750.451(8).

E. Jury Instructions

M Crim JI 20.35, *Accepting the Earnings of a Prostitute*.

F. Caselaw

Prostitution is not limited to sexual intercourse in exchange for money; it also includes the "sexual stimulation of a customer's penis by direct manual contact, in exchange for money[.]" *People v Warren*, 449 Mich 341, 347 (1995).

"Appellate decisions often describe 'prostitution' with a reference to sexual intercourse. However, such references rarely constitute a judicial holding that other paid sexual acts, such as fellatio, cunnilingus, anal intercourse, or masturbation are *not* prostitution. Exceptions exist, but we find them less persuasive than decisions that have found that it is prostitution to perform masturbatory massages for money." *Warren*, 449 Mich at 346.

See also *People v Morey*, 230 Mich App 152, 156 (1998), aff'd 461 Mich 325 (1999) (prostitution, for purposes of MCL 750.457—accepting the earnings of a prostitute—includes an agreement to perform fellatio in exchange for money when the prostitute "actually initiated physical contact with the [customer's] 'private areas'").

3.7 Soliciting or Accosting

A. Elements of Offense

"A person 16 years of age or older who accosts, solicits, or invites another person in a public place or in or from a building or vehicle, by word, gesture, or any other means, to commit prostitution or to do any other lewd or immoral act, is guilty of a crime punishable as provided in [MCL 750.451]." MCL 750.448.

Except as provided in MCL 750.451b, MCL 750.448 does not apply to a law enforcement officer while performing his or her duties as a law enforcement officer. MCL 750.451a. MCL 750.451b provides that the exemption in MCL 750.451a does not apply "if the officer engages in sexual penetration as that term is defined in [MCL 750.520a] while in the course of his or her duties." MCL 750.451b.

B. Penalties

1. Imprisonment and Fines

a. First or Subsequent Violation

A first violation of MCL 750.448 is a misdemeanor punishable by imprisonment for not more than 93 days, or a maximum fine of $500, or both. MCL 750.451(1).

A defendant 16 years of age or older who violates MCL 750.448 and who has one prior conviction is guilty of a misdemeanor punishable by imprisonment for not more than one year, or a maximum fine of $1,000, or both. MCL 750.451(2).

A defendant convicted of violating MCL 750.448 who has two or more prior convictions is guilty of a felony punishable by imprisonment for not more than two years, or a maximum fine of $2,000, or both. MCL 750.451(3).

b. Human-Trafficking Victim-Offender

If the defendant violated MCL 750.448 or a substantially corresponding local ordinance as a direct result of his or her status as a victim of a human-trafficking violation, the court may under certain circumstances defer an adjudication of guilt and place the defendant on probation. MCL 750.451c(1)-(2). See MCL 750.451c in its entirety for details of deferred adjudication under these circumstances.

c. Enhanced Sentence

Under MCL 750.451(5), a prosecutor who intends to seek an enhanced sentence based on a defendant's prior conviction(s) must include on the complaint and information a statement listing the prior conviction(s). At sentencing or at a separate hearing before sentencing, the court, without a jury, must determine the existence of the defendant's prior conviction(s). *Id.* The existence of a prior conviction may be established by any relevant evidence, including, but not limited to, one or more of the following:

> "(a) A copy of the judgment of conviction.
>
> (b) A transcript of a prior trial, plea-taking, or sentencing.

(c) Information contained in a presentence report.

(d) The defendant's statement." MCL 750.451(5).

2. Crime Victim Assessment

Defendants convicted of violating MCL 750.448 for the first time, or defendants aged 16 or older who have a prior conviction must pay a crime victim assessment of $75. See MCL 780.905(1)(b).

Defendants convicted of violating MCL 750.448 who have two or more prior convictions must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

For a first conviction of MCL 750.448 or a conviction (defendant aged 16 or older) of MCL 750.448 with a prior conviction, if the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $50. See MCL 769.1j(1)(b); MCL 769.1k(1)(a).

For a conviction of MCL 750.448 with two or more prior convictions or a first violation of MCL 750.449a(2),if the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

C. Sex Offender Registration

MCL 750.448 is a tier II offense under the Sex Offenders Registration Act (SORA) if the victim is a minor. MCL 28.722(t)(*viii*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

D. Prosecution of Person Under Age 18

1. Presumption of Coercion

"In any prosecution of a person under 18 years of age for an offense punishable under [MCL 750.451] or a local ordinance substantially corresponding to an offense punishable under this section, it shall be presumed that the person under 18 years of age was coerced into child sexually abusive activity or commercial sexual activity in violation of [MCL 750.462e] or otherwise forced or coerced into committing that offense by another person engaged in human trafficking in violation of [MCL 750.462a] to [MCL 750.462h]. The prosecution may overcome this presumption by proving beyond a reasonable doubt that the person was not forced or coerced into committing the offense." MCL 750.451(6).

"The state may petition the court to find the person under 18 years of age to be dependent and in danger of substantial physical or psychological harm under [MCL 712A.2(b)(3)]." MCL 750.451(6). If the person under age 18 "fails to substantially comply with court-ordered services under [MCL 712A.2(b)(3)], [he or she] is not eligible for the presumption under this section." MCL 750.451(6).

2. Mandatory Reporting of Suspected Human Trafficking

"Excluding any reasonable period of detention for investigation purposes, a law enforcement officer who encounters a person under 18 years of age engaging in any conduct that would be a violation of [MCL 750.448, MCL 750.449, MCL 750.450, or MCL 750.462], or a local ordinance substantially corresponding to [MCL 750.448, MCL 750.449, MCL 750.450, or MCL 750.462], if engaged in by a person 16 years of age or over shall immediately report to the [DHHS] a suspected violation of human trafficking involving a person under 18 years of age in violation of [MCL 750.462a] to [MCL 750.462h]." MCL 750.451(7).

"The [DHHS] shall begin an investigation of a human trafficking violation reported to the [DHHS] under [MCL 750.451(7)] within 24 hours after the report is made to the [DHHS], as provided in . . . MCL 722.628. The investigation shall include a determination as to whether the person under 18 years of age is dependent and in danger of substantial physical or psychological harm under [MCL 712A.2(b)(3)]." MCL 750.451(8).

3.8 Procuring a Person for Prostitution

A. Elements of Crime

"A person who does any of the following is guilty of a felony punishable by imprisonment for not more than 20 years:

(a) Procures an inmate for a house of prostitution.

(b) Induces, persuades, encourages, inveigles, or entices a person to become a prostitute.

(c) By promise, threat, or violence, or by any device or scheme, causes, induces, persuades, encourages, takes, places, harbors, inveigles, or entices a person to become an inmate of a house of prostitution or assignation place or any place where prostitution is practiced, encouraged, or allowed.

(d) By any promise or threat, or by violence or any device or scheme, causes, induces, persuades, encourages, inveigles, or entices an inmate of a house of prostitution or place of assignation to remain there as an inmate.

(e) By any promise or threat, or by violence, any device or scheme, fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages, or procures any person to engage in prostitution.

(f) Inveigles, entices, persuades, encourages, or procures any person to come into this state or to leave this state for the purpose of prostitution.

(g) Upon the pretense of marriage, takes or detains a person for the purpose of sexual intercourse.

(h) Receives or gives, or agrees to receive or give, any money or thing of value for procuring or attempting to procure any person to become a prostitute or to come into this state or leave this state for the purpose of prostitution." MCL 750.455.

B. Penalties

1. Imprisonment and Fines

A violation of MCL 750.455 is a felony punishable by imprisonment for not more than 20 years. MCL 750.455. No fines are authorized.

2. Crime Victim Assessment

Defendants convicted of violating MCL 750.455 must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

C. Sex Offender Registration

MCL 750.455 is a tier II offense under the Sex Offenders Registration Act (SORA). MCL 28.722(t)(*ix*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

D. Caselaw

The statutory language of MCL 750.455, "'to become a prostitute[,]' means to change, grow to be, or develop into a [person] who engages in sexual intercourse for money." *People v Morey (Morey II)*, 461 Mich 325, 331 (1999). In other words, "someone who is already practicing prostitution cannot be enticed to become a prostitute." *Morey*, 461 Mich at 334. See also *People v Thurmond*, ___ Mich App ___, ___ (2023). In *Thurmond*, the defendant could not be convicted of violating MCL 750.455(b)—enticing or inducing a person to become a prostitute—because the victim had already engaged in, and remained engaged in, conduct qualifying as prostitution before the conduct named by the prosecution occurred. *Thurmond*, ___ Mich App at ___. However, a person may be convicted of violating MCL 750.455(b) when the victim, although having already engaged in prostitution, effectively abandons that conduct for a period of time, returning to prostitution as a result of the person's actions.

Thurmond, ___ Mich App at ___. See also *Morey II*, 461 Mich at 337-338. There is not a temporal requirement for the time a victim must not be involved in prostitution before a person may convicted under MCL 750.455(b) for enticing or inducing the victim to become a prostitute. *Thurmond*, ___ Mich App at ___. The length of time necessary for a charge of violating MCL 750.455(b) involving a victim who has already engaged in prostitution is a question for the jury. *Thurmond*, ___ Mich App at ___.

A person may be convicted of violating MCL 750.455(f) even when the subject of the enticement, an undercover decoy, was already acting as a prostitute. *People v Norwood*, 303 Mich App 466, 473-474 (2013). In *Norwood*, "[t]he undisputed evidence elicited during the preliminary examination indicated that defendants did not intend to merely send additional clients to the undercover officer and, therefore, facilitate an existing decision to engage in the profession of prostitution. Rather, the evidence indicated that defendants offered to further entice the officer into prostitution by engaging her in an interstate practice, sending her to the state of Florida with promises of clothing, shoes, a residence, and cosmetic enhancement surgery."

Part IV—Sexual Delinquency Offenses: Gross Indecency, Indecent Exposure, and Crimes Against Nature

3.9 Sexual Delinquency

A. Statutory Structure

In Michigan, a person charged with certain sex offenses may also be charged with and convicted of being a sexually delinquent person. See e.g., MCL 750.158 or MCL 750.335a. However, Michigan's sexually delinquent person statute is not a separate offense. "The history of sexual delinquency legislation clearly indicates the Legislature's intent to create a comprehensive, unified statutory scheme . . . to provide an alternate sentence for certain specific sexual offenses . . . ." *People v Winford*, 404 Mich 400, 405-406 (1978). See also *People v Helzer*, 404 Mich 410, 419-420 (1978), overruled in part on other grounds by *People v Breidenbach*, 489 Mich 1, 4 (2011). This unified statutory scheme consists of defining the term *sexually delinquent person*, limiting its application to specific predicate offenses, and outlining the manner with which a person charged with a predicate offense may be identified as a sexually delinquent person.

B. Definition of Sexually Delinquent Person

A sexually delinquent person is "any person whose sexual behavior is characterized

- by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or
- by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or
- by the commission of sexual aggressions against children under the age of 16." MCL 750.10a (bullets added).

"MCL 750.10a is a definitional statute, and does not carry the possibility of a separate conviction or sentence independent of other charges in the Criminal Code." *People v Craig*, 488 Mich 861 (2010) (remanding to trial court "for amendment of the judgment of sentence to reflect a single conviction under MCL 750.338b for gross indecency between male and female as a sexually delinquent person as defined by MCL 750.10a, with a single sentence . . . ").

C. Limitations in Application of Sexual Delinquency

The sexual delinquency sentencing scheme applies to only five specific offenses:

(1) Crime against nature (sodomy/bestiality), MCL 750.158.

(2) Indecent exposure, MCL 750.335a.

(3) Gross indecency between males, MCL 750.338.

(4) Gross indecency between females, MCL 750.338a.

(5) Gross indecency between a male and a female, MCL 750.338b. *People v Arnold (Arnold I)*, 502 Mich 438, 464-465 (2018).

D. Charging an Offender as a Sexually Delinquent Person

"MCL 767.61a outlines the manner in which an individual charged with an identified predicate offense may commensurately be identified as a sexually delinquent person[.]" *People v Arnold (On Remand) (Arnold II)*, 328 Mich App 592, 599 (2019). Specifically, MCL 767.61a provides:

> "In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in [MCL 768.35 (the procedure for accepting guilty pleas)], and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense."

Sexual delinquency must be proved beyond a reasonable doubt. *People v Helzer*, 404 Mich 410, 417 (1978), overruled in part on other grounds by *People v Breidenbach*, 489 Mich 1 (2011).

1. Charging Discretion

A person can be lawfully charged with sexual delinquency only when the principal offense is also charged; the principal offense must contain the alternate sentencing language regarding sexual delinquency. *People v Helzer*, 404 Mich 410, 417 n 10 (1978), overruled in part on other grounds by *People v Breidenbach*, 489 Mich 1, 4 (2011).[11] "[A] charge of sexual delinquency is totally dependent for its prosecution upon conviction of the principal offense." *People v Winford*, 404 Mich 400, 408 n 10 (1978); see also *People v Franklin*, 298 Mich App 539, 547 (2012) (noting that sexual delinquency is not an element of the principal offense"; "[r]ather, a finding of sexual delinquency merely allows for an enhancement of the sentence for the [principal] offense").

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

A sexual delinquency charge must be brought before the beginning of trial on the principal charge; that is, "the original charging instrument should 'also' include any sexual delinquency claim that may be charged." *Winford*, 404 Mich at 408; *Helzer*, 404 Mich at 424-426. If a sexual delinquency charge is not included in the original indictment or in an amended indictment or information before the principal offense is tried, the prosecutor waives the opportunity to bring a sexual delinquency charge. *Helzer*, 404 Mich at 424-426.

The statutory language, "at the time of the said offense," indicates that "the relevant time to decide whether defendant was sexually delinquent [is] at the point when the principal offense was committed." *Helzer*, 404 Mich at 416 n 8.

2. Circuit Court Jurisdiction

If the sexual delinquency charge is based on an underlying misdemeanor offense (e.g., indecent exposure), the prosecutor should bring the prosecution in circuit court under the concurrent jurisdiction statute, MCL 767.1. *People v Winford*, 404 Mich 400, 408 n 11 (1978). If the prosecutor initially charges only the principal misdemeanor offense and later, but before trial, amends and charges sexual delinquency, the proceedings are subject to transfer to circuit court at the time the sexual delinquency charge is added. *Id*.

3. Preliminary Examination

Although the prosecutor must include a sexual delinquency charge on the original or amended indictment before the beginning of trial on the principal charge, the magistrate, at the defendant's preliminary examination, need only find probable cause to bind the defendant over on the principal offense. *People v Winford*, 404 Mich 400, 408 n 10 (1978). The magistrate is not required to find probable cause on the charge of sexual delinquency. *Id*.

4. Guilty Plea

"[MCL 767.61a] contemplates that a defendant may be charged and tried in one action for both sexual delinquency and the underlying sexual offense. Moreover, MCL 767.61a *only* calls for a separate hearing in regards to sexual delinquency '[i]n the event the accused shall plead guilty . . . .'" *People v Breidenbach*, 489 Mich 1, 10 (2011) (second alteration in original). If a defendant pleads guilty to both charges (the underlying offense and the charge of sexual delinquency), MCL 767.61a

requires the court to "conduct an examination of witnesses relative to the sexual delinquency of such person and [authorizes the court to] call on psychiatric and expert testimony." *Breidenbach*, 489 Mich at 9-10 (quotation marks omitted). Testimony that might assist in determining the defendant's mental and physical condition at the time he or she committed the principal offense includes "any competent medical, sociological or psychological testimony[.]" *People v Helzer*, 404 Mich 410, 419 n 14 (1978), overruled in part on other grounds by *Breidenbach*, 489 Mich at 4.[12]

"Even where defendant pleads guilty, the court is ordered to separately investigate the charge of sexual delinquency." *Helzer*, 404 Mich at 419. The court may not sentence a defendant who pleads guilty or *nolo contendere* to both the principal and delinquency charges as a sexual delinquent "without first holding a hearing to determine if defendant was sexually delinquent." *People v Franklin*, 298 Mich App 539, 542, 544 (2012) (because "[e]ntering a plea of *nolo contendere* is 'an admission of all the essential elements of a charged offense,'" and because the defendant pleaded *nolo contendere* to "indecent exposure under circumstances subjecting him to alternative sentencing as a sexually delinquent person," the "plea should be understood as an admission of guilt with regard to the indecent exposure charges and the sexually delinquent person charge"), quoting *People v Patmore*, 264 Mich App 139, 149 (2004).

The examination required under MCL 767.61a can "take[] place at the plea hearing or later," but it must be conducted at a separate hearing; therefore, "an examination of [the defendant's] criminal history is [not] sufficient to meet the [separate examination] requirement[.]" *Franklin*, 298 Mich App at 545.

5. Trial

"[S]eparate jury trials under MCL 767.61a are discretionary, not mandatory." *People v Breidenbach*, 489 Mich 1, 4 (2011), overruling in part *People v Helzer*, 404 Mich 410 (1978).[13] Whether separate juries are necessary in cases where a

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

[13] *Helzer*, 404 Mich at 424, held that separate juries were required to determine a defendant's guilt or innocence of a principal sexual offense and the question of the defendant's status as a sexually delinquent person. According to the Court, "[t]hough not explicitly stated, we find a separate hearing and record directed by clear implication [in MCL 767.61a]." *Helzer*, 404 Mich at 419 n 13. *Breidenbach*, 489 Mich at 4, held that "the *Helzer* Court erred when it created a *compulsory* rule to that effect."

defendant is charged with a criminal sexual offense and with being sexually delinquent at the time he or she committed the principal offense, should be determined on a case-by-case basis according to the provisions of MCR 6.120(B) (joinder and severance of related charges). *Breidenbach*, 489 Mich at 4. A trial court may empanel separate juries if, in its discretion, the trial court "determine[s] that bifurcation is necessary in order to protect a defendant's rights or ensure a fair determination of guilt or innocence[.]" *Id*.; MCR 6.120(B). See *People v Campbell*, 316 Mich App 279, 294, 297 (2016) (holding that the trial court did not abuse its discretion or deny the defendant his due process right to a fair trial when it refused to bifurcate the proceedings or hold separate trials to determine whether the defendant committed indecent exposure as a sexually delinquent person), overruled on other grounds by *People v Arnold (Arnold I)*, 502 Mich 438, 444 (2018).

"[Because s]exual delinquency is an alternate sentencing provision under which a defendant is prosecuted in order to determine whether special circumstances surrounding the principal charge warrant an alternate sentence[, p]roof of the sexual delinquency charge may involve more than the simple ministerial considerations of proving prior convictions. Although prior convictions may form the basis for a guilty verdict, sexual delinquency is not explicitly dependent upon any prior conviction except the principal charge. The only limitation is that the jury must weigh the acts specified in MCL 750.10a as constituting sexual delinquency." *People v Oswald (After Remand)*, 188 Mich App 1, 11-12 (1991) (citation omitted).

In every sexual delinquency prosecution, if requested by an indigent defendant, the court must provide expert testimony for the defense. MCL 767.61a.

E. Penalties

1. Alternate Penalty for Offenders Sentenced as Sexually Delinquent Persons

If an offender is convicted of being a sexually delinquent person at the time he or she committed one of the identified predicate offenses, the offender may be sentenced to the state prison for an indeterminate term, the minimum of which is one day, and the maximum of which is life. See MCL 750.158 (crime against nature or sodomy); MCL 750.335a (indecent exposure); MCL 750.338 (gross indecency between males); MCL 750.338a (gross indecency between females); MCL 750.338b (gross indecency between a male and a female). See also MCL

767.61a, which "sets out how an individual accused of one of the predicate offenses can also be accused of being a sexually delinquent person" and "characterizes the '1 day to life' sentence as 'an alternate sentence.'" *People v Arnold (Arnold I)*, 502 Mich 438, 449, 465 (2018). This alternate sentence "is an *optional* alternative." *Id*. at 465.

With the exception of indecent exposure, MCL 750.335a, each of the identified predicate offenses contains language stating that if the person was sexually delinquent at the time of the offense, he or she *may* be punished by imprisonment for an indeterminate term, and that the minimum term shall be one day, and the maximum term shall be life in prison. See MCL 750.158; MCL 750.338; MCL 750.338a; MCL 750.338b. In 2005, MCL 750.335a was amended to state that indecent exposure by a sexually delinquent person "'*is* punishable by imprisonment for an indeterminate term, the minimum of which *is* 1 day and the maximum of which *is* life'"; however, "this change in wording has no effect on the meaning of the statute and is merely stylistic." *Arnold I*, 502 Mich at 451-452, 479, citing 2005 PA 300. Accordingly, under the original and amended version of the statute, the "1 day to life" provision in MCL 750.335a(2)(c) provides "an *option* a sentencing judge could draw upon, alongside and not to the exclusion of other available options," and if the trial court chooses to impose a "1 day to life" sentence, it cannot be modified. *Arnold I*, 502 Mich at 469.

2. Sentencing

"Sexual delinquency is not merely a penalty enhancement provision related to the principal charge; it is an alternate sentencing provision tied to a larger statutory scheme." *People v Kelly*, 186 Mich App 524, 528 (1990). See also *People v Winford*, 404 Mich 400, 404 n 5 (1978) ("the indeterminate penalty for a sexual delinquency conviction [i]s an *alternate* form of sentencing"; a defendant may only be sentenced once upon conviction of the principal charge and the sexual delinquency charge, i.e., the court has the discretion to sentence the defendant under the terms of the principal offense, or under the terms of the sexual delinquency offense, but not both). "MCL 750.335a and MCL 777.16q [in the statutory sentencing guidelines] provide[] multiple, but exclusive, sentencing options" for the crime of indecent exposure by a sexually delinquent person. *People v Arnold (On Remand) (Arnold II)*, 328 Mich App 592, 616 (2019).

"[T]he Penal Code provides judges with certain options, not mandates, when confronted with an individual convicted of indecent exposure as a sexual delinquent. Trial courts may consider sentencing options consistent with the [advisory sentencing] guidelines, particularly when the trial court determines that factors governed by the Code of Criminal Procedure, such as an offender's status as a habitual offender, supply an appropriate mechanism 'to enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.'" *Arnold II*, 328 Mich App at 611, quoting *People v Smith*, 423 Mich 427, 445 (1985). Accordingly, "a trial court has the option to sentence a defendant to '1 day to life' under MCL 750.335a(2)(c), or to a term consistent with the advisory sentencing guidelines." *Arnold II*, 328 Mich App at 612.

F. Sex Offender Registration

An offense committed by a sexually delinquent person, as defined in MCL 750.10a, is a tier I offense under the Sex Offenders Registration Act (SORA). MCL 28.722(r)(*ix*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

3.10 Gross Indecency Between Males

"Gross indecency . . . punishes sexual conduct that society considers indecent and improper. . . . [G]ross indecency does not require an assault, and may even occur between consenting participants." *People v Hack*, 219 Mich App 299, 307-308 (1996).

A. Elements of Offense

"Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony[.]" MCL 750.338.

1. Procures or Attempts to Procure

"[A] defendant may [not] be convicted of attempting to procure the commission of an act of gross indecency [under MCL 750.338] when the act proposed would be between the defendant and another person." *People v Masten*, 414 Mich 16,

17 (1982). That part of MCL 750.338 "referring to one who 'procures or attempts to procure' an act of gross indecency is meant to apply to situations in which the defendant facilitates or attempts to facilitate the commission of an act of gross indecency by two other persons. . . . It is meant to proscribe two kinds of conduct: committing gross indecency and bringing about gross indecency." *Masten*, 414 Mich at 19.

"Procuring or attempting to procure an act of gross indecency with a person under the age of consent can support a conviction under MCL 750.338, regardless of whether the conduct is performed in public." *People v Lino*, 447 Mich 567, 578 (1994). Defendant's "alleged conduct in orchestrating the conduct of the minors to facilitate [another adult male's] sexual arousal and masturbation in the presence of the minors would constitute the offense of procuring, or attempting to procure, an act of gross indecency even though it was not committed in a public place." *Id*.

2. Acts of Gross Indecency

"[M]asturbation in [a] public [restroom] between consenting adult males" "would constitute an act of gross indecency under MCL 750.338." *People v Bono (On Remand)*, 249 Mich App 115, 121-122 (2002).

"[F]ellatio performed in a public place clearly falls within the ambit of the gross indecency statute." *People v Lino*, 447 Mich 567, 578 (1994).

B. Jury Instructions

M Crim JI 20.31, *Gross Indecency*.

C. Penalties

1. Imprisonment and Fines

Gross indecency between males is a "felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life." MCL 750.338.

2. Crime Victim Assessment

A defendant convicted of gross indecency between males under MCL 750.338 must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.338 to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child to be within the provisions of [MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

D. Sex Offender Registration

If the victim is at least 13 years old but less than 18 years old, MCL 750.338 is a tier II offense under the Sex Offenders Registration Act (SORA). MCL 28.722(t)(*vi*). If the victim is under 13 years old, MCL 750.338 is a tier III offense under the SORA. MCL 28.722(v)(*i*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

E. Caselaw

"[T]here are at least three ways a penal statute may be found unconstitutionally vague: (1) failure to provide fair notice of what conduct is prohibited, (2) encouragement of arbitrary and discriminatory enforcement, or (3) being overbroad and impinging on First Amendment freedoms." *People v Lino*, 447 Mich 567, 575-576 (1994). "Vagueness challenges that do not implicate First Amendment freedoms are examined in light of the facts of each particular case." *Id*. at 575.

MCL 750.338 is not unconstitutionally vague "because it is clear that a number of cases hold that the public act of fellatio between males is encompassed within the scope of the gross indecency statute. [The defendant] had fair notice that public fellatio between males is prohibited by the statute, and, correspondingly, the statute does not create a risk of arbitrary and discriminatory enforcement." *Lino*, 447 Mich at 576 (citations omitted). See also *People v Kalchik*, 160 Mich App 40, 45-46 (1987) ("We do not find that the gross indecency statute, as applied to this defendant, is unconstitutionally vague since this state's courts have interpreted [MCL 750.338] to prohibit the conduct in which defendant was engaged, i.e., fellatio between adult males in a public place"; "defendant was forewarned that the conduct in which he was engaged is prohibited by the gross indecency statute.").

MCL 750.338 is not unconstitutionally vague where the defendant "cannot plausibly claim that he could not have known his conduct [of directing fourteen and fifteen year old boys to physically and verbally abuse another adult male while that adult male masturbated to the abuse] was prohibited." *Lino*, 447 Mich at 573-574. The defendant was "on notice that sexual activity involving persons under the age of consent could constitute the statutory crime of gross indecency." *Id*. at 578.

3.11 Gross Indecency Between Females

"Gross indecency . . . punishes sexual conduct that society considers indecent and improper. . . . [G]ross indecency does not require an assault, and may even occur between consenting participants." *People v Hack*, 219 Mich App 299, 307-308 (1996).

A. Elements of Offense

"Any female person who, in public or in private, commits or is a party to the commission of, or any person who procures or attempts to procure the commission by any female person of any act of gross indecency with another female person shall be guilty of a felony[.]" MCL 750.338a.

B. Jury Instructions

M Crim JI 20.31, *Gross Indecency*.

C. Penalties

1. Imprisonment and Fines

Gross indecency between females is a "felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life." MCL 750.338a.

2. Crime Victim Assessment

A defendant convicted of gross indecency between females must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.338a to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child to be within the provisions of [MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

D. Sex Offender Registration

If the victim is at least 13 years old but less than 18 years old, MCL 750.338a is a tier II offense under the Sex Offenders Registration Act (SORA). MCL 28.722(t)(*vi*). If the victim is under 13 years old, MCL 750.338a is a tier III offense under the SORA. MCL 28.722(v)(*i*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

E. Caselaw

"[O]ral sexual conduct between females committed in a public place is . . . grossly indecent under MCL 750.338a." *People v Brown*, 222 Mich App 586, 590 (1997) ("applying the [*People v Lino*, 447 Mich 567 (1994),] holding [that oral sexual conduct committed between males in a public place was grossly indecent under MCL 750.338] to the case at bar and concluding that oral sexual conduct between females committed in a public place [was] also grossly indecent under MCL 750.338a"). "[O]ral sexual conduct in-and-of itself is [not] grossly indecent under the statute, [it is the] act of oral sexual conduct performed in a *public place* [that] violates the statute. . . . [T]he key issue in determining whether an act of oral sexual conduct was performed in a 'public place' is not so much the exact location of the act, but whether there is the possibility that the unsuspecting public could be exposed to or view the act. . . . [A]n act of oral sexual conduct is grossly indecent, i.e., committed in a public place, when an unsuspecting member of the public, who is in a place the public is generally invited or allowed to be, could have been exposed to or viewed the act." *Brown*, 222 Mich App at 591-592.

3.12 Gross Indecency Between Members of the Opposite Sex

"Gross indecency . . . punishes sexual conduct that society considers indecent and improper. . . . [G]ross indecency does not require an assault, and may even occur between consenting participants." *People v Hack*, 219 Mich App 299, 307-308 (1996).

A. Elements of Offense

"Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section. Any female person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a male person shall be guilty of a felony punishable as provided in this section. Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section." MCL 750.338b.

1. Acts of Gross Indecency

To be an act of gross indecency, "the operative principle is that the activity be sexual in nature. . . . [B]ehavior can be considered sexual activity within the context of the gross

indecency statute even if it does not involve sexual intercourse, oral sexual stimulation, masturbation, or the touching of another person's genitals or anus." *People v Drake*, 246 Mich App 637, 642 (2001). "In order to constitute grossly indecent behavior, the acts must be overt in the sense that they are open and perceivable. The motivation for the behavior can be inferred from the totality of the circumstances and should be considered case by case." *Id*.

2. Intercourse Between Husband and Wife

"[N]ormal heterosexual intercourse between a husband and wife" may fall under MCL 750.338b. *People v Jones*, 222 Mich App 595, 597 (1997). In *Jones*, "defendants' [a married couple] conduct would constitute an act of gross indecency under MCL 750.338b" if, as alleged, "defendants had sexual intercourse in a [prison's] public visiting room, filled with, presumably nonconsenting adults and children under the age of consent, with defendants' three minor children standing nearby in an attempt to shield defendants' conduct from others in the visiting room." *Jones*, 222 Mich App at 604.

B. Jury Instructions

M Crim JI 20.31, *Gross Indecency*.

C. Penalties

1. Imprisonment and Fines

Gross indecency between a male and a female is a felony punishable "by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life." MCL 750.338b.

2. Crime Victim Assessment

A defendant convicted of gross indecency between a male and a female under MCL 750.338b must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.338b to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child to be within the provisions of [MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

D. Sex Offender Registration

If the victim is at least 13 years old but less than 18 years old, MCL 750.338b is a tier II offense under the Sex Offenders Registration Act (SORA). MCL 28.722(t)(*vi*). If the victim is under 13 years old, MCL 750.338b is a tier III offense under the SORA. MCL 28.722(v)(*i*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

3.13 Indecent Exposure

A. Elements of Offense

"A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another."[14] MCL 750.335a(1).

B. Jury Instructions

M Crim JI 20.33, *Indecent Exposure*.

[14]Breastfeeding or expressing breast milk, regardless whether the woman's areola or nipple is visible, does not constitute indecent or obscene conduct. MCL 750.335a(3).

C. Penalties

1. Imprisonment and Fines

A person who violates the prohibition against indecent exposure set forth in MCL 750.335a(1) is guilty of a crime, as follows:

> "(a) Except as provided in subdivision (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
>
> (b) If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> (c) If the person was at the time of the violation a sexually delinquent person, the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life."[15] MCL 750.335a(2).

2. Crime Victim Assessment

A defendant convicted of indecent exposure under MCL 750.335a(2)(a)-(b) is guilty of a misdemeanor and must pay a crime victim assessment of $75. See MCL 780.905(1)(b).

A defendant convicted of indecent exposure by a sexually delinquent person is guilty of a felony and must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments for a conviction of indecent exposure, the court must impose the minimum state cost of not less than $50. See MCL 769.1j(1)(b); MCL 769.1k(1)(a).

If the court orders payment of any combination of a fine, costs, or applicable assessments for a conviction of indecent

[15] "[S]exual delinquency [under MCL 750.335a(2)(c)] is not an actual element of [indecent exposure]. Rather, a finding of sexual delinquency merely allows for an enhancement of the sentence for [an] indecent exposure offense." *People v Franklin*, 298 Mich App 539, 547 (2012).

exposure by a sexually delinquent person, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

D. Sex Offender Registration

MCL 750.335a(2)(b) is a tier I offense under the Sex Offenders Registration Act (SORA) when the victim is a minor. MCL 28.722(r)(*ii*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

E. Sentencing a Sexually Delinquent Person

The "1 day to life" sentence stated in MCL 750.335a(2)(c) is not an exclusive sentence; the "1 day to life" sentence has never been required by MCL 750.335a. *People v Arnold (Arnold I)*, 502 Mich 438, 444 (2018). The *Arnold I* Court explained that "1 day to life" is a nonmodifiable sentencing option for sexual delinquents. *Arnold I*, 502 Mich at 469, 471.[16] That is, an individual convicted of violating MCL 750.335a as a sexually delinquent person may be sentenced to 1 day to life under MCL 750.335a(2)(c) or he or she may be sentenced according to the advisory sentencing guidelines under MCL 777.16q. The Court of Appeals in *People v Kelly*, 186 Mich App 524 (1990), "correctly construed the '1 day to life' alternate sentence as an *option* a sentencing judge could draw upon, alongside and not to the exclusion of other available options." *Arnold I*, 502 Mich at 469.

On remand in *Arnold*, the Court of Appeals held that "MCL 750.335a and MCL 777.16q [the statutory provisions in the Penal Code and the Code of Criminal Procedure, respectively] provide[] multiple, but exclusive, sentencing options" for a defendant convicted of indecent exposure by a sexually delinquent person "premised on the severity of the behavior and the particular characteristics of the offender[.]" *People v Arnold (On Remand) (Arnold II)*, 328 Mich App 592, 610 (2019). MCL 750.335a and MCL 777.16q "must be read *in pari materia* . . . and the language of the relevant statutes counsel that a trial court has the option to sentence a defendant to '1 day to life' under MCL 750.335a(2)(c) or to a term consistent with the advisory sentencing guidelines."[17] *Arnold II*, 328

[16] See MCL 767.61a, which authorizes the imposition of an optional alternate sentence of 1 day to life when a predicate offense is committed by a sexually delinquent person. *Arnold I*, 502 Mich at 465, 466.

Mich App at 612; see also *Kelly*, 186 Mich App at 524; *People v Smith*, 423 Mich 427 (1985).

F. Caselaw

1. Construction of Terms

The conduct prohibited under the indecent exposure statute is not precisely defined. When a word's meaning is not defined in a statute, a court may consult a dictionary to determine the plain and ordinary meaning of the term. *People v Hill*, 269 Mich App 505, 518 n 6 (2006). In *People v Vronko*, 228 Mich App 649, 653-654 (1998), the Court of Appeals defined several terms appearing in the indecent exposure statute:

> "With respect to the common uses of the words contained in the statute, *Webster's New Collegiate Dictionary* (1977) defines 'open,' in part, as being 'exposed to general view or knowledge,' 'having no protective covering,' and 'to disclose or expose to view.' Likewise, the word 'exposure' is defined as meaning a 'disclosure to view' especially of 'a weakness or something shameful or criminal.' *Id*. 'Indecent' is defined as 'grossly unseemly or offensive to manners or morals.' *Id*. Finally, 'indecent exposure' is defined as being an 'intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community.'"

2. Statute Is Not Unconstitutionally Vague

The indecent exposure statute was not unconstitutionally vague as applied to the defendant because "[g]iven the[] definitions and judicial constructions [of the terms in MCL 750.335a], the language of the indecent exposure statute (1) provided fair notice to defendant that [his conduct was] proscribed by the statute, and (2) did not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense [had] been committed in the context of the charged conduct." *People v Vronko*, 228 Mich App 649, 654 (1998).

---

[17] "[T]he Legislature clearly intended to include indecent exposure by a sexually delinquent person as an offense within both the Penal Code and the Code of Criminal Procedure. The intent of the Legislature to provide alternative sentencing options for individuals convicted of this offense obviates the existence of any ambiguity, rendering the rule of lenity inapplicable." *Arnold II*, 328 Mich App at 613.

3. Consent of Audience Is No Defense

On-stage acts of masturbation in front of a consenting audience are actionable under the indecent exposure statute. *People v Wilson*, 95 Mich App 440, 441-443 (1980). "A prosecution for indecent exposure is not beyond the scope of MCL 750.335a simply because the charged conduct is performed before a theater audience which is comprised primarily or even totally of consenting adults." *Wilson*, 95 Mich App at 443.

4. Person Exposed Cannot Also Be Person Offended

To support a prosecution for open or indecent exposure, the person offended by the exposure must be someone other than the person who is exposed. *People v Williams*, 256 Mich App 576, 577, 583 (2003) (against his 8-year-old niece's wishes, the defendant sat in the bathroom while she was bathing and proceeded to draw a picture of his niece that included depictions of her vagina and breasts). "[T]he definition of 'open exposure' . . . adopted [in *People v Vronko*, 228 Mich App 649, 657 (1998),] supports the conclusion that the Legislature's aim was to punish exposures that would be offensive to *viewers*, actual or potential, and not to the person exposed."

5. Televised Indecent Act Actionable

In *People v Huffman*, 266 Mich App 354, 357 (2005), the defendant produced a television show with a three-minute segment showing a penis and testicles marked with facial features. A voice-over provided "purportedly humorous commentary as if on behalf of the character." *Id*. at 357. On appeal from his conviction of indecent exposure, the defendant argued that MCL 750.335a cannot be properly construed to apply to televised images. *Huffman*, 266 Mich App at 358-359. The Court of Appeals upheld the conviction, concluding that the purposes of the indecent exposure statute are "fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure." *Id*. at 360. The Court stated that although "a televised exposure is qualitatively different than a physical exposure," the televised exposure might be more offensive or threatening because it could be unexpected, bigger than life, and continue longer than would have been allowed in a public place. *Id*. at 360-361.

6. Public Exposure Not Necessary

An open or indecent exposure need not necessarily occur in a public place to be actionable. *People v Neal*, 266 Mich App 654,

663-664 (2005). In *Neal*, 266 Mich App at 655, the defendant exposed his erect penis to a minor female guest in his home and argued that in order to be convicted of indecent exposure under MCL 750.335a, the exposure must have taken place in a public place. However, MCL 750.335a prohibits open *or* indecent exposures that are knowingly made, and does not require that indecent exposures occur in a public place. *Neal*, 266 Mich App at 656. Accordingly, the focus should not be on the *location* of an indecent exposure but rather on "the act of intentionally exposing oneself to others who would be expected to be shocked by the display." *Id*. at 658.

7. Double Jeopardy

"Aggravated indecent exposure and indecent exposure are the 'same offense' for purposes of double jeopardy." *People v Franklin*, 298 Mich App 539, 547 (2012). "The offense of indecent exposure does not contain any elements that are distinct from the offense of aggravated indecent exposure." *Id*. "'[W]here one statute incorporates most of the elements of a base statute and adds an aggravating conduct element with an increased penalty compared to the base statute, it is evidence that the Legislature did not intend punishment under both statutes.'" *Id*., quoting *People v McKinley*, 168 Mich App 496, 504 (1988) (alteration in original). "Therefore, because the Legislature has not expressed a clear intent to permit multiple punishments for the same conduct, [a] defendant cannot be convicted of both offenses." *Franklin*, 298 Mich App at 547.

8. Trial

"[S]eparate jury trials under MCL 767.61a are discretionary, not mandatory." *People v Breidenbach*, 489 Mich 1, 4 (2011), overruling in part *People v Helzer*, 404 Mich 410 (1978).[18] Whether separate juries are necessary should be determined on a case-by-case basis according to the provisions of MCR 6.120(B) (joinder and severance of related charges). *Breidenbach*, 489 Mich at 4. A trial court may empanel separate juries if, in its discretion, the trial court "determine[s] that bifurcation is necessary in order to protect a defendant's rights or ensure a fair determination of guilt or innocence[.]" *Id*.; MCR 6.120(B).

See *People v Campbell*, 316 Mich App 279, 294, 297 (2016) (holding that the trial court did not abuse its discretion or deny

[18] *Breidenbach*, 489 Mich at 4, held that "the *Helzer* Court erred when it created a *compulsory* rule" requiring that separate juries determine a defendant's guilt or innocence of a principal sex offense and the question of the defendant's sexual delinquency. See *Helzer*, 404 Mich at 419 n 13, 454.

the defendant his due process right to a fair trial when it refused to bifurcate the proceedings or hold separate trials to determine whether the defendant committed indecent exposure as a sexually delinquent person), overruled on other grounds by *People v Arnold (Arnold I)*, 502 Mich 438, 444 (2018).[19]

3.14 Crime Against Nature

"MCL 750.158 encompasses two categories of crimes: 'abominable and detestable crime[s] against nature' with a human being, and 'abominable and detestable crime[s] against nature' with an animal." *People v Haynes*, 281 Mich App 27, 30 (2008) (alterations in original).

A. Elements of Offense

"Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony[.]" MCL 750.158. "A 'crime against nature' at common law encompassed both sodomy and bestiality." *People v Haynes*, 281 Mich App 27, 30 (2008), quoting *People v Carrier*, 74 Mich App 161, 165 (1977).

"In any prosecution for sodomy, it shall not be necessary to prove emission, and any sexual penetration, however slight, shall be deemed sufficient to complete the crime specified in [MCL 750.158]." MCL 750.159. See also *Carrier*, 74 Mich App at 167 ("Bestiality is encompassed within the meaning of a 'crime against nature' and 'sodomy.'").

1. Sodomy

"Michigan follows the common-law definition of sodomy, which covered only copulation *per anum*, not fellatio." *People v Haynes*, 281 Mich App 27, 30 (2008) (quotation marks and citations omitted).

2. Bestiality

"[A]cts of bestiality are expressly prohibited by MCL 750.158." *People v Carrier*, 74 Mich App 161, 166 (1977). "An act of bestiality is not limited to copulation per anum, but includes

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

an act of sexual connection between a human being and an animal." *Id*.

B. Intent

MCL 750.158 is a general intent crime. See *People v Askar*, 8 Mich App 95, 100-101 (1967) ("the question of motive, intent, mistake, or accident or the existence of a scheme or plan is not . . . material in a prosecution for sodomy").

C. Jury Instructions

M Crim JI 20.32, *Sodomy*.

D. Penalties

1. Imprisonment and Fines

A conviction under MCL 750.158 is "punishable by imprisonment in the state prison not more than 15 years, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life." MCL 750.158.

No fines are authorized under MCL 750.158.

2. Crime Victim Assessment

A defendant convicted of committing a crime against nature must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

E. Sex Offender Registration

MCL 750.158 is a tier II offense under the Sex Offenders Registration Act (SORA) when the offense is "committed against a minor unless either of the following applies:

(A) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

(III) The individual is not more than 4 years older than the victim.

(B) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was 16 or 17 years of age at the time of the violation.

(III) The victim was not under the custodial authority of the individual at the time of the violation." MCL 28.722(t)(*v*).

If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723. "[A] violation of MCL 750.158 requires registration under the SORA for a listed offense only if the victim of the offense is a human being less than 18 years old." *People v Hayes*, 281 Mich App 27, 32 (2008). "SORA does not apply to the portion of MCL 750.158 that prohibits bestiality." *Hayes*, 281 Mich App at 28.

For more information on the SORA's registration requirements, see Chapter 9.

F. Caselaw

1. Not Unconstitutionally Vague

MCL 750.158 is not unconstitutionally vague on grounds that "the average person does not understand what is meant by 'the abominable and detestable crime against nature[.]'" *People v Coulter*, 94 Mich App 531, 535-536 (1980).

2. No Gender-Based Discrimination

MCL 750.158 does not create a gender-based discrimination when "the separate classification [between male homosexual intercourse and female homosexual intercourse] is only inferred and only arises from the natural physical differences

between men and women."*People v Coulter*, 94 Mich App 531, 536-537 (1980).

Part V—Other Offenses Related to Sexual Misconduct

3.15 Accosting or Encouraging a Child for an Immoral Purpose

A. Elements of Offense

> "A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony[.]" MCL 750.145a.

"Because the Legislature used the disjunctive term 'or,' [in the statutory language of MCL 750.145a] it is clear that there are two ways to commit the crime of accosting a minor[:]

> A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act.
>
> Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act." *People v Kowalski*, 489 Mich 488, 499 (2011). See also *People v Darga*, ___ Mich App ___, ___ (2023) (confirming that there are two ways a defendant may violate MCL 750.145a—either (1) by accosting, enticing, or soliciting a child with intent to

> induce/force the child to commit a proscribed act, or (2) by encouraging a child to commit a proscribed act).

In *Darga*, the Court approved of the trial court's use of dictionary definitions of "accost," "entice," "solicit," "encourage," and "induce," when instructing the jury about the offense described in MCL 750.145a. *Darga*, ___ Mich App at ___. From Merriam Webster's College Dictionary, 11th edition, those definitions are:

> "*Accost* means to approach and speak to someone in an often challenging or aggressive way.
>
> *Entice* means to attract artfully or adroitly, or by arousing hope or desire.
>
> *Solicit* means to approach with a request or a plea, to urge strongly, or to entice or lure, especially into evil.
>
> *Encourage* means to inspire with courage, spirit or hope; to attempt to persuade.
>
> *Induce* means to move by persuasion or influence; to call forth or bring about by influence or stimulation." *Darga*, ___ Mich App at ___ (citations omitted; emphasis added).

The *Darga* Court further explained that the definitions were a tool used in its analysis—the definitions were not the totality of its analysis. *Darga*, ___ Mich App at ___. Specifically, with regard to the words "accost," "entice," and "solicit," the Court "[understood] them as proscribing conduct of the person doing the accosting, enticing, or soliciting, rather than proscribing the effect on the intended victim." *Id*. at ___. According to the Court, "each word (informing the other) connotes an effort or attempt at persuasion." *Id*. at ___. "MCL 750.145a requires proof that a defendant had the 'intent to induce or force' a child to commit an immoral act, but it does not require that a defendant succeed (or even that the intended target is aware)." *Darga*, ___ Mich App at ___.

B. Intent

MCL 750.145a "permits conviction under two alternative theories[.]" *People v Kowalski*, 489 Mich 488, 499 (2011). "[T]he encourages prong envisions a *mens rea* consistent with a general criminal intent"; "the Legislature's use of the term 'encourages' indicated its intention that the *mens rea* element of the encourages prong be the intent to do the physical act of encouraging. The verb 'encourages' contemplates intentional conduct by a defendant."[20] *Id*. at 499-500.

"In comparison, if a defendant has committed acts of accosting, enticing, or soliciting, the statute requires the prosecution to demonstrate a specific intent to induce or force the child to commit proscribed acts; it is not enough for the prosecution to merely establish that the defendant committed acts of accosting, enticing, or soliciting." *Kowalski*, 489 Mich at 500.

"[The] theory of accosting a minor for an immoral purpose under MCL 750.145a is an inchoate crime." *People v Darga*, ___ Mich App ___, ___ (2023).

> "The *actus reus* of [accosting a minor for an immoral purpose under MCL 750.145a] is complete when a defendant engages in certain conduct with the specific intent to cause the outcome of a minor engaging in an act proscribed by the statute. The success or failure of the intended act is irrelevant. By extension, if the outcome of a defendant's act is irrelevant to whether the defendant violated MCL 750.145a, the victim's awareness or knowledge of the intended outcome is also irrelevant." *Darga*, ___ Mich App at ___ (intended victim may have been asleep during defendant's efforts).

C. Jury Instructions

M Crim JI 20.40, *Accosting a Child for Immoral Purposes*.

D. Penalties

1. Imprisonment and Fines

Accosting, enticing, or soliciting a child for immoral purposes is a "felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both." MCL 750.145a. "A person convicted of violating [MCL 750.145a] who has 1 or more prior convictions is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both." MCL 750.145b(1).

"If the prosecuting attorney intends to seek an enhanced sentence based upon the defendant having 1 or more prior convictions, the prosecuting attorney shall include on the

[20] "When interpreting a criminal statute that does not have an explicit *mens rea* element, we do not construe the Legislature's silence as an intention to eliminate the *mens rea* requirement. *Kowalski*, 489 Mich at 499. For additional information on *mens rea* and criminal liability, in general, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

complaint and information a statement listing the prior conviction or convictions. The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing. The existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, 1 or more of the following:

(a) A copy of the judgment of conviction.

(b) A transcript of a prior trial, plea-taking, or sentencing.

(c) Information contained in a presentence report.

(d) The defendant's statement." MCL 750.145b(2).

2. Crime Victim Assessment

A defendant convicted of accosting or encouraging a child for immoral purposes must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

Under MCL 333.5129, the court may order a defendant who was arrested and charged with violating MCL 750.145a to undergo examination and/or testing for certain diseases. "The court may, upon conviction or the issuance by the probate court of an order adjudicating a child to be within the provisions of [MCL 712A.2(a)(1)], order an individual who is examined or tested under [MCL 333.5129] to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10).

E. Sex Offender Registration

The Sex Offenders Registration Act (SORA) designates MCL 750.145a and MCL 750.145b as tier II offenses, MCL 28.722(t)(*i*) and MCL 28.722(t)(*ii*), and requires registration if the defendant meets the domicile, residence, employment, or student status, MCL 28.723.

Accosting a child for immoral purposes, MCL 750.145a, "is one of only three offenses for which a conviction does not necessarily require commission of a sexual act that results in placement on the sex-offender registry." *People v Lymon (Lymon II)*, ___ Mich ___, ___(2024) (affirming the judgment of the Court of Appeals in *People v Lymon (Lymon I)*, 342 Mich App 46 (2022), only as to non-sexual offenders who were placed on the sex-offender registry, and vacating the opinion as to conclusions that went beyond consideration of non-sexual offenders). "[T]he imposition of the 2021 SORA on non-sexual offenders . . . constitutes cruel or unusual punishment under the Michigan Constitution." *Lymon II*, ___ Mich at ___. "[O]ffenders whose crimes lacked a sexual component are entitled to removal from the sex-offender registry." *Id*. at ___.

For more information on the SORA's registration requirements, see Chapter 9.

F. Caselaw

1. Not Unconstitutionally Vague

"A statute can be unconstitutionally vague if it: (1) fails to provide fair notice to the public of the proscribed conduct, (2) gives the trier of fact unstructured and unlimited discretion to determine if an offense has been committed, or (3) is overbroad and impinges on First Amendment rights. To evaluate a vagueness challenge, a court must examine the entire text of the statute and give the words of the statute their ordinary meanings." *People v Gaines*, 306 Mich App 289, 319 (2014) (citations omitted).

MCL 750.145a "provides fair notice to the public of the proscribed conduct and does not give a trier of fact unstructured and unlimited discretion to determine whether an offense has been committed. [In this case, n]o reasonable person would have to guess whether asking 13- or 14-year-old girls for photographs of them naked, particularly of their breasts and vaginas, is immoral conduct under the statute. Therefore, defendant's vagueness challenge must fail because he cannot establish that no circumstances exist under which the statute would be valid." *Gaines*, 306 Mich App at 320.

2. Not Unconstitutionally Overbroad

"A statute is overbroad when it precludes or prohibits constitutionally protected conduct in addition to conduct or behavior that it may legitimately regulate." *People v Gaines*, 306 Mich App 289, 320 (2014). Where "[the d]efendant argues that

> the statute regulates both speech and conduct, . . . [the] defendant must demonstrate that the overbreadth of the statute is both real and substantial—there is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id*. at 321 (quotation marks and citations omitted). "MCL 750.145a proscribes accosting or encouraging children for the purpose of inducing them to engage in criminal activity. This statute does not pose realistic dangers to First Amendment protections. . . . Therefore, MCL 750.145a is not facially overbroad." *Gaines*, 306 Mich App at 321.

3.16 Disseminating Sexually Explicit Matter to Minors

A. Elements of Offense

"A person is guilty of disseminating sexually explicit matter to a minor if that person does either of the following:

> (a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
>
> (b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors." MCL 722.675(1).

"A person knowingly disseminates sexually explicit matter to a minor if the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated." MCL 722.675(2). "A person knows the nature of matter if the person either is aware of its character and content or recklessly disregards circumstances suggesting its character and content." MCL 722.675(3).

1. Status of Minor

"A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age." MCL 722.675(4).

2. Persons Exempted From Offense

MCL 722.675 "does not apply to the dissemination of sexually explicit matter to a minor by any of the following:

> (a) A parent or guardian who disseminates sexually explicit matter to his or her child or ward unless the dissemination is for the sexual gratification of the parent or guardian.
>
> (b) A teacher or administrator at a public or private elementary or secondary school that complies with the revised school code, 1976 PA 451, MCL 380.1 to [MCL] 380.1852, and who disseminates sexually explicit matter to a student as part of a school program permitted by law.
>
> (c) A licensed physician or licensed psychologist who disseminates sexually explicit matter in the treatment of a patient.
>
> (d) A librarian employed by a library of a public or private elementary or secondary school that complies with the revised school code, 1976 PA 451, MCL 380.1 to [MCL] 380.1852, or employed by a public library, who disseminates sexually explicit matter in the course of that person's employment.
>
> (e) Any public or private college or university or any other person who disseminates sexually explicit matter for a legitimate medical, scientific, governmental, or judicial purpose.
>
> (f) A person who disseminates sexually explicit matter that is a public document, publication, record, or other material issued by a state, local, or federal official, department, board, commission, agency, or other governmental entity, or an accurate republication of such a public document, publication, record, or other material." MCL 722.676.

3. Exceptions to Offense

Disseminating sexually explicit matter to minors "does not apply to any of the following:

> (a) A medium of communication to the extent regulated by the federal communications commission.
>
> (b) An internet service provider or computer network service provider that is not selling the sexually explicit matter being communicated but that provides the medium for communication of

> the matter. As used in this section, 'internet service provider' means a person who provides a service that enables users to access content, information, electronic mail, or other services offered over the internet or a computer network.
>
> (c) A person providing a subscription multichannel video service under terms of service that require the subscriber to meet both of the following conditions:
>
> > (*i*) The subscriber is not less than 18 years of age at the time of the subscription.
> >
> > (*ii*) The subscriber proves that he or she is not less than 18 years of age through the use of a credit card, through the presentation of government-issued identification, or by other reasonable means of verifying the subscriber's age." MCL 722.682a.

B. Intent

"[A] defendant violates MCL 722.675(1)(b) if he or she knowingly exhibits to a minor a depiction of nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse that is harmful to minors." *People v Lockett*, 295 Mich App 165, 181 (2012).

C. Penalties

1. Imprisonment and Fines

"Disseminating sexually explicit matter to a minor is a felony punishable by imprisonment for not more than 2 years or a fine of not more than $10,000.00, or both. In imposing the fine, the court shall consider the scope of the defendant's commercial activity in disseminating sexually explicit matter to minors." MCL 722.675(5).

2. Crime Victim Assessment

A defendant convicted of disseminating sexually explicit matter to a minor must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

D. Defense to Offense

"It is unquestioned that defendant could not be convicted of [MCL 722.675], because defendant allegedly distributed obscene material not to a 'minor,' but to an adult [undercover deputy posing as a minor]. Instead, defendant [was] charged with the distinct offense of attempt [to violate MCL 722.675 under MCL 750.92], which requires only that the prosecution prove intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense." *People v Thousand (Thousand II)*, 465 Mich 149, 153, 165-166 (2001) ("Because the nonexistence of a minor victim d[id] not give rise to a viable defense to the attempt charge in this case, the circuit court erred in dismissing this charge on the basis of 'legal impossibility.'").

3.17 Drug-Facilitated Criminal Sexual Conduct

A. Elements of Offense

"A person who, without an individual's consent, delivers a controlled substance[21] or a substance described in [MCL 333.7401b[22]] or causes a controlled substance or a substance described in [MCL 333.7401b] to be delivered to that individual to commit or attempt to commit a violation of . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g, against that individual is guilty of a felony[.]" MCL 333.7401a(1).

MCL 333.7401a "applies regardless of whether the person is convicted of a violation or attempted violation of . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g." MCL 333.7401a(3).

---

[21] For more information on the Controlled Substances Act in general, see the Michigan Judicial Institute's *Controlled Substances Benchbook*.

[22] The substance described in MCL 333.7401b is "gamma-butyrolactone [GBL] or any material, compound, mixture, or preparation containing [GBL]."

B. Jury Instructions

M Crim JI 12.2b, *Unlawful Delivery of Controlled Substances or Gamma-butyrolactone to Commit Criminal Sexual Conduct*.

C. Penalties

1. Imprisonment and Fines

A violation of MCL 333.7401a is a "felony punishable by imprisonment for not more than 20 years." MCL 333.7401a(1). No fines are authorized.

"A conviction or sentence under [MCL 333.7401a] does not prohibit a conviction or sentence for any other crime arising out of the same transaction." MCL 333.7401a(2).

2. Crime Victim Assessment

A defendant convicted of drug-facilitated criminal sexual conduct must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

3.18 Intentional Dissemination of Sexually Explicit Visual Material of Another Person

A. Elements of Offense

"A person shall not intentionally and with the intent to threaten, coerce, or intimidate disseminate any sexually explicit visual material of another person if all of the following conditions apply:

(a) The other person is not less than 18 years of age.

(b) The other person is identifiable from the sexually explicit visual material itself or information displayed in connection with the sexually explicit visual material. This subdivision does not apply if the identifying information is supplied by a person other than the disseminator.

(c) The person obtains the sexually explicit visual material of the other person under circumstances in which a reasonable person would know or understand that the sexually explicit visual material was to remain private.

(d) The person knows or reasonably should know that the other person did not consent to the dissemination of the sexually explicit visual material." MCL 750.145e(1).

B. Penalties

1. Imprisonment and Fines

A first violation of MCL 750.145e is a "misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 750.145f(a). "For a second or subsequent violation of [MCL 750.145e], the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 750.145f(b).

"[MCL 750.145e] does not prohibit a person from being charged with, convicted of, or punished for another violation of law committed by that person while violating or attempting to violate [MCL 750.145e]." MCL 750.145e(3).

2. Crime Victim Assessment

A first-time or repeat offender convicted of violating MCL 750.145e must pay a crime victim assessment of $75. See MCL 780.905(1)(b).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $50. See MCL 769.1j(1)(b); MCL 769.1k(1)(a).

C. Statutory Exceptions

"[MCL 750.145e(1)] does not apply to any of the following:

(a) To the extent content is provided by another person, a person engaged in providing:

(*i*) An interactive computer service as that term is defined in 47 USC 230;

(*ii*) An information service, telecommunications service, or cable service as those terms are defined in 47 USC 153;

(*iii*) A commercial mobile service as defined in 47 USC 332;

(*iv*) A direct-to-home satellite service as defined in 47 USC 303(*v*); or

(*v*) A video service as defined in 2006 PA 480, MCL 484.3301 to [MCL] 484.3315.

(b) A person who disseminates sexually explicit visual material that is part of a news report or commentary or an artistic or expressive work, such as a performance, work of art, literary work, theatrical work, musical work, motion picture, film, or audiovisual work.

(c) A law enforcement officer, or a corrections officer or guard in a correctional facility or jail, who is engaged in the official performance of his or her duties.

(d) A person disseminating sexually explicit visual material in the reporting of a crime." MCL 750.145e(2).

3.19 Intercourse With Intent to Infect or With Disregard For Infection With HIV

A. Elements of Offense

1. Specifically Intends to Infect Uninfected Person

A person who knows he or she has HIV and "engages in anal or vaginal intercourse with another person without having first informed the other person that he or she has HIV with the specific intent that the uninfected person contract HIV is guilty of a felony." MCL 333.5210(1).

2. Acts With Reckless Disregard and Transmits HIV to Uninfected Person

A person who knows he or she has HIV and "without having first informed the other person that he or she has HIV, engages in vaginal or anal intercourse, and transmits HIV to an

uninfected person causing that person to become HIV positive, acts with reckless disregard and is guilty of a felony." MCL 333.5210(2).

3. Acts With Reckless Disregard and Does Not Transmit HIV

A person who knows he or she has HIV and "without having first informed the other person that he or she has HIV, engages in vaginal or anal intercourse, and who acts with reckless disregard but does not transmit HIV, is guilty of a misdemeanor[.]" MCL 333.5210(3).

"A person who knows that he or she has HIV who is adherent with the treatment plan of an attending physician and has been medically suppressed per accepted medical standards is not acting with reckless disregard." MCL 333.5210(4).

4. Consent to Contact With Person Who Admits to HIV Infection

"[I]f a defendant admits being HIV infected and the other person consents to the physical contact despite the risks associated with such contact, there is no criminal liability." *People v Jensen (On Remand)*, 231 Mich App 439, 455 (1998).[23]

B. Penalties

1. Imprisonment and Fines

An infected person who knows he or she has HIV and without first informing the other person engages in vaginal or anal intercourse with the specific intent to transmit HIV to the uninfected person is guilty of a felony punishable by up to four years of imprisonment, or a fine of up to $5,000, or both. See MCL 333.5210(1); MCL 750.503.

An infected person who knows he or she has HIV and engages in vaginal or anal intercourse without first having informed the other person of his or her HIV status, acts with reckless disregard, and if the uninfected person becomes HIV positive, the infected person is guilty of a felony punishable by up to

[23] MCL 333.5210 was amended after the *Jensen* case was published to replace the term *sexual penetration* with *anal and vaginal intercourse*, to include acts of specific intent and reckless disregard, and to modify the penalties. See 2018 PA 537, effective March 28, 2019.

four years of imprisonment, or a fine of up to $5,000, or both. See MCL 333.5210(2); MCL 750.503.

A person who knows he or she is infected with HIV and who engages in vaginal or anal intercourse with an uninfected person without first having informed the uninfected person that he or she has HIV, and acts with reckless disregard but who does not transmit HIV to the uninfected person is "guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 333.5210(3).

2. Crime Victim Assessment

A defendant convicted under MCL 333.5210(1) or MCL 333.5210(2) must pay a crime victim assessment of $130, and a defendant convicted under MCL 333.5210(3) must pay a crime victim assessment of $75. See MCL 780.905(1)(a)-(b).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68 for a conviction of MCL 333.5210(1) or MCL 333.5210(2), and not less than $50 for a conviction of MCL 333.5210(3). See MCL 769.1j(1)(a)-(b); MCL 769.1k(1)(a).

C. Caselaw

1. Right to Privacy Not Absolute

"'The right of privacy does not shield all private sexual acts from state regulation.'" *People v Jensen (On Remand)*, 231 Mich App 439, 457 (1998), quoting *State v Gamberella*, 633 So 2d 595, 604 (La App, 1993). "Michigan has an undeniable compelling interest in discouraging the spread of HIV. Requiring an infected person to so inform sexual partners so they can make an informed decision before engaging in sexual penetration is narrowly tailored to further this compelling state interest." *Jensen*, 231 Mich App at 458, 461 (finding that MCL 333.5210 "does not unconstitutionally deprive defendant of her right to privacy regarding the fact that she was HIV infected, and that any right to privacy involving her HIV infection is subordinate to her sexual partner's right to either avoid sexual penetration or to engage in sexual penetration only after being informed that defendant was HIV infected").

2. Private Not Public Disclosure Mandated

MCL 333.5210 does not require public disclosure of a person's HIV status. *People v Jensen (On Remand)*, 231 Mich App 439, 464-465 (1998).

> "[MCL 333.5210] does not prohibit [an infected person] from engaging in sexual penetration but only requires her to inform her potential sexual partners, individually and privately, that she has this communicable disease. The statute does not require or imply that she need publicize the fact that she is HIV positive. It merely compels her to *privately* divulge this health status to those with whom she intends to engage in sexual penetration. Hence, we do not agree that the statute requires public disclosure; rather, it requires *private disclosure* only to those who are immediately in danger of exposure to the virus because they are contemplating the opportunity to engage in sexual penetration with [the infected person]." *Jensen*, 231 Mich App at 464-465 ("[I]n weighing the infringement of defendant's negative First Amendment right against compelled speech by requiring private disclosure that she is HIV infected against the magnitude of the state's interests in controlling the spread of this currently incurable disease, the state's interests outweigh defendant's right against compelled speech.").

3.20 Internet and Computer Solicitation

A. Elements of Offense

A person may be prosecuted under MCL 750.145d even if the person is not convicted of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense. MCL 750.145d(5).

1. Minor Victims Only

MCL 750.145d(1)(a) penalizes a person who uses the Internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under

any of the following statutes, if the victim or intended victim is a minor or is believed by that person to be a minor:

- Accosting, enticing, or soliciting a child for an immoral purpose, MCL 750.145a.
- Child sexually abusive activity, MCL 750.145c.
- Recruiting, inducing, soliciting, or coercing a minor to commit a felony, MCL 750.157c.
- Kidnapping, MCL 750.349.
- Kidnapping a child under the age of 14, MCL 750.350.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Dissemination of sexually explicit matter to a minor, MCL 722.675.

2. Minor and Adult Victims

MCL 750.145d(1)(b) penalizes a person who uses the Internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the following offenses, without regard to the age of the intended victim:

- Stalking, MCL 750.411h.
- Aggravated stalking, MCL 750.411i.

B. Jury Instructions

M Crim JI 35.10, *Use of a Computer to Commit Specified Crimes*.

C. Penalties

1. Imprisonment and Fines

MCL 750.145d(2) contains the following penalties for violations of MCL 750.145d(1), regardless of the victim's age:

- If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of less than one year, the person is guilty of a misdemeanor punishable by not more than one year of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(a).

- If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of one year or more but less than two years, the person is guilty of a felony punishable by not more than two years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(b).

- If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of two years or more but less than four years, the person is guilty of a felony punishable by not more than four years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(c).

- If the underlying crime is a felony with a maximum term of imprisonment of four years or more but less than ten years, the person is guilty of a felony punishable by not more than ten years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.145d(2)(d).

- If the underlying crime is a felony with a maximum term of imprisonment of ten years or more but less than 15 years, the person is guilty of a felony punishable by not more than 15 years of imprisonment, or a maximum fine of $10,000, or both. MCL 750.145d(2)(e).

- If the underlying crime is a felony with a maximum term of imprisonment of 15 years or more or for life, the person is guilty of a felony punishable by not more than 20 years of imprisonment, or a maximum fine of $20,000, or both. MCL 750.145d(2)(f).

A person may be charged with, convicted of, and punished for any other violation of law committed while violating or

attempting to violate MCL 750.145d, including the underlying offense. MCL 750.145d(4).

Consecutive sentencing. A term of imprisonment imposed for violating MCL 750.145d may be made consecutive to any term of imprisonment imposed for conviction of the underlying offense. MCL 750.145d(3).

2. Crime Victim Assessment

A defendant convicted of violating MCL 750.145d(1) when the underlying offense is punishable by one year or more of imprisonment must pay a crime victim assessment of $130, and a defendant convicted of violating MCL 750.145d(1) when the underlying offense is punishable by less than one year of imprisonment must pay a crime victim assessment of $75. See MCL 780.905(1)(a)-(b).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68 for a conviction of Internet or computer solicitation when the underlying offense is punishable by imprisonment of one year or more. See MCL 769.1j(1)(a); MCL 769.1k(1)(a). If the underlying offense is punishable by less than one year of imprisonment, the court must order the defendant to pay the minimum state cost of not less than $50. See MCL 769.1j(1)(b); MCL 769.1k(1)(a).

A court may order a person convicted of violating MCL 750.145d to reimburse the state or local unit of government for expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under MCL 769.1f. MCL 750.145d(8). MCL 769.1f contains a nonexclusive list of the expenses for which a governmental unit may be reimbursed when a defendant is convicted of certain offenses. The list of expenses includes, for example, salaries, wages, and overtime pay for law enforcement personnel and emergency services personnel, and the costs of prosecution. MCL 769.1f(2).

D. Sex Offender Registration

MCL 750.145d(1)(a), except for a violation arising out of a violation of MCL 750.157c,[24] is a tier II offense under the Sex Offenders Registration Act (SORA). MCL 28.722(t)(*iv*). If the defendant meets

the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

E. Jurisdictional Considerations

MCL 750.145d contains jurisdictional requirements specific to a violation or attempted violation of its provisions:

> "A violation or attempted violation of [MCL 750.145d] may be prosecuted in any jurisdiction in which the communication originated or terminated." MCL 750.145d(7).

> "A violation or attempted violation of [MCL 750.145d] occurs if the communication originates in this state, is intended to terminate in this state, or is intended to terminate with a person who is in this state." MCL 750.145d(6).

F. Caselaw

When a defendant's Internet communication with a "minor"[25] originated in Indiana but was intended to terminate with a meeting with the "minor" in Michigan, the defendant's conduct fell within the parameters of MCL 750.145d(6). *People v Aspy*, 292 Mich App 36, 44 (2011). In *Aspy*, the defendant, while in Indiana, viewed the minor's profile, was informed the minor was from Michigan, reserved a campsite in Michigan to which the defendant intended to take the minor, stocked his truck with alcohol, and left Indiana with the purpose of picking up the minor to engage in prohibited acts in Michigan. *Id*. at 44-45. There was "no doubt that defendant intended that his Internet communications terminate in Michigan[.]" *Id*. at 45.

A defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor[26] for the purpose of attempting to commit or committing CSC-III under MCL 750.520d(1)(a) may be bound over for trial for allegedly violating MCL 750.145d(1)(a). *People v Cervi*, 270 Mich App 603, 606, 615, 619 (2006) (the defendant attempted to arrange a meeting at which he

[24] MCL 750.157c penalizes a person aged 17 or older who recruits, induces, solicits, or coerces a minor less than age 17 to commit or attempt to commit an act that would be a felony if committed by an adult.

[25] The "minor" was an adult member of a group that identified internet predators.

[26] In this case, the minor was an undercover deputy sheriff posing as a minor.

expected the minor to fellate him). The prosecution may charge a defendant under MCL 750.145d(1)(a) for each time he or she, with the specific intent to engage a perceived minor in conduct prohibited by MCL 750.520d(1)(a), uses a computer to communicate on the Internet with the minor. *Cervi*, 270 Mich App at 617. Similarly, a defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor for the purpose of producing or attempting to produce child sexually abusive material under MCL 750.145c(2) may be bound over for trial for allegedly violating MCL 750.145d(1)(a). *Cervi*, 270 Mich App at 606, 625 (the defendant attempted to arrange a meeting at which the defendant was to videotape the sexual activity that was to occur between him and the minor).

See also *People v Adkins*, 272 Mich App 37, 38 (2006), where the defendant was properly convicted of violating MCL 750.145d(1)(a) for attempting to commit child sexually abusive activity, MCL 750.145c(2), when he communicated via the Internet with a law enforcement officer posing as a minor.

MCL 750.145d "does not impermissibly burden free expression because 'words alone' are not punishable under the statute; rather the statute criminalizes communication with a minor or perceived minor with the specific intent to make that person the victim of one of the enumerated crimes." *Cervi*, 270 Mich App at 605-606.

3.21 Kidnapping

The crime of kidnapping, while sexually-neutral in title and substance, may be committed to avoid detection and to facilitate a sexual assault. Threats of kidnapping, if they coerce the victim to submit to sexual penetration or contact, fall under the *force or coercion* provisions of the CSC Act:

> "Force or coercion includes . . . [w]hen the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person. . . . As used in this subdivision, 'to retaliate' includes threats of physical punishment, kidnapping, or extortion." MCL 750.520b(1)(f)(*iii*); MCL 750.520e(1)(b)(*iii*).

A. Elements of Offense

"A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:

(a) Hold that person for ransom or reward.

(b) Use that person as a shield or hostage.

(c) Engage in criminal sexual penetration or criminal sexual contact prohibited under [MCL 750.520b–MCL 750.520m] with that person.

(d) Take that person outside of this state.

(e) Hold that person in involuntary servitude.

(f) Engage in child sexually abusive activity, as that term is defined in [MCL 750.145c], with that person, if that person is a minor." MCL 750.349(1).

B. Statute of Limitations

Generally, an indictment for kidnapping may be found and filed within 10 years after the offense is committed. MCL 767.24(6)(a). However, if the offense is reported to law enforcement within one year after the kidnapping, and the kidnapper is unknown, an indictment may be found and filed within 10 years after the individual is identified. See MCL 767.24(6)(b).

C. Jury Instructions

M Crim JI 19.1, *Kidnapping*.

D. Penalties

1. Imprisonment and Fines

A violation of MCL 750.349 is "a felony punishable by imprisonment for life or any term of years or a fine of not more than $50,000.00, or both." MCL 750.349(3).

An offender convicted of kidnapping under MCL 750.349 may also be charged with, convicted of, or sentenced for any other offenses arising from the same transaction as the kidnapping violation. MCL 750.349(4).

2. Crime Victim Assessment

A defendant convicted of kidnapping must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

E. Sex Offender Registration

The Sex Offenders Registration Act (SORA) designates kidnapping a minor under MCL 750.349 as a tier III offense, MCL 28.722(v)(*ii*), and requires registration if the defendant meets the domicile, residence, employment, or student status, MCL 28.723.

Kidnapping a minor "is one of only three offenses for which a conviction does not necessarily require commission of a sexual act that results in placement on the sex-offender registry." *People v Lymon (Lymon II)*, ___ Mich ___, ___(2024) (affirming the judgment of the Court of Appeals in *People v Lymon (Lymon I)*, 342 Mich App 46 (2022), only as to non-sexual offenders who were placed on the sex-offender registry, and vacating the opinion as to conclusions that went beyond consideration of non-sexual offenders). "[T]he imposition of the 2021 SORA on non-sexual offenders . . . constitutes cruel or unusual punishment under the Michigan Constitution." *Lymon II*, ___ Mich at ___. "[O]ffenders whose crimes lacked a sexual component are entitled to removal from the sex-offender registry." *Id*. at ___.

For more information on the SORA's registration requirements, see Chapter 9.

F. Caselaw

A defendant commits the crime of kidnapping under MCL 750.349(1)(c) if he "knowingly restrains another person with the intent" to commit a criminal sexual offense. *People v Anderson*, 331 Mich App 552, 562 (2020). "The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." MCL 750.349(2). In *Anderson*, the defendant argued he could not be convicted of kidnapping because none of the sexual assaults occurred during the times he restrained the victim in the downstairs or upstairs closets. *Anderson*, 331 Mich App at 562. However, the closet confinements were not the restraint that warranted defendant's kidnapping convictions. *Id*.

> "[T]he record shows that defendant sat on the victim while scraping a knife over her back. He then used that knife to cut off the victim's belt before he instructing her

to remove her clothes and then committing the sexual assault. Although the closet confinements were of longer duration, restraint for the purposes of the kidnapping statute need not be for any specific period of time. By using his own body weight and the knife to restrict the victim, defendant 'restrained' the victim within the meaning of the kidnapping statute. That this restraint was accomplished with the intent to commit a sexual assault is evidenced by the fact that defendant removed the victim's belt while she was constrained and committed the sexual act immediately after the confinement, while the victim was still under the strain of the prior restraint." *Anderson*, 331 Mich App at 563.

3.22 Kidnapping a Child Under Age 14—Child Enticement

A. Elements of Offense

"(1) A person shall not maliciously, forcibly, or fraudulently lead, take, carry away, decoy, or entice away, any child under the age of 14 years, with the intent to detain or conceal the child from the child's parent or legal guardian, or from the person or persons who have adopted the child, or from any other person having the lawful charge of the child. A person who violates this section is guilty of a felony . . . .

(2) An adoptive or natural parent of the child shall not be charged with and convicted for a violation of this section."[27] MCL 750.350.

B. Intent

Child enticement is a specific-intent crime. *People v Kuchar*, 225 Mich App 74, 77 (1997).

C. Penalties

1. Imprisonment and Fines

A conviction of child enticement is punishable by imprisonment for life or any term of years. MCL 750.350. No fine is authorized. See *id*.

[27] The parental kidnapping statute, MCL 750.350a, applies to the conduct of adoptive and natural parents.

2. Crime Victim Assessment

The court must order a defendant convicted of child enticement to pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

D. Sex Offender Registration

MCL 750.350 is a tier III offense under the Sex Offenders Registration Act (SORA). MCL 28.722(v)(*iii*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

E. Caselaw

Although adoptive and natural parents are exempt from prosecution for kidnapping under MCL 750.350(1)-(2), an individual whose parental rights were previously terminated does not constitute a *natural parent*, and thus, is not exempt from prosecution under the statute. *People v Wambar*, 300 Mich App 121, 126, 129 (2013) (once the defendant-father's parental rights were terminated, he was not a natural parent under MCL 750.350(2), and thus, was properly convicted of kidnapping his biological child under MCL 750.350(1)).[28]

[28] In *Wambar*, 300 Mich App at 126-127, the Court of Appeals acknowledged that "the Legislature could have added an explicit provision to MCL 750.350(2) explaining that the phrase 'natural parent' does not encompass a person whose parental rights have been terminated, we nonetheless conclude, in light of the special legal definition of 'parent[,]' [which "indicates that a person may cease to be a parent for certain purposes under the law if that person's status as a parent has been terminated in a legal proceeding"] and in light of the general import of a termination of parental rights, that the exemption in MCL 750.350(2) should be read to exclude a person [whose parental rights were previously terminated]."

3.23 Sexual Contact or Penetration Under Pretext of Medical Treatment

A. Elements of Offense—Pretext of Medical Treatment Involving Sexual Contact

"An individual who undertakes medical treatment of a patient and in the course of that medical treatment misrepresents to the patient that sexual contact between the individual and the patient is necessary or will be beneficial to the patient's health and who induces the patient to engage in sexual contact with the individual by means of the misrepresentation is guilty of a felony . . . ." MCL 750.90(1).

B. Elements of Offense—Pretext of Medical Treatment Involving Sexual Penetration[29]

"An individual who undertakes medical treatment of a patient and in the course of that medical treatment misrepresents to the patient that sexual penetration between the individual and the patient is necessary or will be beneficial to the patient's health and who induces the patient to engage in sexual penetration with the individual by means of the misrepresentation is guilty of a felony . . . ." MCL 750.90(2).

C. Penalties

1. Imprisonment and Fines

a. Pretext of Medical Treatment—Sexual Contact

A person convicted of violating MCL 750.90(1) (sexual contact) may be sentenced to not more than 20 years of imprisonment. MCL 750.90(1). No fine is authorized. See *id*.

[29] MCL 333.16279(1) prohibits a medical professional (licensee or registrant) from performing "a medical treatment, procedure, or examination on a patient who is a minor that involves the vaginal or anal penetration of the minor" unless the specific conditions set forth in MCL 333.16279(1)(a)-(c) are satisfied or the medical treatment is not subject to those conditions, as described in MCL 333.16279(3)(a)-(f). Violation of MCL 333.16279(1) is a felony, and a first offense is punishable by not more than two years of imprisonment or a fine of not more than $5,000, or both. MCL 333.16279(5)(a). A subsequent violation is punishable by not more than five years of imprisonment or a fine of not more than $10,000, or both. MCL 333.16279(5)(b). A defendant charged with violating MCL 333.16279(1) may be charged with, convicted of, or punished for any other violation of law committed during the defendant's violation of MCL 333.16279(1). MCL 333.16279(6). A sentence imposed for violating MCL 333.16279(1) may be made consecutive to other terms of imprisonment imposed for any other crime, including crimes committed during the same transaction. MCL 333.16279(7).

b. Pretext of Medical Treatment—Sexual Penetration

A person convicted of MCL 750.90(2) (sexual penetration) may be sentenced to not more than 25 years of imprisonment. MCL 750.90(2). No fine is authorized. See *id*.

c. Additional Offenses Charged

"[MCL 750.90] does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating [MCL 750.90]." MCL 750.90(3).

d. Consecutive Sentencing Permitted

"The court may order a term of imprisonment imposed for a violation of [MCL 750.90] to be served consecutively to a term of imprisonment imposed for any other crime, including any other violation of law arising out of the same transaction as the violation of [MCL 750.90]." MCL 750.90(4).

2. Crime Victim Assessment

The court must order a defendant convicted of violating MCL 750.90 to pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

3.24 Taking or Enticing Away a Minor Under Age 16

A. Elements of Offense

"A person who takes or entices away a minor under the age of 16 years from the minor's father, mother, guardian, or other person having the legal charge of the minor, without their consent, for the purpose of prostitution, concubinage,[30] sexual intercourse, or marriage is guilty of a felony[.]" MCL 750.13.

B. Intent

The taking or enticing away of a minor in violation of MCL 750.13 is a specific-intent crime; it requires a prosecutor to prove not only the act of enticement but also the intent or "the particular purpose" for the enticement—i.e., prostitution, concubinage, sexual intercourse, or marriage. *People v Fleming*, 267 Mich 584, 586-589 (1934).

C. Statute of Limitations

"An indictment for a violation or attempted violation of . . . MCL 750.13 . . . may be found and filed within 25 years after the offense is committed." MCL 767.24(2).

D. Penalties

1. Imprisonment and Fines

A conviction of MCL 750.13 is punishable by no more than 10 years of imprisonment. MCL 750.13. No fines are authorized. See *id*.

2. Crime Victim Assessment

A defendant convicted of violating MCL 750.13 must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

3.25 Unlawful Imprisonment

A. Elements of Offense

A person is guilty of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:

- the person was restrained through the use of a weapon or dangerous instrument.

[30] "Concubinage has been defined as any form of illicit intercourse." *People v Fleming*, 267 Mich 584, 586 (1934).

- the person restrained was secretly confined.
- the person was restrained in order to facilitate the commission of another felony or to facilitate flight after commission of another felony. MCL 750.349b(1)(a)-(c).

B. Penalties

1. Imprisonment and Fines

The crime of unlawful imprisonment is a felony punishable by not more than 15 years of imprisonment, or a fine of not more than $20,000, or both. MCL 750.349b(2).

A defendant may be charged with, convicted of, or sentenced for any other violation of law committed during the defendant's commission of unlawful imprisonment. MCL 750.349b(4).

2. Crime Victim Assessment

The court must order a defendant convicted of unlawful imprisonment to pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

C. Sex Offender Registration

The Sex Offenders Registration Act (SORA) designates MCL 750.349b as a tier I offense if the victim is a minor, MCL 28.722(r)(*iii*), and requires registration if the defendant meets the domicile, residence, employment, or student status, MCL 28.723.

Unlawful imprisonment of a minor, MCL 750.349b, "is one of only three offenses for which a conviction does not necessarily require commission of a sexual act that results in placement on the sex-offender registry." *People v Lymon (Lymon II)*, ___ Mich ___, ___(2024) (affirming the judgment of the Court of Appeals in *People v Lymon (Lymon I)*, 342 Mich App 46 (2022), only as to non-sexual offenders who were placed on the sex-offender registry, and vacating the opinion as to conclusions that went beyond consideration of non-sexual offenders). "[T]he imposition of the

2021 SORA on non-sexual offenders . . . constitutes cruel or unusual punishment under the Michigan Constitution." *Lymon II*, ___ Mich at ___. "[O]ffenders whose crimes lacked a sexual component are entitled to removal from the sex-offender registry." *Id*. at ___.

For more information on the SORA's registration requirements, see Chapter 9.

D. Caselaw

1. SORA Registration for Crime Without Sexual Component

Registration under SORA may be required even when there is "no express sexual component" to the crime." *People v Fonville*, 291 Mich App 363, 380 (2011).

2. "Restraint"

"[T]he knowing restraint element of unlawful imprisonment does not require evidence of physical force. Nonphysical force that involves a credible threat of harm can constitute restraint when it "'forcibly restrict[s] a person's movements'" or "'forcibly confine[s] the person so as to interfere with that person's liberty without that person's consent or without lawful authority.'" *People v Jarrell*, 344 Mich App 464, 488 (2022), quoting MCL 750.349b(3)(a) (alterations in original).

3. "Confine"

MCL 750.349b "does not define the word 'confine,'" and "[n]othing in [MCL 750.349b] requires a certain level of difficulty of discovery or escape." *People v Kosik*, 303 Mich App 146, 152, 153 (2013). Rather, "[o]ur Supreme Court has stated that 'secret confinement' means the 'deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament.'" *Id*. at 152, quoting *People v Jaffray*, 445 Mich 287, 309 (1994).

"The determination whether a person has been secretly confined is generally not dependent on the duration of the confinement." *Kosik*, 303 Mich App at 153. "Whether and when defendant [chooses] to release the victim is immaterial to whether there was secret confinement." *Id*.

4. Sufficient Evidence to Support Conviction

Sufficient evidence existed to support the defendant's conviction of unlawful imprisonment under MCL 750.349b(1) where the victim was restrained without physical force in a variety of ways, including: the defendant displayed to the victim a pocket knife he carried at all times; there were at least 50 knives throughout he house where the defendant rented a room and much of the activity in the case occurred; the homeowner's knife collection included machetes, long knives, and pocket knives; the defendant told the victim that she was being watched by cameras and could go viral at any time; the victim was made to believe she owed the defendant a debt; the defendant obtained the victim's identification card from the victim's purse and read off the victim's mother's address; the defendant said "'it would be a shame if something happened to [the victim's daughter]"; and the defendant threatened the victim with a hot fire poker. *People v Jarrell*, 344 Mich App 464, 471 (2022).

Sufficient evidence existed to support the defendant's conviction of unlawful imprisonment under MCL 750.349b(1)(b) (secret confinement) where the defendant entered the store after the victim's coworker went on her break and the store was empty, he forcefully grabbed the victim and led her to a windowless conference room where she could not be seen, he closed the door and stood in front of it to prevent her from escaping, and he took the victim's phone away from her so she could not call for help. *People v Kosik*, 303 Mich App 146, 153-154 (2013).

Sufficient evidence existed to support the defendant's conviction of unlawful imprisonment under MCL 750.349b(1)(b) (secret confinement) where the defendant dragged the victim by her hair and forced her into her car, punched her in the mouth and choked her until she lost consciousness, drove her to a store and took her car keys and phone when he went into the store, and demanded that the victim not reveal their location to her sister after he answered the sister's call on the victim's phone. *People v Railer*, 288 Mich App 213, 215-219 (2010).

3.26 Voyeurism

A. Elements of Offense

"(1) A person shall not do any of the following:

(a) Surveil another individual who is clad only in his or her undergarments, the unclad genitalia or buttocks of another individual, or the unclad breasts of a female individual under circumstances in which the individual would have a reasonable expectation of privacy.

(b) Photograph, or otherwise capture or record, the visual image of the undergarments worn by another individual, the unclad genitalia or buttocks of another individual, or the unclad breasts of a female individual under circumstances in which the individual would have a reasonable expectation of privacy.

(c) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section." MCL 750.539j.

"[MCL 750.539j] does not prohibit security monitoring in a residence if conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose." MCL 750.539j(4). In addition, "[MCL 750.539j] does not apply to a peace officer of this state or of the federal government, or the officer's agent, while in the performance of the officer's duties." MCL 750.539j(5).

B. Penalties

1. Imprisonment and Fines

- For a first offense, an individual convicted of violating or attempting to violate MCL 750.539j(1)(a) (surveilling another individual) is guilty of a felony punishable by not more than two years of imprisonment, or a maximum fine of $2,000, or both. MCL 750.539j(2)(a)(*i*).

- An individual with a previous conviction for violating or attempting to violate MCL 750.539j(1)(a), who violates or attempts to violate MCL 750.539j(1)(a) is guilty of a felony punishable by not more than five years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.539j(2)(a)(*ii*).

- An individual who violates or attempts to violate MCL 750.539j(1)(b) (photograph/otherwise record) or MCL 750.539j(1)(c) (distribute/transmit photograph or visual image) is guilty of a felony punishable by not more than five years of imprisonment, or a maximum fine of $5,000, or both. MCL 750.539j(2)(b).

"[MCL 750.539j] does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate [MCL 750.539j(1)(a)-(c)]." MCL 750.539j(3).

2. Crime Victim Assessment

A defendant convicted of voyeurism must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

3. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

C. Sex Offender Registration

If the victim is a minor, a violation of MCL 750.539j is a tier I offense under the Sex Offenders Registration Act (SORA). MCL 28.722(r)(*vi*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723.

For more information on the SORA's registration requirements, see Chapter 9.

3.27 Sexual Contact with a Dead Human Body[31]

A. Sexual Contact—Misdemeanor

"An individual who engages in sexual contact with a dead human body is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both." MCL 750.160d(1).

B. Sexual Penetration—Felony

"An individual who engages in sexual penetration with a dead human body is guilty of a felony punishable by imprisonment for not more than 15 years." MCL 750.160d(2).

[31] **[TO RS: SEE 1:21.1, P 34.]** Also know as Melody's Law. See 2024 PA 79, enacting § 2.

C. Consecutive Sentencing

"A term of imprisonment imposed for a violation of this section may run consecutively to any term of imprisonment imposed for another violation arising from the same transaction." MCL 750.160d(3).

D. Sex Offender Registration

A violation of MCL 750.160d(1) (sexual contact with a dead human body) is a Tier I offense under the Sex Offenders Registration Act (SORA). MCL 28.722(r)(*vii*).[32]

A violation of MCL 750.160d(2) (sexual penetration with a dead human body) is a Tier III offense under the SORA. MCL 28.722(v)(*vii*).[33]

For more information on the SORA's registration requirements, see Chapter 9.

Part VI—Human-Trafficking Offenses

Human-trafficking statutes penalize specific conduct related to forced labor or services. Services, in MCL 750.462a(*l*), "means an ongoing relationship between a person and an individual in which the individual performs activities under the supervision of or for the benefit of the person, including, but not limited to, *commercial sexual activity and sexually explicit performances*." (Emphasis added.) For purposes of human trafficking, *services* includes unlawful sexual conduct. Therefore, all of the offenses described in the Human Trafficking chapter of the Michigan Compiled Laws are discussed with the detail necessary to the content of this benchbook.

For additional information on the human trafficking of children, see the Michigan Department of Health and Human Services, *Human Trafficking of Children Protocol*.[34]

[32]See 2024 PA 66, effective October 6, 2024.

[33]See 2024 PA 66, effective October 6, 2024.

[34]The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

3.28 Human-Trafficking Offenses

The content contained in this section applies to each of the offenses in MCL 750.462b–MCL 750.462e.[35] Information unique to any of the human-trafficking offenses may be found with the discussion of that particular offense.

A. Statute of Limitations

An indictment for a violation of the Human Trafficking Act that is punishable by life imprisonment may be found and filed at any time. MCL 767.24(1)(c). Otherwise, an indictment for a violation or attempted violation of the Human Trafficking Act may be found and filed within 25 years after the offense was committed. MCL 767.24(2).

B. Attempts, Conspiracies, and Solicitations

A person who attempts, conspires, or solicits another to commit a human-trafficking offense is subject to the same penalty as a person who commits the offense. MCL 750.462f(3).

C. Offenses Arising Out of the Same Transaction

A person may be charged with, convicted of, or punished for any other violation of law "arising out of the same transaction as the violation of [the Human Trafficking Act]." MCL 750.462f(4).

D. Victim's Resistance

A victim's resistance or lack of resistance is not relevant to the prosecution of a human-trafficking offense. MCL 750.462h.

E. Victim's Testimony

A victim is not required to testify in the prosecution of a human-trafficking offense. MCL 750.462g(1). If a victim does testify, the victim's testimony need not be corroborated. *Id*. See *People v Baskerville*, 333 Mich App 276, 286 (2020) (holding that the victim's uncorroborated testimony was sufficient evidence to support the defendant's conviction under MCL 750.462e(a)).

[35]The human-trafficking offense in MCL 750.462e is subject to a term of imprisonment and a maximum fine that differs from the offenses in MCL 750.462b–MCL 750.462d.

F. Expert Testimony Regarding Victims

Expert testimony about a human-trafficking victim's behavioral patterns, and the ways in which a victim's behavior may deviate from societal expectations, is admissible in court in the prosecution of a human-trafficking offense if the expert testimony is otherwise admissible under the rules of evidence and the laws of Michigan. MCL 750.462g(2).

G. Jury Instructions

Jury instructions for human trafficking-offenses are as follows. Not all instructions will apply in every case.

- M Crim JI 36.1, *Obtaining a Person for Forced Labor or Services*;
- M Crim JI 36.2, *Holding a Person in Debt Bondage*;
- M Crim JI 36.3, *Knowingly Subjecting a Person to Forced Labor or Debt Bondage*;
- M Crim JI 36.4, *Participating in a Forced Labor, Debt Bondage or Commercial Sex Enterprise for Financial Gain*;
- M Crim JI 36.4a, *Participating in a Forced Labor or Commercial Sex Enterprise for Financial Gain or for Anything of Value with a Minor*;
- M Crim JI 36.5, *Aggravating Factors*;
- M Crim JI 36.6, *Using Minors for Commercial Sexual Activity or for Forced Labor or Services*;
- M Crim JI 36.7, *Testimony of Victim Not Required/Need Not Be Corroborated*; and
- M Crim JI 36.8, *Victim's Resistance or Lack of Resistance Not Relevant*.

H. Imprisonment and Fines

1. Violations of § 462b, § 462c, and § 462d

- A violation without bodily injury, an individual being involved in commercial sexual activity, kidnapping or attempted kidnapping, CSC-I or attempted CSC-I, or an attempt to kill or the death of an individual is a felony punishable by not more than 10 years of

imprisonment, a fine of not more than $10,000, or both. MCL 750.462f(1)(a).

- A violation that results in bodily injury or that results in commercial sexual activity is a felony punishable by not more than 15 years of imprisonment, a fine of not more than $15,000, or both. MCL 750.462f(1)(b).

- A violation that results in serious bodily injury is a felony punishable by not more than 20 years of imprisonment, a fine of not more than $20,000, or both. MCL 750.462f(1)(c).

- A violation that involves kidnapping or attempted kidnapping, CSC-I or attempted CSC-I, or an attempt to kill or the death of an individual, is a felony punishable by life imprisonment or any term of years, a fine of not more than $50,000, or both. MCL 750.462f(1)(d).

2. Violations of § 462e

A violation of MCL 750.462e is a felony punishable by not more than 20 years of imprisonment, a fine of not more than $20,000, or both. MCL 750.462f(2).

I. Consecutive Sentencing

"The court may order a term of imprisonment imposed for [a human-trafficking violation] to be served consecutively to a term of imprisonment imposed for the commission of any other crime, including any other violation of law arising out of the same transaction as the [human-trafficking] violation[.]" MCL 750.462f(5).

J. Crime Victim Assessment

A defendant convicted of a human-trafficking offense must pay a crime victim assessment of $130. See MCL 780.905(1)(a).

K. Minimum State Cost

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

L. Restitution

When sentencing a defendant for a human-trafficking offense, the court must order full restitution. See MCL 769.1a(2); MCL 769.34(6); MCL 771.3(1)(e); MCL 780.766(2); MCR 6.425(E)(1)(f).

In addition to any mandatory restitution under the crime victim's rights act, MCL 780.66, a court may order a defendant convicted of a human-trafficking crime to pay restitution as provided in MCL 780.766b. MCL 750.462f(6). MCL 780.766b authorizes the court to order a defendant to pay for a victim's lost income as calculated according to MCL 780.766b(a)(*i*)-(*iii*); the cost of transportation, temporary housing, and childcare expenses incurred because of the offense; attorney fees and other costs and expenses described in MCL 780.766b(c)(*i*)-(*iv*) that were incurred because of the offense; and "[a]ny other loss suffered by the victim as a proximate result of the offense," MCL 780.766b(d).

M. Human Trafficking Victims Compensation Act

Under the Human Trafficking Victims Compensation Act, MCL 752.981 *et seq.*, a person who commits a human-trafficking offense under MCL 750.462a–MCL 750.462h, "is liable to the victim of the violation for economic and noneconomic damages that result from the violation[.]" MCL 752.983(1). These include, but are not limited to:

> "(a) Physical pain and suffering.
>
> (b) Mental anguish.
>
> (c) Fright and shock.
>
> (d) Denial of social pleasure and enjoyments.
>
> (e) Embarrassment, humiliation, or mortification.
>
> (f) Disability.
>
> (g) Disfigurement.
>
> (h) Aggravation of a preexisting ailment or condition.
>
> (i) Reasonable expenses of necessary medical or psychological care, treatment, and services.
>
> (j) Loss of earnings or earning capacity.
>
> (k) Damage to property.

> (*l*) Any other necessary and reasonable expense incurred as a result of the violation." MCL 752.983(1).

A victim is entitled to the damages sustained regardless whether the victim suffered bodily injury, the damages were foreseeable to the violator, or the violator was charged with or convicted of a human-trafficking offense. MCL 752.983(2)-(4).

"An action to recover damages under [MCL 752.983] must be filed within 3 years after the last violation that is the subject of the action occurred." MCL 752.984.

"[The Human Trafficking Victims Compensation Act] does not affect any right that a victim has to recover damages under other law." MCL 752.985.

N. Medical Assistance Benefits For Victim

"If an individual is a victim of a human trafficking violation, he or she may receive medical assistance benefits for medical and psychological treatment resulting from his or her status as a victim of that human trafficking violation." MCL 400.109m(1).

O. Human-Trafficking Victim Commits a Prostitution Offense

Sentencing options, such as deferred sentencing, are available for victims of human trafficking who commit certain offenses involving prostitution if the victim proves by a preponderance of the evidence that the offense was a direct result of his or her status as a victim of human trafficking. MCL 750.451c.

3.29 Human Trafficking: Of a Minor

A. Elements of Offense

"A person shall not do any of the following, regardless of whether the person knows the age of the minor:

> (a) Recruit, entice, harbor, transport, provide, or obtain by any means a minor for commercial sexual activity.
>
> (b) Recruit, entice, harbor, transport, provide, or obtain by any means a minor for forced labor or services." MCL 750.462e.

B. Sex Offender Registration

MCL 750.462e(a) is a tier II offense under the Sex Offenders Registration Act (SORA). See MCL 28.722(t)(*vii*). If the defendant meets the domicile, residence, employment, or student status, registration is required. See MCL 28.723. However, MCL 750.462e(b) is not designated as a tier I, tier II, or tier III offense under the SORA, and registration is not required for that offense.

For more information on the SORA's registration requirements, see Chapter 9.

3.30 Selling Travel Services for the Purpose of Human Trafficking

"A person shall not knowingly sell or offer to sell travel services that include or facilitate travel for the purpose of engaging in what would be a violation of [prostitution under MCL 750.448 *et seq*.], or of [human trafficking under MCL 750.462a *et seq*.], if the violation occurred in this state." MCL 750.459(2).

Except as provided in MCL 750.451b, MCL 750.459 does not apply to a law enforcement officer while performing his or her duties. MCL 750.451a. MCL 750.451b provides that the exemption in MCL 750.451a does not apply "if the officer engages in sexual penetration as that term is defined in [MCL 750.520a] while in the course of his or her duties." MCL 750.451b.

A. Imprisonment and Fines

A person who violates MCL 750.459(2) "is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both." MCL 750.459(2). A violation of MCL 750.459(2) involving a minor is "a felony punishable by imprisonment for not more than 10 years or a fine of not more than $15,000.00, or both." MCL 750.459(3).

B. Crime Victim Assessment

The court must order a defendant convicted of violating MCL 750.459 to pay a crime victim assessment of $130. See MCL 780.905(1)(a).

C. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

3.31 Other Human-Trafficking Offenses

A. Human Trafficking: Forced Labor or Services

"A person shall not knowingly recruit, entice, harbor, transport, provide, or obtain an individual for forced labor or services." MCL 750.462b.

B. Human Trafficking: Holding Individual in Debt Bondage

"A person shall not knowingly recruit, entice, harbor, transport, provide, or obtain an individual for the purpose of holding the individual in debt bondage." MCL 750.462c.

C. Human Trafficking: Recruiting or Racketeering

"A person shall not do either of the following:

> (a) Knowingly recruit, entice, harbor, transport, provide, or obtain an individual by any means, knowing that individual will be subjected to forced labor or services or debt bondage.
>
> (b) Knowingly benefit financially or receive anything of value from participation in an enterprise, as that term is defined in [MCL 750.159f], if the enterprise has engaged in an act proscribed under [the Human Trafficking Act]." MCL 750.462d.

Part VII—Offenses Involving Vulnerable Adults

3.32 Vulnerable Adults: Sexually Explicit Visual Material

A. Elements of Offense

"A person shall not intentionally or knowingly harass, abuse, threaten, force, coerce, compel, or exploit the vulnerability of a

vulnerable adult in a manner that causes the vulnerable adult to provide that person, or any other person, sexually explicit visual material." MCL 750.145h(1).

B. Penalties

1. Imprisonment and Fines

First offense. A person who violates MCL 750.145h(1) for a first offense is guilty of a misdemeanor punishable by not more than one year of imprisonment, a fine of not more than $500, or both. MCL 750.145h(2).

Second or subsequent offense. A person who violates MCL 750.145h(1) who has one or more prior convictions for violating MCL 750.145h(1) is guilty of a felony punishable by not more than two years of imprisonment, a fine of not more than $1,000, or both. MCL 750.145h(3).

2. Enhanced Sentence

Under MCL 750.145h(4), a prosecutor who intends to seek an enhanced sentence based on a defendant's prior conviction(s) must include on the complaint and information a statement listing the prior conviction(s). MCL 750.145h(4). At sentencing or at a separate hearing before sentencing, the court, without a jury, must determine the existence of the defendant's prior conviction(s). *Id.* The existence of a prior conviction may be established by any relevant evidence, including, but not limited to, one or more of the following:

> "(a) A copy of the judgment of conviction.
>
> (b) A transcript of a prior trial, plea-taking, or sentencing.
>
> (c) Information contained in a presentence report.
>
> (d) The defendant's statement." *Id*.

3. Crime Victim Assessment

The court must order a defendant convicted of violating MCL 750.145h to pay a crime victim assessment of $130 for a felony conviction, or $75 for a misdemeanor conviction. See MCL 780.905(1)(a)-(b).

4. Minimum State Cost and Other Costs

If the court orders payment of any combination of a fine, costs, or applicable assessments for a first violation of MCL 750.145h, the court must impose the minimum state cost of not less than $50. See MCL 769.1j(1)(b); MCL 769.1k(1)(a). If the court orders payment of any combination of a fine, costs, or applicable assessments for a second or subsequent violation, the court must impose the minimum state cost of not less than $68. See MCL 769.1j(1)(a); MCL 769.1k(1)(a).

5. Restitution

When sentencing a defendant convicted of a crime, in addition to or in lieu of any other penalty authorized or required by law, the must order "that the defendant 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."MCL 780.766(2). However, if other entities have provided services or compensation to the victim for loss resulting from a crime, the court must order that restitution for the cost of the services or compensation be paid to those entities instead of the victim, and must state specific reasons for its action on the record. MCL 780.766(8). Restitution for misdemeanor convictions must be ordered under the general restitution statute. See MCL 769.1a(2).

Chapter 4: Defenses to Sexual Assault Crimes

4.1 Consent[1]

As discussed in this section, consent may be an affirmative defense to charged offenses involving CSC and related conduct. However, an alleged victim of criminal sexual conduct need not show that he or she resisted the defendant. See M Crim JI 20.27, *Consent*.

A. Applicability to Criminal Sexual Conduct Offenses

Consent may be raised as an affirmative defense to criminal sexual conduct offenses when a defendant produces enough evidence to place consent at issue, and the defense of consent is not precluded by law.[2] *People v Thompson*, 117 Mich App 522, 528 (1982) (CSC-I based on commission of an underlying felony—kidnapping). When a defendant produces sufficient evidence to give rise to the issue of an affirmative defense, the prosecutor must disprove the affirmative defense beyond a reasonable doubt. *Id*.

---

[1] Other defenses arising in criminal cases are discussed in the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

[2] See, for example, MCL 750.520e(1)(e), which specifically precludes consent as an affirmative defense to the offense of CSC-IV where the actor was a mental health professional, and the sexual contact occurs during or within two years after the victim was the actor's client (and not the actor's spouse).

Force or coercion. "In the context of the CSC statutes, consent can be utilized as a defense to negate the elements of force or coercion." *People v Waltonen*, 272 Mich App 678, 689 (2006). "The statute [prohibiting CSC-III—penetration accomplished by force or coercion] is silent on the defense of consent. However, [MCL 750.520d(1)(b)] impliedly comprehends that a willing, noncoerced act of sexual intercourse between persons of sufficient age who are neither mentally defective, or incapacitated nor physically helpless is not criminal sexual conduct." *People v Jansson*, 116 Mich App 674, 682 (1982). The Court further explained:

> "Although consent therefore precludes conviction of criminal sexual conduct in the third degree by force or coercion, the prosecution is not required to prove nonconsent as an independent element of the offense. If the prosecution offers evidence to establish that an act of sexual penetration was accomplished by force or coercion, that evidence necessarily tends to establish that the act was nonconsensual." *Jansson*, 116 Mich App at 682-683.

CSC offense while armed. In *People v Hearn*, 100 Mich App 749, 755 (1980), the Court of Appeals stated:

> "Although [MCL 750.520b(1)(e)—CSC-I while armed with a weapon] does not specifically address the defense of consent, its various provisions when considered together clearly imply the continuing validity of that defense. Certainly the Legislature, in eliminating the necessity of proof of nonconsent by the prosecution, did not intend to preclude an accused from alleging consent as a defense to the charge."

CSC-I involving commission of underlying felony. "[T]he issue of consent relative to charges brought under [MCL 750.520b(1)(c)] can only arise in the context of the underlying felony because if a defendant successfully argues the existence of consent with respect to the underlying felony, assuming that consent is a legally recognizable defense, the prosecution cannot establish the second element of CSC[-]I pursuant to [MCL 750.520b(1)(c)]."[3] *Waltonen*, 272 Mich App at 689.

Consent is not a defense to CSC-I under MCL 750.520b(1)(c) (penetration under circumstances involving the commission of any other felony) if consent is not a valid defense to the underlying

[3] In *Waltonen*, the underlying felony was MCL 333.7401(2)(a)(*iv*)—delivery of less than 50 grams of a controlled substance. *Waltonen*, 272 Mich App at 679-680.

felony itself. *People v Wilkens*, 267 Mich App 728, 737 (2005). Accordingly, because consent is not a defense to the felony of producing child sexually abusive material under MCL 750.145c(2), it is not a defense to MCL 750.520b(1)(c) under circumstances involving child sexually abusive material. *Wilkens*, 267 Mich App at 737-738.

B. Consent Defense Inapplicable to Certain CSC Offenses

The consent defense does not apply to CSC offenses involving victims who lack the legal capacity to consent. In *People v Khan*, 80 Mich App 605, 619 n 5 (1978), the Court of Appeals observed:

> "Although the statute is silent on the defense of consent, we believe it impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither 'mentally defective',[4] 'mentally incapacitated', nor 'physically helpless', is not criminal sexual conduct." *Khan*, 80 Mich App at 619 n 5 (citations omitted).

1. Offenses Requiring Proof of Age[5]

Because a person under the age of 16 is legally incapable of consenting to a sexual act, consent is inapplicable for all CSC offenses involving victims under the age of 16. *People v Starks*, 473 Mich 227, 235 (2005); *People v Cash*, 419 Mich 230, 247-248 (1984); see also *In re Tiemann*, 297 Mich App 250, 263 (2012) (rejecting "[the respondent's] argument that MCL 750.520d violates public policy or is ambiguous with regard to the prosecution of consenting minors engaging in sexual conduct").

Consent may *not* be raised as a defense to the following CSC offenses:

- **First-degree criminal sexual conduct** (penetration) or **second-degree criminal sexual conduct** (contact) when:
  - the victim is under age 13. MCL 750.520b(1)(a); MCL 750.520c(1)(a).

---

[4] The *mentally defective* terminology has been deleted from the language in the CSC Act. In its place, the Legislature has added *intellectual disability*, *mental illness*, *mentally disabled*, and *mentally incapable*.

[5] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 505 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 464 (citation omitted).

- the victim is at least age 13 but less than age 16, and the actor is a member of the victim's household. MCL 750.520b(1)(b)(*i*); MCL 750.520c(1)(b)(*i*).

- the victim is at least age 13 but less than age 16, and the actor is related to the victim by blood or affinity to the fourth degree. MCL 750.520b(1)(b)(*ii*); MCL 750.520c(1)(b)(*ii*).

- the victim is at least age 13 but less than age 16, and the actor is in a position of authority over the victim and used his or her authority to coerce the victim to submit. MCL 750.520b(1)(b)(*iii*); MCL 750.520c(1)(b)(*iii*).

- the victim is at least age 13 but less than age 16, and the actor is a teacher, substitute teacher, or administrator of the public or nonpublic school, school district, or intermediate school district where the victim is enrolled. MCL 750.520b(1)(b)(*iv*); MCL 750.520c(1)(*iv*).

- the victim is at least age 13 but less than age 16, and the actor is an employee or contractual service provider of the public or nonpublic school, school district, or intermediate school district where the victim is enrolled. MCL 750.520b(1)(b)(*v*); MCL 750.520c(1)(b)(*v*).

- the victim is at least age 13 but less than age 16, and the actor is a non-student volunteer in any public or nonpublic school, an employee of the state of Michigan or a local unit of government of the state of Michigan or of the United States who is assigned to provide any service to the school, school district, or intermediate school district where the victim is enrolled and used his or her employee, contractual, or volunteer status to access or establish a relationship with the victim. MCL 750.520b(1)(b)(*v*); MCL 750.520c(1)(b)(*v*).

- the victim is at least 13 but less than 16, and "[t]he actor is an employee, contractual service provider, or volunteer of a child care organization, or a person licensed to operate a foster family home or a foster family group home," where the victim is a resident and the sexual penetration occurred during the victim's residency. MCL 750.520b(1)(b)(*vi*); MCL 750.520c(1)(b)(*vi*).

- **Third-degree criminal sexual conduct** (penetration) when:
  - the victim is at least age 13 but less than age 16. MCL 750.520d(1)(a).
- **Fourth-degree criminal sexual conduct** (contact) when:
  - the victim is at least age 13 but less than age 16, and the actor is five or more years older than the victim. MCL 750.520e(1)(a).

Note: A person may be charged with and convicted of a criminal sexual conduct offense under MCL 750.520b to MCL 750.520g, even when the victim is the person's legal spouse. MCL 750.520*l*. "However, a person may not be charged or convicted solely because his or her legal spouse is mentally incapable." *Id*.

2. Offenses Requiring Proof That a Victim Has a Mental or Physical Disability

Some provisions of the CSC Act require proof of a victim's incapacity. A victim who has a mental illness or who is intellectually disabled, mentally disabled, mentally incapable, mentally incapacitated, or physically helpless is presumed legally incapable of consent under the CSC Act; accordingly, a consent defense is inapplicable to these offenses. See *People v Khan*, 80 Mich App 605, 619 n 5 (1978). In *People v Davis*, 102 Mich App 403, 408 (1980), a CSC-III case involving the former *mentally defective* element, the Court of Appeals stated as follows:

> "The rationale behind statutes prohibiting sexual relations with mentally defective persons is that such persons are presumed to be incapable of truly consenting to the sexual act. This rationale remains just as cogent in light of the enactment of MCL 750.520d(1)(c)."[6]

Consent may *not* be raised as a defense to the following CSC offenses:

[6] MCL 750.520d(1)(c) prohibits sexual penetration with an individual "[t]he actor knows or has reason to know . . . is mentally incapable, mentally incapacitated, or physically helpless."

- **First-degree criminal sexual conduct** (penetration) and **second-degree criminal sexual conduct** (contact) when:

  - "[t]he actor is aided or abetted by 1 or more other persons[,] and . . . [t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." MCL 750.520b(1)(d)(*i*); MCL 750.520c(1)(d)(*i*).

  - "[t]he actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." MCL 750.520b(1)(g); MCL 750.520c(1)(g).

  - "[t]hat other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and . . . [t]he actor is related to the victim by blood or affinity to the fourth degree . . . [or t]he actor is in a position of authority over the victim and used this authority to coerce the victim to submit." MCL 750.520b(1)(h)(*i*)-(*ii*); MCL 750.520c(1)(h)(*i*)-(*ii*).

- **Third-degree criminal sexual conduct** (penetration) and **fourth-degree criminal sexual conduct** (contact) when:

  - "[t]he actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." MCL 750.520d(1)(c); MCL 750.520e(1)(c).

Note: A person may be charged with and convicted of a criminal sexual conduct offense under MCL 750.520b to MCL 750.520g, even when the victim is the person's legal spouse. MCL 750.520*l*. "However, a person may not be charged or convicted solely because his or her legal spouse is mentally incapable." *Id*.

3. Offense Requiring Proof of Professional Relationship Between Actor and Victim

Consent may *not* be raised as a defense to the following CSC offense:

- **Fourth-degree criminal sexual conduct** (contact) when:

- "[t]he actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is the actor's client or patient and not the actor's spouse." MCL 750.520e(1)(e).

C. Burden of Proof

Once a defendant produces enough evidence to put consent in controversy, the prosecutor bears the burden of disproving consent beyond a reasonable doubt. See *People v Thompson*, 117 Mich App 522, 528 (1982) (kidnapping and CSC-I).

"[T]he presence of consent is not necessarily the factual equivalent of the absence of coercion." *People v Bayer*, 279 Mich App 49, 68 (2008) (victim was a patient of the defendant-psychiatrist), vacated in part on other grounds 482 Mich 1000 (2008).[7] "Rather, it is a determination of the validity of that consent that is the focus of the inquiry." *Bayer* 279 Mich App at 68.

D. Jury Instructions on Consent

When drafting instructions on consent, a trial court must be mindful not to impermissibly shift the burden of proof to the defendant. See *People v Ullah*, 216 Mich App 669, 677-678 (1996). In *Ullah*, the Court of Appeals approved a jury instruction "virtually identical to [M Crim JI 20.27]," which stated that if the jury found that the evidence of consent raised a reasonable doubt concerning whether the complainant consented freely and willingly, it "'must find the defendant not guilty.'" *Ullah*, 216 Mich App at 677-678. The Court explained that the "instruction did not state that defendant had the burden of proving or establishing a reasonable doubt. . . . [T]he instruction given . . . required acquittal if the jury found the evidence relating to consent raised a reasonable doubt concerning whether the complainant consented to the acts." *Id*. at 678.

4.2 Mistake of Fact

A. Offenses Involving Victims With a Mental or Physical Disability

The mistake-of-fact defense applies to CSC offenses that refer to a victim's mental or physical condition if the statutory language

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

requires that the defendant *knows or has reason to know* of the victim's condition. See, e.g., MCL 750.520d(1)(c). A defendant who makes a *reasonable* mistake as to the victim's mental or physical condition may not be criminally liable for his or her conduct. *People v Davis*, 102 Mich App 403, 406-407 (1980) (defendant was highly intoxicated at the time he picked up a woman wandering on the grounds of a state mental institution).[8]

The *Davis* Court discussed the legislative intent behind the *knows or has reason to know* language appearing in MCL 750.520d(1)(c):

> "It is our belief that by including the 'knows or has reason to know' language, the Legislature did not desire to excuse a defendant who is unreasonable in his conclusion that the victim could consent to the sexual penetration. Rather, we believe that the Legislature was desirous of protecting individuals who have sexual relations with a partner who appears mentally sound, only to find out later that this is not the case. A mental illness which renders a person 'mentally defective'[9] within the meaning of MCL 750.520a(c) . . . is not necessarily always apparent to the world at large. . . . We are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to *reasonable* persons." *Davis*, 102 Mich App at 406-407 (emphasis added).

Other CSC crimes involving a victim's mental or physical condition and containing the same *knows or has reason to know* language are:

- **first-** or **second-degree criminal sexual conduct** (sexual penetration or contact with the victim) **aided or abetted by one or more persons**, and *actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless*. MCL 750.520b(1)(d)(*i*) (CSC-I); MCL 750.520c(1)(d)(*i*) (CSC-II).

---

[8] The *Davis* Court discussed the *knows or has reason to know* statutory language in the context of the defendant's claim that MCL 750.520d(1)(c) was a specific-intent crime and that "his intoxication could be a defense to the crime if his drunken state precluded him from knowing or having reason to know that the victim was mentally defective." *Davis*, 102 Mich App at 406. The Court disagreed. "[T]he 'knows or has reason to know' language of [MCL 750.520d(1)(c) does not impose] a specific intent element which must be established in order to sustain a conviction. . . . A person who has reason to know of his partner's mentally defective condition without, in fact, being truly cognizant of its existence has only the general intent to commit the act of sexual penetration, and no additional intent to engage in penetration with one he actually knows is mentally incapacitated." *Davis*, 102 Mich App at 406 (citation omitted).

[9] After *Davis* was decided, the term *mentally defective* was replaced by the term *mentally incapable*. See MCL 750.520d(1)(c).

- **first-** or **second-degree criminal sexual conduct** (sexual penetration or contact with the victim) **causing personal injury to the victim**, and *actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless*. MCL 750.520b(1)(g) (CSC-I); and MCL 750.520c(1)(g) (CSC-II).

- **Third-degree criminal sexual conduct** (sexual penetration with the victim) and *actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless*. MCL 750.520d(1)(c).

- **Fourth-degree criminal sexual conduct** (sexual contact with the victim) and *actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless*. MCL 750.520e(1)(c).

Whether a defendant *knows or has reason to know* that a victim is mentally incapable, mentally incapacitated, or physically helpless is determined by a reasonable person or objective standard, not by a defendant's subjective perception and evaluation of the victim's condition. *People v Baker*, 157 Mich App 613, 614-615 (1986) (defendant was convicted of CSC-I for engaging in sexual intercourse with a mentally impaired woman and claimed that the jury should have applied a subjective standard, not a reasonable person standard). See also *People v Cox*, 268 Mich App 440, 446-447 (2005) (defendant engaged in sexual conduct with a victim who was mentally incapable of consent where the victim's mental condition was "readily noticeable" and defendant had "ample opportunity" to notice the victim's limitations).

B. Offenses Requiring Proof of a Victim's Age[10]

A defendant's reasonable mistake of fact regarding a victim's age is not a defense to a statutory rape offense. *People v Gengels*, 218 Mich 632, 641 (1922). Consequently, the CSC Act's "age" offenses are strict liability crimes. *In re Hildebrant*, 216 Mich App 384, 386 (1996) (a *defendant's* status as a minor did not preclude conviction of CSC-III when the victim was a minor at least age 13 but less than age 16 because "[t]he language of the third-degree criminal sexual conduct statute does not exclude any class of offenders on the basis of age"). See also *In re Tiemann*, 297 Mich App 250, 257 (2012) (rejecting the 15-year-old respondent's contention "that MCL 750.520d violates public policy as applied to consenting minors in the same age class").

[10] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 505 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 464 (citation omitted).

Michigan does not recognize a reasonable-mistake-of-age defense in cases of statutory rape. *People v Cash*, 419 Mich 230, 240 (1984) (defendant was convicted of CSC-III for engaging in sexual intercourse with a 15-year-old girl who, at the time of the offense, told the defendant she was 17). The *Cash* Court noted that the Legislature could have provided for a reasonable-mistake-of-age defense by adding the *knows or has reason to know* language to the CSC Act's age elements, as it did for other elements:

> "Had the Legislature desired to revise the existing law by allowing for a reasonable-mistake-of-age defense, it could have done so, but it did not do so. This is further supported by the fact that under another provision of the same section of the statute, concerning the mentally ill or physically helpless rape victim, the Legislature specifically provided for the defense of a reasonable mistake of fact by adding the language that the actor 'knows or has reason to know' of the victim's condition where the prior statute contained no requirement of intent. The Legislature's failure to include similar language under the section of the statute in question indicates to us the Legislature's intent to adhere to the *Gengels*[11] rule that the actual, and not the apparent, age of the complainant governs in statutory rape offenses." *Cash*, 419 Mich at 241.

4.3 Voluntary Intoxication

This section contains a brief discussion on the defense of voluntary intoxication as it relates to criminal sexual conduct offenses. For a more comprehensive discussion, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

The defense of voluntary intoxication is available only to specific-intent crimes and is explained in MCL 768.37. MCL 768.37 states:

> "(1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.
>
> (2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a

[11] *People v Gengels*, 218 Mich 632 (1922).

preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired."[12]

A. Defense Available

Voluntary intoxication is available as a defense to the following specific-intent criminal sexual conduct offenses:

- Assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1). *People v Nickens*, 470 Mich 622, 631 (2004).
- Assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2). *People v Snell*, 118 Mich App 750, 755 (1982), overruled on other grounds by *People v Grissom*, 492 Mich 296, 320, 320 n 40 (2012).

B. Defense Not Available

Voluntary intoxication is *not* applicable to the following general-intent criminal sexual conduct crimes:

- First-degree criminal sexual conduct, MCL 750.520b. *People v Langworthy*, 416 Mich 630, 645 (1982).
- Second-degree criminal sexual conduct, MCL 750.520c. *People v Brewer*, 101 Mich App 194, 195 (1980).
- Third-degree criminal sexual conduct, MCL 750.520d. *People v Corbiere*, 220 Mich App 260, 266 (1996).
- Fourth-degree criminal sexual conduct, MCL 750.520e. *People v Lasky*, 157 Mich App 265, 272 (1987).

C. Intoxication Alone Not Legal Insanity

Voluntary intoxication alone is not sufficient to support a defendant's claim of legal insanity.[13] *People v Carpenter*, 464 Mich 223, 231 n 5 (2001). MCL 768.21a(2) states:

> "An individual who was under the influence of voluntarily consumed or injected alcohol or controlled

[12] See M Crim JI 7.10, *Person Under the Influence of Alcohol or Controlled Substances*; M Crim JI 7.13, *Insanity at the Time of the Crime*; and M Crim JI 7.14, *Permanent or Temporary Insanity*.

[13] See M Crim JI 7.10, *Person Under the Influence of Alcohol or Controlled Substances*.

> substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances."

4.4 Jury Instructions Addressing Defenses

"After closing arguments are made or waived, the court must orally instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may orally instruct the jury before the parties make closing arguments." MCR 2.513(N)(1).

"Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574 (2000) (self-defense). A trial court must give a defendant's requested instruction on his or her defense theory when the defendant presents "some evidence" to support all elements of an affirmative defense. *People v Lemons*, 454 Mich 234, 248 (1997) (defense of duress). "[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge." *People v Mills*, 450 Mich 61, 81 (1995). See also *People v Hawthorne*, 474 Mich 174, 179, 184-185 (2006).

> "The court shall instruct the jury as to the law applicable to the case . . . . The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29.

Chapter 5: Select Considerations in the Trial Process

5.1 Use of Videoconferencing Technology In the Trial Process[1]

Subject to MCR 2.407 and except as otherwise provided in MCR 6.006, the use of videoconferencing technology is permitted in criminal cases in both district and circuit courts. MCR 6.006(A).

A. In General

"A court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding."[2] MCR 6.006(A)(2). To determine whether to use videoconferencing technology, the court must consider constitutional requirements, as well as the factors in MCR 2.407.[3] MCR 6.006(A)(3).

---

[1] For a comprehensive discussion of the court rules governing the use of videoconferencing technology, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 1*.

[2] "[MCR 6.006] does not supersede a participant's ability to participate by telephonic means under MCR 2.402." MCR 6.006(A)(4).

All proceedings conducted using videoconferencing are subject to the State Court Administrative Office's (SCAO) requirements, standards, and guidelines, and to the criteria in MCR 2.407(C). MCR 2.407(B)(1).[4] The manner and extent of using videoconferencing is also subject to the SCAO standards. *Id*. In keeping with the Court Rules and subject to MCR 2.407(B)(4), "courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings by videoconferencing technology."[5] MCR 2.407(B)(2).

Jurors are to consider a witness's testimony provided through the use of videoconferencing technology the same as they would consider a witness's testimony given in person. M Crim JI 5.16. Specifically, M Crim JI 5.16 instructs jurors to consider witness testimony given through videoconferencing technology "by the same standards as any other witness," and to give it "the same consideration [the juror] would have given it had the witness testified in person." Jurors are further instructed to signal the court immediately if they cannot hear or see the testifying witness. *Id*.

B. Circuit Court Proceedings

In general, a circuit court may use videoconferencing technology to conduct any non-evidentiary or trial proceeding. MCR 6.006(B)(1).

"Notwithstanding any other provisions of these rules, the use of videoconferencing technology shall not be used in bench or jury trials, or any proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court after all parties have had notice and an opportunity to be heard on the use of videoconferencing technology." MCR 6.006(B)(4).

1. Preferred Mode of Conducting Proceedings

For some proceedings, videoconferencing will be the preferred mode of conducting those proceedings. MCR 6.006(B)(2). As used in MCR 6.006(B)(2), *preferred* "means scheduled to be

[3]For a detailed discussion of the factors in MCR 2.407(C) a court must consider when determining whether a case is suited for videoconferencing, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 1*.

[4]In addition, "[t]he use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).

[5]"[MCR 2.407] does not supersede a participant's ability to participate by telephonic means under MCR 2.402." MCR 2.407(B)(3).

conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq*., or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)."[6] MCR 6.006(B)(2).

Videoconferencing technology is preferred for:

> "(a) initial arraignments on the information;
>
> (b) pretrial conferences;
>
> (c) motions pursuant to MCR 2.119; and
>
> (d) pleas." MCR 6.006(B)(2).

2. Presumed Mode of Conducting Proceedings

In all other proceedings—those not identified as *preferred*—it is *presumed* that the parties, witnesses, and other participants will appear in person. MCR 6.006(B)(3).

3. Demand to Appear In Person

Nothing in MCR 6.006 precludes a defendant who has the right to be physically present at a proceeding from demanding to appear in person at the proceeding. MCR 6.006(B)(5).

"If there is a demand to appear in person, or a participant is found to be unable to adequately use the technology, to hear or understand or be heard or understood, the presiding judge and any attorney of record for said participant must appear in person with the participant for said proceeding." MCR 6.006(B)(5).

When a defendant has demanded to appear in person or a participant's ability to participate requires an in-person appearance, "the court must allow other participants to participate using videoconferencing technology," unless the court has determined that the case or proceeding is not suited for videoconferencing. MCR 6.006(B)(5).

[6]For a detailed discussion of the factors in MCR 2.407(C) a court must consider when determining whether a case is suited for videoconferencing, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 1*.

C. District Court Proceedings

1. Preferred Mode of Conducting Proceedings

"The use of videoconferencing technology shall be the preferred mode for conducting arraignments and probable cause conferences for in-custody defendants." MCR 6.006(C)(1). As in proceedings that occur in circuit court, *preferred* "means scheduled to be conducted remotely subject to a request under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by the William Van Regenmorter Crime Victim's Rights Act, MCL 780.751 *et seq.*, or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)."[7] MCR 6.006(C)(1).

2. Presumed Mode of Conducting Proceedings

In all other criminal proceedings—those proceedings not identified as *preferred*—it is *presumed* that the parties, witnesses, and other participants will appear in person. MCR 6.006(C)(2).

3. Videoconferencing Technology Prohibited

"Notwithstanding any other provision of these rules and subject to constitutional rights, the use of videoconferencing technology shall not be used in evidentiary hearings, bench trials or jury trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court." MCR 6.006(C)(3).

4. Preliminary Examinations

Notwithstanding anything in this rule to the contrary, district courts may use videoconferencing technology "to take testimony from any witness in a preliminary examination" as long as the defendant is present in the courtroom or has waived his or her right to be present. MCR 6.006(C)(4).

D. Determining Whether a Case Is Suited For Videoconferencing

Nothing in MCR 2.407 precludes a court from deciding that a proceeding is not suited for videoconferencing. MCR 2.407(B)(5).

[7]For a detailed discussion of the factors in MCR 2.407(C) a court must consider when determining whether a case is suited for videoconferencing, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 1*.

The court has authority to mandate that "any hearing, even a proceeding categorized as presumptively subject to videoconferencing technology, to be conducted in person." *Id*. Whenever a court must determine whether videoconferencing is appropriate for a case or proceeding or whenever the court must rule on a participant's objection to using videoconferencing technology, "the court shall consider the factors in [MCR 2.407(C)]."[8] MCR 2.407(B)(5)(a).

If the court decides to require in-person proceedings in a case having a presumption for using videoconferencing technology, the court must state its decision and its reasoning for the decision on the record or in writing. MCR 2.407(B)(5)(b).

5.2 Nondomestic Sexual Assault Personal Protection Orders (PPOs)[9]

MCL 600.2950a governs nondomestic personal protection orders (PPOs) (domestic relationship PPOs[10] are governed by MCL 600.2950). Nondomestic PPOs that expressly address stalking are governed by MCL 600.2950a(1) and enjoin a person from engaging in stalking behavior, regardless of that person's relationship with the individual being stalked. MCL 600.2950a(2) governs nondomestic PPOs in sexual assault cases. This section is limited to a discussion of nondomestic PPOs involving sexual assault.

A. Initiating a Nondomestic Sexual Assault PPO

1. Petition for a PPO

An individual may petition the court under MCL 600.2950a(2) for a PPO restraining or enjoining another individual from any of the conduct listed in MCL 600.2950a(3). According to MCL 600.2950a(2), the petitioner may start an independent action to obtain a PPO, or the petitioner may join a claim to, or file a

[8]For a detailed discussion of the factors in MCR 2.407(C) a court must consider when determining whether a case is suited for videoconferencing, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 1*.

[9]For information about violations of a personal protection order and a court's contempt powers, see the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 5.

[10]A domestic relationship personal protection order is an order obtained by a petitioner against the petitioner's spouse, former spouse, a person with whom the petitioner has a child in common, an individual with whom the petitioner has had a dating relationship, or an individual residing in or having resided in the same household as the petitioner. MCL 600.2950(1). See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5, for information regarding domestic relationship personal protection orders.

motion in, an action in which the petitioner and the individual to be restrained are parties. MCL 600.2950a(2). However, the methods available for initiating a PPO under MCL 600.2950a conflict with the method of initiating a PPO under MCR 3.703(A). While the statute allows for a PPO to be initiated as part of another action *or* as an independent action, MCR 3.703(A) expressly states that an action for a PPO is an independent action that "may *not* be commenced by filing a motion in an existing case or by joining a claim to an action." (Emphasis added.) If initiating an action by motion as part of an existing action, by joining a claim to an existing action, or by actually beginning an action independent of the existing action, constitute procedural matters, the court rule would govern the initiation of PPO proceedings. See MCR 1.103. This issue has not been addressed by an appellate court.

"A petitioner may omit his or her address of residence from documents filed with the court under [MCL 600.2950a]. If a petitioner omits his or her address of residence, the petitioner shall provide the court a mailing address." MCL 600.2950a(6).

"An individual who knowingly and intentionally makes a false statement to a court in support of his or her petition for a [PPO] is subject to the contempt powers of the court." MCL 600.2950a(24).[11]

2. Hearing on a Petition for a PPO

a. Scheduling

If a petitioner does not request an ex parte order, or the petitioner has requested a hearing after the court refused to grant an ex parte order, the court must schedule a hearing as soon as possible. MCR 3.705(B)(1). However, no hearing need be scheduled if, after interviewing the petitioner, the court determines "that the claims are sufficiently without merit [and] that the action should be dismissed without a hearing[.]" MCR 3.705(B)(1)(a)-(b).

Notice. The petitioner must serve the respondent with notice of the hearing along with the petition as provided in MCR 2.105(A).[12] MCR 3.705(B)(2). Two days' notice of a hearing on a petition for a PPO under

[11] See the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 5, for more information.

[12] MCR 2.105(A) provides the methods of service permitted when serving an individual.

MCL 600.2950a(2) is sufficient. MCR 3.705(B)(2).

b. Record

"The hearing shall be held on the record." MCR 3.705(B)(3). The court may permit videoconferencing technology in accordance with MCR 2.407. MCR 3.705(B)(3).

c. Attending the Hearing

The petitioner is required to attend the hearing, and if the petitioner fails to attend, the court may either adjourn and reschedule the hearing or dismiss the petition. MCR 3.705(B)(4).[13]

If the respondent does not appear at the hearing and the court determines that diligent efforts to serve the respondent were made whether the respondent was served or not, the court may enter the PPO without further notice to the respondent if the court determines that the petitioner is entitled to relief. MCR 3.705(B)(5).

3. Rape-Shield Statute Applies[14]

The rape-shield statute, MCL 750.520j, addresses the admissibility of specific instances of a victim's sexual conduct and opinion or reputation evidence of a victim's sexual conduct in matters arising under MCL 750.520b–MCL 750.520g. MCL 750.520j(1). The rape-shield statute "applies in any hearing on a petition for, a motion to modify or terminate, or an alleged violation of a [PPO] requested or issued under [MCL 600.2950a(2).]" MCL 600.2950a(4). However, the following time requirements apply to the motion and offer of proof required when a respondent proposes to present evidence covered by the rape-shield statute:

> "(a) The written motion and offer of proof must be filed at least 24 hours before a hearing on a petition

[13] But see *HMM v JS*, ___ Mich App ___, ___ (2024), which noted that the Confrontation Clause of the Sixth Amendment to the United States Constitution does not apply to PPO proceedings, which are noncriminal. However, "[d]ue process 'mandates an opportunity for the respondent to present evidence at a hearing to terminate a PPO,' and this includes the opportunity for meaningful cross examination." *Id.* at ___ (citations omitted).

[14] See Section 6.2, for a detailed discussion of the rape-shield statute. See also the Michigan Judicial Institute's *Evidence Benchbook* for a discussion of the rape-shield statute.

> to issue a [PPO] or on an alleged violation of a [PPO].
>
> (b) The written motion and offer of proof must be filed at the same time that a motion to modify or terminate a [PPO] is filed." MCL 600.2950a(4).

Note that the timing of a motion and offer of proof seeking the admission of evidence governed by the rape-shield statute *in PPO cases* differs from the timing set forth in the rape-shield statute for the admission of such evidence. See MCL 750.520j(2).

B. Issuing a Nondomestic Sexual Assault PPO[15]

1. Court's Decision on a Petition for a Nondomestic Sexual Assault PPO

In a PPO proceeding under MCL 600.2950a, the court must immediately state in writing the specific reasons for issuing or denying a PPO. MCL 600.2950a(7); MCR 3.705(B)(6). If the court's decision on a petition for a PPO follows a hearing, the court must also immediately state on the record the specific reasons for issuing or refusing to issue a PPO. MCL 600.2950a(7); MCR 3.705(B)(6).

If a nondomestic PPO is issued, the PPO must state its expiration date clearly, and the date must appear on the face of the order. MCL 600.2950a(11)(d); MCR 3.706(A)(4).

2. PPO *Must* Be Issued

The family division of circuit court must issue a PPO against a respondent "if the court determines that the respondent has been convicted of a sexual assault of the petitioner or that the respondent was convicted of furnishing obscene material to the petitioner under . . . MCL 750.142, or a substantially similar law of the United States, another state, or a foreign country or tribal or military law." MCL 600.2950a(2)(a).

3. PPO *May* Be Issued

The court may issue a PPO "if the petitioner has been subjected to, threatened with, or placed in reasonable apprehension of sexual assault by the individual to be enjoined." MCL

[15] Note that the Juvenile Code governs PPOs issued against minors. MCL 600.2950a(28). See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 13, for information about minor PPOs.

600.2950a(2)(b). The court must not issue a PPO under MCL 600.2950a(2)(b) "unless the petition alleges facts that demonstrate that the respondent has perpetrated or threatened sexual assault against the petitioner." *Id*. "Evidence that a respondent has furnished obscene material to a minor petitioner is evidence that the respondent has threatened sexual assault against the petitioner." *Id*. The court may issue a PPO under MCL 600.2950a(2)(b) without regard to whether the respondent was charged with or convicted of sexual assault or of violating MCL 750.142, or a substantially similar federal, state, foreign, tribal, or military law. MCL 600.2950a(2)(b).

4. PPO *Must Not* Be Issued

A court must not issue a nondomestic sexual assault PPO under MCL 600.2950a if:

- the respondent is the petitioner's unemancipated minor child. MCL 600.2950a(27)(a).
- the petitioner is the respondent's unemancipated minor child. MCL 600.2950a(27)(b).
- the respondent is a minor child under the age of 10. MCL 600.2950a(27)(c).
- the petitioner is a prisoner. MCL 600.2950a(30). If a court erroneously issues a PPO to a petitioner who is a prisoner, the court must "rescind the [PPO] upon notification and verification that the petitioner is a prisoner." *Id*.

Additionally, "[a] court shall not issue a mutual personal protection order." MCL 600.2950a(8). See also MCR 3.706(B). "Correlative separate personal protection orders are prohibited unless both parties have properly petitioned the court under [MCL 600.2950a(1) or MCL 600.2950a(2)]." MCL 600.2950a(8).

C. Conduct Subject to a Nondomestic Sexual Assault PPO

"The court may restrain or enjoin an individual against whom a [nondomestic sexual assault PPO] is sought under [MCL 600.2950a(2)] from 1 or more of the following:

(a) Entering onto premises.

(b) Threatening to sexually assault, kill, or physically injure petitioner or a named individual.

(c) Purchasing or possessing a firearm.

(d) Interfering with the petitioner's efforts to remove the petitioner's children or personal property from premises that are solely owned or leased by the individual to be restrained or enjoined.

(e) Interfering with the petitioner at the petitioner's place of employment or education or engaging in conduct that impairs the petitioner's employment or educational relationship or environment.

(f) Following or appearing within the sight of the petitioner.

(g) Approaching or confronting the petitioner in a public place or on private property.

(h) Appearing at the petitioner's workplace or residence.

(i) Entering onto or remaining on property owned, leased, or occupied by the petitioner.

(j) Contacting the petitioner by telephone.

(k) If the petitioner is a minor who is enrolled in a public or nonpublic school that operates any of grades K to 12, attending school in the same building as the petitioner.

(*l*) Sending mail or electronic communications to the petitioner.

(m) Placing an object on, or delivering an object to, property owned, leased, or occupied by the petitioner.

(n) Engaging in conduct that is prohibited under . . . MCL 750.411s [electronic communication].

(o) Any other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence or sexual assault." MCL 600.2950a(3).

D. Constitutionality of PPOs

"MCL 600.2950a provides sufficient procedural safeguards to satisfy due process." *IME v DBS*, 306 Mich App 426, 437 (2014) (recognizing the substantially similar safeguards in both MCL 600.2950 and MCL 600.2950a), citing *Kampf v Kampf*, 237 Mich App 377, 383-386 (1999). The *Kampf* Court stated that "[t]here is no

procedural due process defect [under MCL 600.2950] in obtaining an emergency order of protection without notice to a respondent when the petition for the emergency protection order is supported by affidavits that demonstrate exigent circumstances justifying entry of an emergency order without prior notice, and where there are appropriate provisions for notice and an opportunity to be heard after the order is issued." *Kampf*, 237 Mich App at 383-384 (citation omitted). Because the procedural safeguards in MCL 600.2950a "are substantially similar to the procedural safeguards provided under MCL 600.2950," the procedural safeguards set out in MCL 600.2950a satisfy due process. *IME*, 306 Mich App at 437. Those safeguards are found in the following subsections:

- MCL 600.2950a(1)-(2), issuing a PPO.
- MCL 600.2950a(13), filing a motion to modify or rescind an ex parte PPO.
- MCL 600.2950a(14), hearing on a motion to modify or rescind an ex parte PPO.
- MCL 600.2950a(18), giving notice to respondent of the PPO.
- MCL 600.2950a(22), giving the respondent actual notice of the PPO and an opportunity to comply with the PPO before arresting the respondent whenever a law enforcement officer responding to a call that a PPO was violated discovers that the respondent had no notice of the PPO.

"When issuing a PPO under MCL 600.2950a(2)(a), a trial court may restrain or enjoin a variety of conduct." *IME*, 306 Mich App at 440. In *IME*, the respondent argued that "[MCL 600.2950a] impermissibly allows a court to issue a PPO that—in theory—could interfere with a variety of fundamental rights[.]" *IME*, 306 Mich App at 439 (the respondent argued that the PPO issued by the court denied him his constitutional right to bear arms). The Court of Appeals concluded that MCL 600.2950a(2)(a) "does not on its face impair a fundamental right," *IME*, 306 Mich App at 441, and that several reasons exist to support a petitioner's right to the issuance of a PPO enjoining from specific conduct the respondent who sexually assaulted the petitioner. *Id*. at 442-443. "The Legislature's decision to allow the victims of sexual assault to seek [PPOs] against the persons convicted of assaulting them is reasonably related to the legitimate government purpose of protecting the victims of sexual assault from further victimization." *Id*. at 443. In addition, "trial courts have substantial discretion to fashion a PPO that balances the petitioner's need for appropriate protection and the respondent's liberty interests." *Id*. "Th[e] flexibility [involved in issuing a PPO]

advances the Legislature's interest in protecting the victims of sexual assault while ensuring that the perpetrators' liberty interests are not arbitrarily or unreasonably restrained." *Id.* at 444.

"PPO proceedings are civil in nature"; however, "because of the potential criminal consequences for a respondent's violation of a PPO, and the liberty interests at stake, . . . plain-error review . . . applies to unpreserved issues in PPO proceedings." *HMM v JS*, ___ Mich App ___, ___ (2024).

E. Notice to Respondent of a PPO

"A [PPO] issued under [MCL 600.2950a] must be served personally, by registered or certified mail, return receipt requested, delivery restricted to the addressee at the last known address or addresses of the individual restrained or enjoined or by any other method allowed by the Michigan court rules." MCL 600.2950a(18). See also MCR 3.706(D).

Failure to serve a respondent with a PPO "does not affect [the PPO's] validity or effectiveness." MCR 3.706(D). See also MCL 600.2950a(18) (a PPO's immediate effectiveness or immediate enforcement is not affected by whether the respondent has been served with the PPO).

A respondent who has not been served *may*, or in some circumstances, *must* be served with a true copy or given oral notice of the PPO by a law enforcement officer. See MCL 600.2950a(18) (*allowing* an officer, at any time, to either serve an actual copy or "advise the individual" of the PPO's existence, the conduct enjoined, the penalties for violating the PPO, and where the individual may obtain a copy); MCL 600.2950a(22) (*requiring* an officer who discovers, when responding to a call for a PPO violation, that the respondent had no notice of the PPO, to either serve an actual copy or "advise the individual" of the PPO's existence, the conduct enjoined, the penalties for violating the PPO, and where the individual may obtain a copy); MCR 3.706(E). "A proof of service or proof of oral notice must be filed with the clerk of the court issuing the [PPO]." MCL 600.2950a(18). See also MCL 600.2950a(22); MCR 3.706(E).

In cases where a police officer responds to a call that a PPO was violated and discovers that the respondent had no notice of the PPO against him or her, the officer must give the respondent the opportunity to comply with the PPO before being arrested for violating it. MCL 600.2950a(22).

F. Violation and Enforcement of a PPO

A PPO issued under MCL 600.2950a is effective and immediately enforceable anywhere in Michigan as soon as the order is signed by a judge. MCL 600.2950a(9).[16] After a PPO has been served on the respondent, the PPO is also enforceable by another state, an Indian tribe, or a territory of the United States. *Id*.

At a respondent's first appearance in circuit court for the enforcement of a PPO issued under MCL 600.2950a, the court must advise the respondent as provided in MCR 3.708(D)(1)-(6).

Specifically, PPOs are enforceable under MCL 600.2950(23), MCL 600.2950a(23),[17] MCL 764.15b, and MCL 600.1701. Under MCL 600.2950a, an individual 17 years of age or older who refuses or fails to comply with the conditions of a PPO issued against him or her is subject to the criminal contempt powers of the court.[18] MCL 600.2950a(23). "The criminal penalty under [MCL 600.2950a] may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct." MCL 600.2950a(23).

A PPO issued under MCL 600.2950a may also be enforced under MCL 764.15b. MCL 600.2950a(25). MCL 764.15b(1)(a)-(c) authorize a peace officer to arrest an individual, without a warrant, when the officer has reasonable cause to believe, or when the officer has positive information that another peace officer has reasonable cause to believe, all of the following:

- a PPO was issued under MCL 600.2950a or there is a valid foreign protection order,

---

[16] See also MCL 600.2950a(21), which states: "Subject to [MCL 600.2950a(22), a PPO] is immediately enforceable anywhere in this state by any law enforcement agency that has received a true copy of the order, is shown a copy of it, or has verified its existence on the L.E.I.N." MCL 600.2950a(22) applies when law enforcement officers respond to a call alleging that an individual has violated a PPO and the individual has not yet been served with the PPO. In those cases, before arresting the individual, law enforcement officers must give the individual notice of the PPO and an opportunity to comply with the PPO. MCL 600.2950a(22).

[17] MCL 600.2950a(23) provides that a respondent under the age of 17 who violates a PPO is subject to disposition under MCL 712A.18. See also MCL 764.15b(1)(c)(*ii*), which indicates that individuals under *age 18* are subject to the dispositional alternatives in MCL 712A.18. See 2019 PA 112, effective October 1, 2021.

[18] An individual over age 17 who is found in contempt of court for violating a PPO "must be imprisoned for not more than 93 days and may be fined not more than $500.00." MCL 600.2950a(23). However, note that effective October 1, 2021, MCL 764.15b(1)(c)(*i*) was amended to raise the age of individuals subject to the criminal contempt penalties described in MCL 600.2950a(23) from age 17 or older to age 18 or older. See 2019 PA 112. For more information about the court's contempt power, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

- the individual against whom the PPO was issued violated or is violating the PPO,[19] and

- if the PPO was issued under MCL 600.2950a, the PPO states on its face that the individual who violates the terms of the PPO is subject to immediate arrest.

An individual 18 years of age or older who violates a PPO issued under MCL 600.2950a is subject to criminal contempt of court and if found guilty of criminal contempt, he or she is subject to not more than 93 days of imprisonment and a fine of no more than $500. MCL 764.15b(1)(c)(*i*).

G. Motion to Modify or Terminate a PPO[20]

When the respondent is a person licensed to carry a concealed weapon and who must carry it as a condition of their employment or a law enforcement officer specified in MCL 600.2950a(5) who carries a firearm during the normal course of their employment, the court must schedule a motion to modify or terminate a PPO within five days of when the motion was filed. MCR 3.707(A)(2).

H. Ex Parte PPOs

1. Petition for an Ex Parte PPO

A petition requesting an ex parte PPO "must set forth specific facts showing that immediate and irreparable injury, loss, or damage will result to the petitioner from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued." MCR 3.703(G).

2. Time for Ruling on an Ex Parte PPO

"The court must rule on a request for an ex parte order within one business day of the filing date of the petition." MCR 3.705(A)(1).

3. Granting an Ex Parte PPO

The court must grant an ex parte order "[i]f it clearly appears from specific facts shown by verified complaint, written petition, or affidavit that the petitioner is entitled to relief [and]

[19]The specific conduct that qualifies as a violation of the PPO is listed in MCL 764.15b(1)(b)(*i*)-(*ix*).

[20]See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5, for a comprehensive discussion of motions to modify or terminate a PPO.

if immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or . . . notice will itself precipitate adverse action before a [PPO] can be issued." MCR 3.705(A)(2).[21] See also MCR 3.703(G) and MCL 600.2950a(12), which contain substantially similar language. In a proceeding under MCL 600.2950a, "the court must state in writing the specific reasons for issuance of the [ex parte PPO]." MCR 3.705(A)(2).

"A petitioner bears the burden of proof when seeking to obtain an ex parte PPO." *HMM v JS*, ___ Mich App ___, ___ (2024) (cleaned up). "In Michigan, there are two aspects of the 'burden of proof'—the burden of persuasion and the burden of going forward with the evidence." *Id*. at ___ (quotation marks and citation omitted). "Although the latter burden might shift throughout a proceeding as evidentiary presumptions rise and fall, the former burden *always* remains with the petitioner." *Id*. at ___ (citations omitted).

4. Refusing to Grant Ex Parte PPO

If the court refuses to grant the petition, the court must state in writing its reasons for refusing to grant an ex parte PPO. MCR 3.705(A)(5). Additionally, if the court denies the petition for an ex parte PPO, the court must advise the petitioner of his or her right to request a hearing as described in MCR 3.705(B) within 21 days of the order's entry. MCR 3.705(A)(5). If no hearing is requested, the ex parte PPO becomes final. *Id*.

5. Record Made of Evidence Supporting Ex Parte PPO

"A permanent record or memorandum must be made of any nonwritten evidence, argument or other representations made in support of issuance of an ex parte order." MCR 3.705(A)(2). See, e.g., *HMM v JS*, ___ Mich App ___, ___ (2024), where the trial court's order denying respondent's motion to terminate the ex parte PPO against him was vacated and the matter was remanded because "the procedure employed at the hearing did not permit the circuit court to consider the evidence properly, nor did the circuit court require petitioner to establish that she had been sexually assaulted or was in

[21] See, e.g., *HMM v JS*, ___ Mich App ___, ___ (2024), quoting MCR 3.705(A)(2): "[I]f the petitioner establishes through verified complaint, written petition, or affidavit that she is entitled to the relief sought, the court must enter the PPO on an ex parte basis, i.e., without notice to the respondent, 'if immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice itself will precipitate adverse action before a [PPO] can be issued.'" (Alteration in original.)

reasonable apprehension of sexual assault." The trial court allowed petitioner to testify off-camera and significantly limited respondent's ability to cross-examine her about the sexual assault allegation in her petition. *Id*. at ___. The Court found that the record on appeal was inadequate to determine if plaintiff met her burden of proof to obtain an ex parte PPO under MCL 600.2950a(2)(b). *HMM*, ___ Mich App at ___.

6. Duration of Ex Parte PPO

An ex parte PPO is valid for not less than 182 days. MCL 600.2950a(13); MCR 3.705(A)(3). The order must state the date it expires. MCR 3.705(A)(3).

7. Service of an Ex Parte PPO

"If an ex parte order is entered, the petitioner shall serve the petition and order as provided in MCR 3.706(D).[22] However, failure to make service does not affect the order's validity or effectiveness." MCR 3.705(A)(4).

8. Motion to Modify or Rescind an Ex Parte PPO

"The individual restrained or enjoined may file a motion to modify or rescind the [PPO] and request a hearing under the Michigan court rules. A motion to modify or rescind the [PPO] must be filed within 14 days after the order is served or after the individual restrained or enjoined receives actual notice of the [PPO] unless good cause is shown for filing the motion after 14 days have elapsed." MCL 600.2950a(13).[23] See also MCR 3.707(A)(1)(b).

A hearing on a respondent's motion to modify or rescind a PPO must be scheduled and held within 14 days after the motion is filed. MCL 600.2950a(14); MCR 3.707(A)(2). If the respondent is a person described in MCL 600.2950a(5) (listing individuals who are authorized to carry a weapon and must do so as condition of their employment or in the normal course of their employment), and the PPO prohibits the respondent from purchasing or possessing a firearm, the court must schedule a hearing on the respondent's motion to modify or rescind the PPO within five days after the motion is filed. MCL 600.2950a(14); MCR 3.707(A)(2).

---

[22] MCR 3.706(D) prescribes that service of an ex parte PPO should occur as provided in MCR 2.105(A).

[23] See also MCR 3.707(A)(1)(b), which contains similar language. See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 5, for more information about procedural and notice issues involving PPOs.

"[O]n a motion to terminate or modify [an] ex parte PPO, the burden of proof remains with a petitioner who seeks to establish a justification for the continuance of a PPO." *HMM v JS*, ___ Mich App ___, ___ (2024) (cleaned up).[24] It was an abuse of discretion for the circuit court to shift the burden of proof to respondent. *Id*. at ___.

"Due-process protections apply to proceedings on a motion to terminate a PPO." *Id*. at ___. "Due process mandates an opportunity for the respondent to present evidence at a hearing to terminate a PPO, and this includes the opportunity for meaningful cross examination." *Id*. at ___(quotation marks and citations omitted). "[T]he circuit court abused its discretion by prohibiting respondent's counsel from fully cross examining petitioner," which, along with other plain errors, "affected respondent's substantial rights, specifically his liberty interests." *Id*. at ___.

5.3 Pretrial Release[25]

Detailed information about pretrial release—the constitutional right to pretrial release and exceptions to that right, types of pretrial release, conditional release, money bail, bond and interim bond, violating release conditions, denial of pretrial release, custody decisions, and appealing a court's disposition of a defendant's pretrial release appear in the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 8.

A. Conditions of Release

1. Electronic Monitoring Device Requirements

Under MCL 765.6b(6), a court may order a defendant charged with a crime involving domestic violence, or any other assaultive crime (includes specific CSC offenses), to wear an electronic monitoring device as a condition of release.[26] MCL 765.6b(6).

[24]See Section 5.2(H)(3) for more information on the burden of proof in PPO proceedings.

[25]See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 3, for a detailed discussion of pretrial release. **Note:** The discussion in this chapter applies to adult defendants. For information about the pretrial release of juvenile offenders, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 6.

[26]See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 3, for more information about electronic monitoring devices.

2. Prohibitions Involving Firearms

A pretrial release order or amended order issued under MCL 765.6b(1) may prohibit a defendant from purchasing or possessing a firearm. MCL 765.6b(3).[27] If the defendant is ordered to carry[28] or wear an electronic monitoring device as provided in MCL 765.6b(6), the court *must* include a condition in the defendant's pretrial release order prohibiting him or her from purchasing or possessing a firearm. MCL 765.6b(3).

> **Note:** Federal law also prohibits a defendant *convicted* in any court of a crime punishable by more than one year, including misdemeanor crimes involving domestic violence, from possessing firearms. 18 USC 922(g).[29]

B. Denial of Pretrial Release

The court may deny pretrial release to a defendant charged with CSC-I "if the court finds that proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person." MCR 6.106(B)(1)(b). The court may also deny pretrial release to a defendant charged with commission of a violent felony and:

> "[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or
>
> [B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or

---

[27] See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 6, for more information about firearm restrictions.

[28] MCL 765.6b(3) contains the language "carry or wear" when it refers to the court's obligation to order a defendant to not purchase or possess a firearm if the court has also ordered the defendant to *carry* or *wear* an electronic monitoring device. A 2013 amendment of MCL 765.6b removed the word *carry* from MCL 765.6b(6) but did not remove the word from MCL 765.6b(3). See 2013 PA 54.

[29] 18 USC 922 has been adjudged unconstitutional as applied in a number of federal district courts and circuit courts of appeal. "An as-applied challenge 'does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.'" *United States v Mitchell*, 652 F3d 387, 405 (CA 3, 2011), quoting *United States v Marcavage*, 609 F3d 264, 273 (CA 3, 2010). For cases in which 18 USC 922(g)(1) was held unconstitutional as applied, see e.g., *Miller v Sessions*, 356 F Supp 3d 472 (ED Pa, 2019) (even though plaintiff's offense qualified for the prohibition in 18 USC 922(g)(1), the statute was unconstitutional as applied because plaintiff's offense was not a serious crime, and the statutory prohibition could not withstand intermediate scrutiny). Though persuasive, Michigan state courts "are not . . . bound by the decisions of the lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

substantially similar laws of the United States or another state arising out of separate incidents, if the court finds that proof of the defendant's guilt is evident or the presumption great." MCR 6.106(B)(1)(a)(*ii*).

1. Defendant's Right to a Speedy Trial[30]

Defendants have a constitutional and statutory right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; see also MCR 6.004(A). A defendant charged with CSC-I or with a violent felony under the conditions stated in MCR 6.106(B)(1)(a)(*ii*), who is denied pretrial release as provided in MCR 6.106(B)(1), must be afforded a trial within 90 days after the date of the court's order denying pretrial release, excluding delays attributable to the defense, unless the court immediately schedules a hearing and sets an amount of bail. See MCR 6.106(B)(3).

2. Victim's Right to a Speedy Trial[31]

In addition to a criminal *defendant's* right to a speedy trial, certain crime *victims* have a right to a speedy trial. Const 1963, art 1, § 24. Victims entitled to a speedy trial include victims of child abuse, which includes sexual abuse or any other assaultive crime, victims of CSC-I, CSC-II, or CSC-III, and victims of an assault with the intent to commit criminal sexual conduct involving penetration or the intent to commit CSC-II. MCL 780.759(1).

5.4 Access to Court Proceedings[32]

A. Applicable Court Rule

Generally, and except as otherwise provided by statute or court rule, a court may not limit the public's access to court proceedings. MCR 8.116(D)(1). However, the public's right to access may be denied or limited when all of the following conditions are satisfied:

> "(a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte*

[30]For more information about a defendant's right to a speedy trial, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9.

[31]For more information about a victim's right to a speedy trial, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 6.

[32]For more information, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 3.

> has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;
>
> (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> (c) the court states on the record the specific reasons for the decision to limit access to the proceeding." MCR 8.116(D)(1)(a)-(c).

Any individual may file a motion to have an order limiting access to a court proceeding set aside. MCR 8.116(D)(2). In addition, any individual may file an objection to the court's entry of a limiting order. *Id*. Disposition of a motion or objection challenging the court's decision to limit access to a court proceeding is governed by MCR 2.119 (court rule governing motion practice). MCR 8.116(D)(2). "If the court denies the motion or objection, the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action." *Id*.

> **Note:** Whenever a court limits the public's access to a proceeding that would otherwise be open to the public, the court must provide the State Court Administrative Office with a copy of the order. MCR 8.116(D)(3).

B. Preliminary Examinations

The magistrate may close the courtroom to the general public during the preliminary examination of a person charged with criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency, or any other offense involving sexual misconduct, if all of the following conditions are met:

> "(a) The magistrate determines that the need for protection of a victim, a witness, or the defendant outweighs the public's right of access to the examination.
>
> (b) The denial of access to the examination is narrowly tailored to accommodate the interest being protected.
>
> (c) The magistrate states on the record the specific reasons for his or her decision to close the examination to members of the general public." MCL 766.9(1).

To determine whether excluding members of the general public from a preliminary examination is necessary to protect a victim or a witness, the magistrate must consider all of the following:

> "(a) The psychological condition of the victim or witness.
>
> (b) The nature of the offense charged against the defendant.
>
> (c) The desire of the victim or witness to have the examination closed to the public." MCL 766.9(2).

The magistrate may close a preliminary examination to members of the public to protect a party's right to a fair trial only if both of the following apply:

> "(a) There is a substantial probability that the party's right to a fair trial will be prejudiced by publicity that closure would prevent.
>
> (b) Reasonable alternatives to closure cannot adequately protect the party's right to a fair trial." MCL 766.9(3).

"A balancing of rights and interests must be struck, but the legislative directive to the courts reflecting the public policy of this state is that any denial of access must be narrowly tailored to accommodate the interests sought to be protected to avoid the further abridgment of the right of access by appellant or those similarly situated." *In re Closure of Preliminary Examination*, 200 Mich App 566, 570-571 (1993) (reversing the court's closure of the courtroom during the entire preliminary examination when "the bulk of the testimony presented at the examination did not concern the sensitive subject for which the court sought to protect the victim").

In *In re Closure*, 200 Mich App at 569-570, "[t]he assault against the victim was brutal, and the sexual attack heinous," and the trial court did not abuse its discretion in concluding that closure of the courtroom was appropriate to adequately protect the victim's rights. However, the trial court failed to "narrowly tailor" its decision when it conducted a preliminary examination in its entirety in a closed courtroom. *Id*. at 568. Rather, the Court of Appeals held that "no need existed to have excluded the public from opening statements, testimony from witnesses other than the victim, that portion of the victim's testimony not related to more personal aspects, closing arguments, and the court's ruling." *Id*. at 570.

C. Trial

Defendants are entitled to a public trial. US Const, Am VI; Const 1963, art 1, § 20; MCL 600.1420; MCR 8.116(D)(1). Additionally, under the First and Fourteenth Amendments, the public and the press have a right to access court proceedings. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580 (1980). The right of public access includes access to jury selection, preliminary hearings, and the trial. *Presley v Georgia*, 558 US 209, 213 (2010); *Press-Enterprise Co v Superior Court*, 478 US 1, 10 (1986); *Waller v Georgia*, 467 US 39, 46 (1984). However, the right of public access is not absolute, and a court may limit access when necessary following the proper procedure.[33] See e.g., MCR 8.116(D)(1); *Presley*, 558 US 209; *Waller*, 467 US 39, *Richmond Newspapers, Inc*, 448 US at 580; *People v Vaughn*, 491 Mich 642 (2012); *People v Russell*, 297 Mich App 707 (2012); *People v Kline*, 197 Mich App 165 (1992). See the Michigan Judicial Institute's *Limiting Public Access to Criminal Proceedings Benchcard* for more information.

D. Film or Electronic Media Coverage

Film or electronic media coverage is permitted in all court proceedings when requested. Administrative Order (AO) No. 1989 - 1, 432 Mich cxii (1989). Media representatives must submit a written request to the clerk of the court in which the coverage is requested not less than three business days before the proceeding is scheduled to begin. AO 1989-1, Part 2(a)(i). The parties must be notified that a request for film or electronic media coverage has been made. *Id*.

Under AO 1989-1, Part 2(a)(ii), "[a] judge may terminate, suspend, limit, or exclude film or electronic media coverage at any time upon a finding, made and articulated on the record in the exercise of discretion" if

- the fair administration of justice requires such action, or
- rules established under AO 1989-1 or additional rules imposed by the judge have been violated.

"The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses." AO 1989-1, Part 2(a)(ii). In addition, media coverage of jurors and jury selection is prohibited. AO 1989-1, at Part 2(a)(iii).

[33]For information about limiting access to court proceedings, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 3.

"A trial judge's decision to terminate, suspend, limit, or exclude film or electronic media coverage is not appealable, by right or by leave." AO 1989-1, Part 2(a)(iv).

Detailed requirements concerning the type of equipment permitted, sound and light criteria, and the equipment's placement in the courtroom are found in AO 1989-1, Parts 4-6.

The permission for film or electronic coverage of court proceedings granted by AO 1989-1 does not alter a trial court chief judge's or a trial judge's authority "to control proceedings in their courtrooms, and to ensure decorum and prevent distractions and to ensure the fair administration of justice in the pending cause." AO 1989-1, Part 3.

5.5 Protections for Victims and Witnesses[34]

A. Special Accommodations for Testifying Victims and Witnesses

Special accommodations, including the use of support persons, courtroom support dogs, anatomically correct mannequins or dolls, and witness screens, may be made for victims or witnesses who may be especially vulnerable when testifying at trial or at another court proceeding. See MCL 600.2163a.

MCL 600.2163a has limited application in cases involving criminal sexual conduct. MCL 600.2163a applies to prosecutions and proceedings involving, among other offenses not relevant to this discussion, CSC-I, CSC-II, CSC-III, CSC-IV, and assault with intent to commit a CSC offense involving penetration or CSC-II when any of those offenses involves:

- a witness (alleged victim) who is a person under the age of 16, or
- a witness (alleged victim) who is over age 16 and has a developmental disability. MCL 600.2163a(1)(g)(*i*)-(*ii*); MCL 600.2163a(2)(a).

[34]For more information about protecting witnesses and victims from embarrassment, intimidation, and potentially violent encounters inside or outside of the courtroom, and about the procedures involved in obtaining the supports authorized by MCL 600.2163a (e.g., dolls or mannequins, support persons, and courtroom support dogs), see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 6. For information about these matters involving juvenile offenders, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 7.

MCL 600.2163a also applies to prosecutions and proceedings involving, among other offenses, an assaultive crime under MCL 770.9a when the crime involves a witness (an alleged victim) who qualifies as a vulnerable adult. MCL 600.2163a(1)(g)(*iii*); MCL 600.2163a(2)(b).

Accommodations permitted under MCL 600.2163a include:

- "[i]f pertinent, . . . dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination." MCL 600.2163a(3).
- "a support person [to] sit with, accompany, or be in close proximity to [a] witness during his or her testimony." MCL 600.2163a(4).
- "a courtroom support dog and handler [to] sit with, or be in close proximity to, [a] witness during his or her testimony." MCL 600.2163a(4).
- the ability to provide a videorecorded statement for certain proceedings. MCL 600.2163a(8).

B. Pictorial Evidence

There are limitations on duplicating evidence in cases of sexually abusive crimes involving children; specific requirements apply to the defendant's use of any pictorial evidence of a child engaging in a listed sexual act. See MCL 750.145c(11). A court must deny a defendant's request to reproduce "any photographic or other pictorial evidence of a child engaging in a listed sexual act if the prosecuting attorney makes that evidence reasonably available to the defendant. *Id*.

5.6 Testing and Counseling for Sexually Transmitted Infections

There are two situations in which a court has the authority to order testing and counseling for sexually transmitted infection, hepatitis B or C infection, human immunodeficiency virus (HIV) infection, and acquired immunodeficiency syndrome (AIDS): (1) after a defendant has been *arrested and charged* with a sex offense listed in MCL 333.5129(1) or MCL 333.5129(2); and (2) after a defendant has been *bound over to or indicted in* circuit court for a sex offense listed in MCL 333.5129(3).

A. Defendants Arrested and Charged

1. Discretionary Examination and Testing

Under MCL 333.5129(1), the court may order a defendant who has been arrested and charged with a violation of any of the following prostitution offenses[35] to be examined or tested for sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS:[36]

- Soliciting prostitution, MCL 750.448.
- Receiving a person into a place of prostitution, MCL 750.449.
- Engaging services for the purpose of prostitution, MCL 750.449a.
- Aiding and abetting certain prostitution offenses, MCL 750.450.
- Keeping a house for the purpose of prostitution, MCL 750.452.
- Procuring a person for a house of prostitution, MCL 750.455.
- A local ordinance prohibiting prostitution or engaging or offering to engage the services of a prostitute.

If the examination or test results indicate the presence of sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, or AIDS, the examination or test results must be reported to the defendant, the department of health and human services, and the appropriate local health department for partner notification, as required under MCL 333.5114 and MCL 333.5114a. MCL 333.5129(1).

2. Mandatory Distribution of Information About Sexually Transmitted Infection and HIV Infection and Recommendation of Counseling

If an individual is arrested and charged with a violation of any of the sex offenses in MCL 333.5129(2), the judge or magistrate responsible for setting the individual's conditions of release

[35] See Sections 3.6, 3.7, and 3.8 for more information about prostitution offenses.

[36] See SCAO Form MC 234, *Order For Counseling and Testing For Disease/Infection*.

pending trial must distribute to the individual the same information about sexually transmitted infection and HIV infection that county clerks are required to distribute to marriage license applicants under MCL 333.5119(1).[37] The relevant offenses listed in MCL 333.5129(2) are:[38]

- Accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Soliciting prostitution, MCL 750.448.
- Receiving a person into a place of prostitution, MCL 750.449.
- Engaging services for the purpose of prostitution, MCL 750.449a.
- Aiding and abetting certain prostitution offenses, MCL 750.450.
- Keeping a house for the purpose of prostitution, MCL 750.452.
- Procuring a person for a house of prostitution, MCL 750.455.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- A local ordinance prohibiting prostitution, solicitation, or gross indecency.[39]

[37] No statutory provision requires distribution of such information to a victim of any of the offenses listed in MCL 333.5129(2).

[38] See Chapters 2 and 3 for detailed information about the crimes listed in MCL 333.5129(2).

The information required to be distributed by county clerks under MCL 333.5119(1), and thus by a judge or magistrate under MCL 333.5129(2), includes written educational materials prepared or approved by the department of health and human services on topics related to prenatal care, the transmission and prevention of sexually transmitted infection, and HIV infection. MCL 333.5119(1). This information must include a list of locations where HIV counseling and testing services funded by the department of health and human services are available. *Id*.

Also, the judge or magistrate "shall *recommend* that the [defendant] obtain additional information and counseling at a local health department testing and counseling center regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and [AIDS]." MCL 333.5129(2) (emphasis added). A defendant's participation in counseling under MCL 333.5129(2) is voluntary. *Id*.

B. Defendants Bound Over to Circuit Court

1. Mandatory Examination and Testing

Under MCL 333.5129(3), the district court must order a defendant who is bound over to circuit court for violating any of the offenses set out in MCL 333.5129(3) to be examined or tested for sexually transmitted infection, hepatitis B infection, hepatitis C infection, and for the presence of HIV or HIV antibodies, if there is reason to believe that the violation involved sexual penetration or exposure to a defendant's body fluids.[40] "The circuit court shall order the examination or testing if the defendant is brought before it by way of indictment for any of the violations described in [MCL 333.5129(3)]."*Id.*

The offenses enumerated in MCL 333.5129(3) are:[41]

[39] Information regarding HIV infection must also be distributed to a person charged with or convicted of intravenously using a controlled substance under MCL 333.7404, or a corresponding local ordinance. MCL 333.5129(2). The court must also recommend that the individual obtain additional information and counseling about hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. *Id*. The court is not required to distribute information about, order testing or examination for, or recommend counseling regarding sexually transmitted infection to individuals charged with or convicted of intravenously using a controlled substance. MCL 333.5129(9).

[40] SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

[41] See Chapters 2 and 3 for detailed information about these offenses.

- Accosting, enticing, or soliciting a minor for immoral purposes or encouraging a minor to commit an immoral act, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between males and females, MCL 750.338b.
- Aiding and abetting certain prostitution offenses, MCL 750.450.
- Keeping a house for the purpose of prostitution, MCL 750.452.
- Procuring a person for a house of prostitution, MCL 750.455.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

Additionally, at the victim's request, the circuit court must order a defendant who is bound over to or brought before it for CSC-I, CSC-II, CSC-III, CSC-IV, or assault with intent to commit CSC to be examined or tested "not later than 48 hours after the date that the information or indictment is presented and the defendant is in custody or has been served with the information or indictment." MCL 333.5129(3). "The court shall include in its order for expedited examination or testing at the victim's request under [MCL 333.5129(3)] a provision that requires follow-up examination or testing that is considered medically appropriate based on the results of the initial examination or testing." *Id.*

"Except as otherwise provided in [MCL 333.5129(5)-(7)], or as otherwise provided by law, the examinations and tests must be confidentially administered by a licensed physician, the department, or a local health department." MCL 333.5129(3).

For information on mandatory testing and examination after a defendant is *convicted* of an offense specified in MCL

333.5129(4), which includes many of the offenses specified for defendants who are arrested and charged, or bound over or indicted, see Section 8.3.

2. Mandatory Counseling

In addition to ordering testing and examination under MCL 333.5129(3), the court must order a defendant who has been bound over or indicted for an offense listed in MCL 333.5129(3) to undergo counseling. MCL 333.5129(3). At a minimum, this counseling must include information regarding the treatment, transmission, and protective measures relevant to sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and AIDS. *Id*.

C. Disclosure of Examination or Testing Results

The confidentiality referred to in MCL 333.5129(3) and MCL 333.5129(4) is limited to the *administration* of examinations or tests. The confidentiality of *results* gotten by the examinations or tests authorized by MCL 333.5129(3)-(4) is set forth in MCL 333.5129(6).

1. Disclosure to the Victim or Exposed Individual

When the defendant engaged in sexual penetration or contact with the victim or another individual, or the victim or individual was exposed to a body fluid of the defendant, and when the victim or individual has consented to the provision of his or her name, address, and telephone number to the person or agency conducting the examination or testing, the examination or test results must immediately be provided to the victim or individual by the person or agency conducting the examination or tests. MCL 333.5129(5). The court must provide the victim's or individual's contact information to the person or agency conducting the examinations or administering the tests. *Id*.

If the victim or individual is a minor or otherwise incapacitated, his or her parent, guardian, or person in loco parentis may give consent for purposes of MCL 333.5129(5).

2. Disclosure to the Court

The examination or test results obtained from examinations or testing conducted under MCL 333.5129(3) or MCL 333.5129(4) and any other medical information obtained from the defendant must be transmitted to the court, and after the defendant is sentenced, the examination or test results must be

made part of the court record. MCL 333.5129(6). The examination or test results described in MCL 333.5129(6) is confidential and may be disclosed to the following individuals/entities or under the following circumstances:

- the defendant, MCL 333.5129(6)(a).
- the local health department, MCL 333.5129(6)(b).
- the department, MCL 333.5129(6)(c).
- the victim or other individual required to be informed of the results, MCL 333.5129(6)(d).
- when the defendant provides written authorization for disclosure of the information, MCL 333.5129(6)(e).
- as otherwise provided by law, MCL 333.5129(6)(f).

"A person or agency that discloses information in compliance with [MCL 333.5129(6)] is not civilly or criminally liable for making the disclosure." MCL 333.5129(7).

3. Disclosure to the Department of Corrections

When a defendant is placed in the custody of the department of corrections (DOC), the court must transmit a copy of the examination and test results and other medical information to the DOC. MCL 333.5129(7).

"A person or agency that discloses information in compliance with [MCL 333.5129(7)] is not civilly or criminally liable for making the disclosure." *Id*.

D. Confidentiality of Disclosed Information

When a person or agency receives test results or other medical information regarding HIV infection or AIDS under MCL 333.5129(6) or MCL 333.5129(7), the person or agency must comply with MCL 333.5131 and must not disclose the test results or medical information except as specifically permitted by MCL 333.5131. MCL 333.5129(7).

"All reports, records, and data pertaining to testing, care, treatment, reporting, and research, and information pertaining to partner notification under [MCL 333.5114a], that are associated with HIV infection and [AIDS] are confidential." MCL 333.5131(1). MCL 333.5131 governs the release of reports, records, data, and information described in MCL 333.5131(1). *Id*.

MCL 333.5131(3)(a)-(b) state the circumstances and restrictions that apply to the disclosure of information related to HIV infection or AIDS. Information regarding HIV infection and AIDS may be disclosed only in response to a court order and subpoena. MCL 333.5131(3).

> "A court that is petitioned for an order to disclose the information [regarding HIV infection or AIDS] shall determine both of the following:
>
> > (*i*) That other ways of obtaining the information are not available or would not be effective.
> >
> > (*ii*) That the public interest and need for the disclosure outweigh the potential for injury to the patient." MCL 333.5131(3)(a).

A court order requiring disclosure of the information must do all of the following:

> "(*i*) Limit disclosure to those parts of the patient's record that are determined by the court to be essential to fulfill the objective of the order.
>
> "(*ii*) Limit disclosure to those persons whose need for the information is the basis for the order.
>
> "(*iii*) Include any other measures as considered necessary by the court to limit disclosure for the protection of the patient." MCL 333.5131(3)(b).

The confidentiality of the reports, records, and data associated with HIV infection and AIDS does not apply in all cases. MCL 333.5131(5)(a)-(g). However, when information is disclosed under MCL 333.5131(5), the person who discloses the information "shall not include in the disclosure information that identifies the individual to whom the information pertains, unless the identifying information is determined by the person making the disclosure to be reasonably necessary" to the situations described in MCL 333.5131(7). MCL 333.5131(7).

Except as otherwise provided by law, the results of a test for HIV infection or AIDS is information subject to the physician-patient privilege outlined in MCL 600.2157. MCL 333.5131(2).

A violation of MCL 333.5131 is a misdemeanor punishable by not more than one year of imprisonment or a maximum fine of $5,000, or both. MCL 333.5131(8). A person who violates MCL 333.5131 is also "liable in a civil action for actual damages or $1,000.00, whichever is greater, and costs and reasonable attorney fees." *Id*.

E. Positive Test Results Require Referral for Appropriate Medical Care

If a person counseled, examined, or tested under MCL 333.5129 is found to have a sexually transmitted infection, hepatitis B or C infection, or HIV infection, the agency that provided the counseling or testing must refer the person for appropriate medical care. MCL 333.5129(8). The department of health and human services, the local health department, or any other agency that provided the testing or counseling is not financially responsible for medical care the person may receive as a result of a referral. *Id*.

F. Ordering Payment for the Costs of Examination and Testing

After a defendant who was examined or tested under MCL 333.5129 is convicted, the court may order the defendant "to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10). The individual ordered to pay the costs of an examination or test must pay the costs within 30 days of the order or at another time provided by the court. MCL 333.5129(11). Failure to pay the costs within 30 days or as otherwise ordered by the court is a misdemeanor punishable by not more than 90 days of imprisonment or a fine of not more than $100, or both. *Id*.

5.7 Discovery[42]

A. Obligations of Prosecution

Under MCR 6.201(B)(1)-(5),[43] in felony cases the prosecution must, upon request, provide the defendant with specific information. Disclosure requirements expressly applicable to sexual assault cases are found in MCL 768.27a, MCL 768.27b, and MCL 768.27c.[44]

Under MCL 768.27a(1), "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor

[42]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9, for a detailed discussion of discovery. See the Michigan Judicial Institute's *Evidence Benchbook* for detailed information about evidence.

[43]MCR 6.201 governs the scope of criminal discovery in Michigan. *People v Phillips*, 468 Mich 583, 588-589 (2003).

[44]Discussion in this benchbook is limited to discovery matters unique to sexual assault and domestic violence cases. A more detailed discussion of discovery appears in Chapter 9 of the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*.

is admissible and may be considered for its bearing on any matter to which it is relevant."[45] If the prosecution intends to offer evidence of the other listed offense, the prosecution must disclose the evidence to the defendant "at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered." *Id*.

In a criminal case accusing the defendant of an offense involving domestic violence or sexual assault, "evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE] 403."[46] MCL 768.27b(1). If the prosecution intends to offer evidence of the defendant's commission of other acts of domestic violence or sexual assault, "the prosecuting attorney shall disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown." MCL 768.27b(2).

Evidence of a declarant's statement is admissible under the circumstances listed in MCL 768.27c(1). MCL 768.27c(3) requires the prosecution to disclose "the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."[47]

B. Privileged Information

MCL 600.2157a(2) prevents the disclosure of confidential communication transmitted between a victim and a sexual assault or domestic violence counselor. According to MCL 600.2157a(2):

> "[A] confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as

[45]For more information about evidence of a defendant's commission of other listed offenses against a minor, see Section 6.5.

[46]For more information about evidence of a defendant's commission of other offenses involving domestic violence or sexual assault, see Section 6.6.

[47]For more information about admitting a declarant's statement concerning injuries or threats of injuries, see Section 6.8.

evidence in any civil or criminal proceeding without the prior written consent of the victim."

Chapter 6: General Evidence

6.1 Basic Rules of Evidence

A. Rule 402: Relevant Evidence[1]

"Generally, relevant evidence is admissible. MRE 402[.]" *People v Sharpe*, 502 Mich 313, 331 (2018). "Relevant evidence may be excluded, however, if its probative value is substantially

[1]Only a very brief discussion of a limited number of evidentiary rules and statutes is provided in this benchbook. For more information about the admission of evidence under MRE 404(b), MCL 768.27a, MCL 768.27b, and MCL 768.27c, see the Michigan Judicial Institute's *Evidence Benchbook*.

outweighed by the danger of unfair prejudice. MRE 403."[2] *Sharpe*, 502 Mich at 331.

Evidence of a complainant's pregnancy, abortion, and lack of other sexual partners may be relevant under MRE 402. *Sharpe*, 502 Mich at 332. The *Sharpe* Court explained: "The evidence of [the complainant's] pregnancy and abortion definitively demonstrates that sexual penetration occurred." *Id*. at 333. That evidence is highly probative because if the jury believes that the complainant had not engaged in sexual intercourse with anyone but the defendant during the specified time period, then the defendant was the man who sexually assaulted the complainant. *Id*.

B. Rule 403: Probative Value and Unfair Prejudice[3]

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." MRE 403.

Evidence of the complainant's abortion was admissible because its probative value was not substantially outweighed by the danger of unfair prejudice. *People v Sharpe*, 502 Mich 313, 333 (2018) (noting that "abortion evidence . . . is not so inherently prejudicial in today's society as to render it inadmissible"). "[I]t also serves the purpose of explaining why the prosecutor is unable to offer DNA evidence to prove the identity of the man who impregnated [the complainant]." *Id*. at 334. Similarly, evidence that the complainant had no sexual partners other than the defendant during the relevant period of time was admissible because the evidence was highly probative of establishing that the defendant was the man who sexually assaulted the complainant. *Id*.

C. Rule 404: Character Evidence[4]

Except as otherwise indicated, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]" MRE

[2]Relevant evidence may also be excluded "if its probative value is substantially outweighed by . . . confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." MRE 403.

[3]See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2, for detailed information about balancing probative value and the risk of unfair prejudice to determine admissibility under MRE 403.

[4]See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2, for a detailed discussion of character evidence and MRE 404.

404(a). In criminal sexual conduct cases, two types of evidence bearing on a victim's character may be introduced:

> "(*i*) [evidence of] the alleged victim's past sexual conduct with the defendant; and
>
> (*ii*) [evidence of] specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MRE 404(a)(2)(C).

"MRE 404(a) only excludes character evidence used to prove conformity to a character trait"; it is error to exclude evidence under MRE 404(a)(3)[5] where a valid, nonpropensity explanation for admission of the evidence has been articulated. See *People v Sharpe*, 502 Mich 313, 332 n 11 (2018).

Evidence of a complainant's virginity to show that the complainant was not likely to have consented to the alleged sexual assault was inadmissible where the evidence was introduced to show that "[she] was acting in conformity with her prior lack of sexual activity." *People v Bone*, 230 Mich App 699, 703 (1998).[6]

6.2 Rape-Shield Statute and Admitting or Excluding Evidence

The rape-shield statute, MCL 750.520j, "serves to limit the admissibility of evidence of a complainant's sexual conduct[.]" *People v Sharpe*, 502 Mich 313, 325 (2018). "[The rape-shield statute] bars, with two narrow exceptions, evidence of *all* sexual activity by the complainant not incident to the alleged rape." *People v Adair*, 452 Mich 473, 478 (1996) (quotation marks and citation omitted).

"The rape-shield statute 'constitutes a legislative policy determination that sexual conduct or reputation regarding sexual conduct as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant.'" *Sharpe*, 502 Mich at 326, quoting *People v Morse*, 231 Mich App 424, 429-430 (1998). "[The] rape-shield statute reflect[s] the Legislature's determination that, in the overwhelming majority of prosecutions, evidence of a rape victim's sexual conduct with parties other than the defendant, as well as the victim's sexual reputation, is neither an accurate measure of the victim's veracity nor determinative of the likelihood of consensual sexual relations with the defendant." *People*

[5] The exceptions to the general prohibition against the admission of other-acts evidence to show character that apply to CSC cases now appear in MRE 404(a)(2)(C). See ADM File No. 2021-10, effective January 1, 2024.

[6] "Not[ing], however, that evidence introduced for some other relevant purpose does not become inadmissible merely because it tends to show that the victim was a virgin." *Bone*, 230 Mich App at 702 n 3.

v Powell, 201 Mich App 516, 519 (1993). "The statute also reflects a belief that 'inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury.'" *Sharpe*, 502 Mich at 326, quoting *People v Arenda*, 416 Mich 1, 10 (1982). "Finally, the statute protects the privacy of the alleged victim and, in so doing, removes an institutional discouragement from seeking prosecution." *Sharpe*, 502 Mich at 326.

Specifically, the rape-shield statute, provides:

> "(1) Evidence of *specific instances of the victim's sexual conduct*, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under [MCL 750.520b to MCL 750.520g][7] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> > (a) Evidence of the victim's past sexual conduct[8] with the actor.
> >
> > (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." MCL 750.520j (emphasis added).

A. Evidence of Subsequent Sexual Relations Between Victim and Defendant

"[D]eterminations of relevance, materiality, prejudicial nature, and the defendant's constitutional right to use the proffered evidence, depend on the facts of the case." *People v Adair*, 452 Mich 473, 476-477, 484-485 (1996) (defendant was charged with sexually assaulting his wife and sought to introduce evidence of specific incidences when he and his wife engaged in consensual sexual relations *after* the alleged assault). "[T]he rape-shield statute should not be interpreted to foreclose consideration of such issues [subsequent consensual sexual relations] arbitrarily." *Id*. at 485.

To decide whether evidence of subsequent sexual relations should be admitted, the court should consider (1) the length of time between the alleged assault and the subsequent sexual relations, and (2) whether the complainant and the defendant had a personal relationship before the alleged assault. See *Adair*, 452 Mich at 486-

[7] See Chapter 2 for information on the CSC offenses found in these statutes.

[8] "'[P]ast' sexual conduct refers to conduct that has occurred before the evidence is offered at trial." *People v Adair*, 452 Mich 473, 483 (1996).

487. "The rape-shield statute provides that the trial court should balance these considerations in determining whether the proposed evidence is material and whether its probative value is outweighed by its prejudicial nature." *Id*. at 486.

"[T]he trial court appropriately should limit the scope of sexual conduct evidence where constitutionally possible."*Adair*, 452 Mich at 487.

B. Admissibility of Statements Under the Rape-Shield Statute

Statements or references to statements that do not refer to specific instances of sexual conduct are not barred from admission by the rape-shield statute. *People v Ivers*, 459 Mich 320, 328-329 (1998) (complainant's statement to her friend to "get her a guy" and an additional statement by complainant indicating that she would probably have sex in her freshman year at college, was not a statement referring to specific conduct and was not, therefore, barred by the rape-shield statute). The important distinction to be made is whether a statement does or does not *amount* to or *reference* a specific instance of conduct, not whether the evidence simply qualifies as a statement or as conduct. *Id*. at 329.

The statements made in *Ivers* were not precluded by MCL 750.520j because they did not constitute the type of evidence barred by the rape-shield statute. *Ivers*, 459 Mich at 328. That is, the statements were not "[e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, [or] reputation evidence of the victim's sexual conduct[.]" *Id*. at 328; MCL 750.520j(1).

C. Evidence of Semen, Disease, Pregnancy, or Abortion Under the Rape-Shield Statute

"[T]he Legislature has *ipso facto* made clear that semen, pregnancy, or disease, while perhaps related to sex, are not themselves the specific instances of sexual conduct envisioned by MCL 750.520j." *People v Sharpe*, 502 Mich 313, 328 (2018) (evidence of pregnancy and abortion was not protected by the rape-shield statute and was otherwise admissible under MRE 402 and MRE 403). Although evidence of the complainant's pregnancy and subsequent abortion "necessarily implies that sexual activity occurred that caused the pregnancy, the pregnancy and abortion are not evidence regarding a specific instance of sexual conduct." *Sharpe*, 502 Mich at 328.

"[W]hether evidence falls within the purview of the rape-shield statute concerns whether the evidence '*amount*[s] to or *reference*[s] specific conduct,' not whether the evidence constitutes a

consequence of or relates to sexual activity generally." *Sharpe*, 502 Mich at 328, quoting *People v Ivers*, 459 Mich 320, 329 (1998) (second and third alterations in original).

D. Evidence That a Minor Victim Watched Pornography On His or Her Own

Evidence that a victim viewed pornography on his or her own does not itself constitute "sexual conduct" for purposes of the rape-shield statute, MCL 750.520j. *People v Masi*, 346 Mich App 1, 27 (2023). Without more, such as evidence that the individual viewing pornography engaged in an act of sexual gratification, the rape-shield statute does not prohibit from admission at a defendant's trial evidence that a victim watched pornography in the defendant's absence. *Id*. at 27. However, the admission at trial of evidence that a victim watched pornography on his or her own remains subject to other applicable rules of evidence. *Id*. at 27 (directing the trial court to consider whether evidence that the victim viewed pornography was relevant to the defendant's assertion that the victim's age-inappropriate sexual knowledge was a result of having viewed pornography, rather than a result of any sexual misconduct by the defendant).

E. Evidence That a Minor Victim Had Been Sexually Abused Before Defendant Allegedly Abused the Minor

Evidence showing that a minor victim was sexually abused by an individual other than the defendant and that the sexual abuse by the other individual occurred before the defendant allegedly abused the minor victim is precluded under the rape-shield statute. *People v Masi*, 346 Mich App 1, 18, 20 (2023). Evidence of previous sexual abuse constitutes evidence of a specific instance of a victim's previous sexual conduct for purposes of MCL 750.520j. *Masi*, 346 Mich App at 18. In *Masi*, the defendant attempted to overcome the rape-shield statute's prohibition against the admission of evidence that the minor victim was sexually abused by a third party before the defendant allegedly sexually abused the minor victim. *Id*. at 19, 21. The trial court properly excluded evidence of the minor victim's previous sexual abuse because the circumstances of the previous abuse were not "'significantly similar'" to the circumstances present in the allegations against the defendant. *Id*. at 20. In addition, the trial court did not abuse its discretion by excluding evidence of the previous sexual abuse because the individual responsible for the minor's previous abuse was not convicted of criminal sexual misconduct for what occurred. *Id*. at 20.

F. Notice Requirements of Intent to Offer Evidence Subject to the Rape-Shield Statute

A defendant must provide notice of an intent to offer evidence of the complainant's prior sexual conduct with the defendant or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. MCL 750.520j(2). In MCL 750.520j(2), the rape-shield statute states:

> "If the defendant proposes to offer evidence described in [MCL 750.520j(1)(a) or (b)], the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an *in camera* hearing to determine whether the proposed evidence is admissible under [MCL 750.520j(1)]. If new information is discovered during the course of the trial that may make the evidence described in [MCL 750.520j(1)(a) or (b)] admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under [MCL 750.520j(1)]."

Preclusion of evidence of a past sexual relationship between a complainant and a defendant because the defendant failed to comply with the notice requirements in the rape-shield statute is not unconstitutional per se. *Michigan v Lucas (Lucas I)*, 500 US 145, 152-153 (1991). The Supreme Court specifically stated:

> "[T]he Michigan Court of Appeals erred in adopting a *per se* rule that Michigan's notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. The Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion." *Lucas*, 500 US at 152-153.

Violation of the notice provisions of the rape-shield statute may result in preclusion of the proffered evidence so long as preclusion does not infringe on the defendant's Sixth Amendment rights. *People v Lucas (On Remand) (Lucas II)*, 193 Mich App 298, 301-302 (1992). In *Lucas II*, the defendant was convicted after a bench trial of CSC-III against his former girlfriend. *Id*. 299, 300. The defendant did not, at any time before trial, file a written motion and offer of proof. *Id*. at 300. Rather, to support his defense of consent, the defendant orally moved at trial to introduce evidence of his past sexual relationship

with the complainant. *Id*. On the sole basis that the defendant failed to comply with the notice requirements of the rape-shield statute, and without holding an *in camera* hearing, the trial court denied the defendant's motion. *Id*.

The Michigan Court of Appeals concluded that the constitutionality of preclusion based on the statutory notice requirement must be determined on a case-by-case basis. *Lucas II*, 193 Mich App at 302. The Court, on another occasion, concluded that a trial court had improperly excluded evidence: "[T]he trial court erred by excluding the evidence solely on the basis of defendant's failure to give notice, without exercising its discretion in light of the particular circumstances of the case." *People v McLaughlin*, 258 Mich App 635, 655 (2003). To determine whether preclusion is proper, a court may consider the following:

> (1) The statute's 10-day notice period is intended to encourage victims to report assaults and to protect victims from surprise, harassment, unnecessary invasions of privacy, and undue delay. *Lucas II*, 193 Mich App at 302-303.
>
> (2) Notice prevents surprise to the prosecution and allows time to investigate whether the alleged prior relationship existed. *Id*. at 302.
>
> (3) The timing of the defendant's offer to produce evidence may be relevant—evidence offered closer in time to the date of trial suggests willful misconduct in an effort to gain a tactical advantage. *Id*. at 303.

After remand to the trial court, the Court of Appeals agreed with the trial court's determination that defense counsel was aware of the statutory notice requirements and had made a tactical decision to move for admission of the evidence on the date of trial. *People v Lucas (After Remand) (Lucas III)*, 201 Mich App 717, 719 (1993).

G. *In Camera* Hearing

A court *may* hold an *in camera* hearing where the defendant seeks to admit evidence of the victim's sexual conduct with the defendant or to show the source or origin of semen, pregnancy, or disease. MCL 750.520j(2). A court *must* hold an *in camera* hearing where the defendant offers relevant evidence of the victim's past sexual conduct that falls outside the scope of MCL 750.520j, and that also implicates the defendant's constitutional right of confrontation. *People v Hackett*, 421 Mich 338, 350-351 (1984).

The following information illustrates the process:

- Defendant must make an offer of proof and demonstrate the relevance of the proposed evidence as it relates to the purpose for which the defendant seeks admission of the evidence. If there is not a sufficient showing of relevance, the trial court should deny the defendant's motion for admission. *Hackett*, 421 Mich at 350.

- If there is a sufficient offer of proof and the defendant's constitutional right to confrontation is implicated—that is, the admission of evidence of past sexual conduct is not sought simply for its use as evidence of character or for impeachment—the trial court must order an *in camera* hearing to determine admissibility in light of the constitutional concerns. *Hackett*, 421 Mich at 350; see also *People v Butler*, ___ Mich ___, ___ (2024) ("Once a sufficient offer of proof is made, the *in camera* evidentiary hearing is not optional."). The trial court must explicitly state its finding that the proffered evidence was sufficient to require the *in camera* hearing under *Hackett*. *Butler*, ___ Mich at ___. The *Butler* Court noted that, for an offer of proof of a complainant's prior false sexual assault allegations to be sufficient to warrant an *in camera* hearing, "[t]here must be a showing of at least some apparently credible and potentially admissible evidence that the prior allegation was false." *Id*. at ___ (vacating the trial court and Court of Appeals opinions and remanding the case to the Court of Appeals for further consideration as directed by the Michigan Supreme Court).[9]

- "At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions." *Hackett*, 421 Mich at 350-351.

- The trial court retains discretionary authority to exclude relevant evidence offered for any purpose when the risks of unfair prejudice, confusion of the issues, or misleading the jury substantially outweigh the probative value of the evidence. *Hackett*, 421 Mich at 351; see also *Butler*, ___ Mich at ___ (when determining the admissibility of a complainant's prior false rape allegations, the court must "if necessary, make a preliminary determination as to whether, and the extent to which, the evidence is otherwise admissible under the rules of evidence").

[9] In *Butler*, the Michigan Supreme Court instructed the Court of Appeals to remand the case to the trial court to have the trial court "determine the appropriate standard of proof for the admissibility of evidence of prior false allegations of sexual assault by the complainant" and to "conduct an *in camera* evidentiary hearing to determine whether defendant presents sufficient proof of the falsity of the 2008 allegations at the evidentiary hearing to warrant admission of the evidence at trial . . ." *Butler*, ___ Mich at ___.

"[T]he trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation." *Hackett*, 421 Mich at 351.

The *in camera* hearing must occur on the record, but outside the presence of the jury and the public. *People v Byrne*, 199 Mich App 674, 679 (1993).

H. Evidence Offered by Complainant

"Although the [rape-shield] statute was enacted in response to the practice of impeaching the complainant's testimony with evidence of the complainant's sexual conduct, the plain language of the statute does not condition the exclusion of such evidence upon whether the evidence is offered by the prosecutor or by the defendant." *People v Sharpe*, 502 Mich 313, 327 (2018).

The rape-shield statute was not designed "to prevent a complainant's disclosure of her own sexual history or its attendant consequences." *Sharpe*, 502 Mich at 330-331. Accordingly, voluntarily offered "evidence of [a complainant's] pregnancy, abortion, and lack of sexual history to bolster her allegations of criminal sexual conduct against defendant" may be admissible. *Id*. at 330. However, "[t]he admission of this type of evidence may open the door to the introduction of evidence whose admission may otherwise have been precluded by the rape-shield statute." *Id*. at 331 n 10.

I. Caselaw Involving the Rape-Shield Statute

1. Origin of Semen, Pregnancy, or Disease

"The rape-shield law does not prohibit defense counsel from introducing 'specific instances of sexual activity . . . to show the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of the elements of the crime charged provided the inflammatory or prejudicial nature of the rebuttal evidence does not outweigh its probative value.'" *People v Shaw*, 315 Mich App 668, 680 (2016), quoting *People v Mikula*, 84 Mich App 108, 115 (1978). In *Shaw*, defense counsel was ineffective for failing to present the testimony of the complainant's former live-in boyfriend concerning the couple's sexual relationship. *Shaw*, 315 Mich App at 681. According to the Court, "the testimony would likely have been very significant given that, without it, there was no likely explanation, other than defendant's guilt, to

explain the extensive hymenal changes and the chronic anal fissure." *Id*.

Where evidence of the complainant's abortion was not barred by the rape-shield statute, the trial court had to determine whether the evidence qualified for admission under the Michigan Rules of Evidence. *People v Sharpe*, 502 Mich 313, 331 (2018). According to the *Sharpe* Court, the trial court abused its discretion when it determined that evidence of the complainant's abortion was inadmissible as improper character evidence, because the prosecutor had identified a valid nonpropensity explanation for its admission. *Id*. at 332 n 11. Evidence of the complainant's pregnancy and abortion "definitively demonstrate[d] that sexual penetration occurred" and also "explain[ed] why the prosecutor [was] unable to offer DNA evidence to prove the identity of the man who impregnated [the complainant]." *Id*. at 333, 334.

2. Lack of Sexual Activity

"[E]vidence that [the complainant] did not engage in other sexual intercourse [during the year relevant to the charged offense] does not fall within the plain language of the rape-shield statute." *People v Sharpe*, 502 Mich 313, 330 (2018). Evidence of the complainant's lack of sexual partners "demonstrates an absence of conduct, not a 'specific instance' of sexual conduct." *Id*.

3. Prostitution or Topless Dancing

"A victim's employment as a topless dancer does not render her a prostitute." *People v Powell*, 201 Mich App 516, 520 (1993). Offering evidence of the victim's employment as a topless dancer "constitute[d] nothing more than an attempt to place before the jury the victim's 'questionable' sexual character." *Id*. This type of evidence is clearly the type of evidence subject to the rape-shield statute. *Id*.

In *Powell*, the defendant claimed that he was falsely accused of CSC-I after he engaged in a consensual act of prostitution for which he failed to pay. *Powell*, 201 Mich App at 518. The defendant sought to introduce third-party testimony that the complainant was seen walking with alleged prostitutes before the incident, and that the complainant was seen dancing topless at a local topless club after the incident. *Id*. at 520. The *Powell* Court concluded that the proposed evidence of the complainant's topless dancing was "not material to his claim

that the victim was a prostitute from whom he solicited services on the date in question" and was inadmissible. *Id*.

4. Public Sexual Conduct

The complainant's exposure of her breasts to two men in a bar, and her permitting one of the men to touch her breasts following the exposure, amounted to "sexual conduct" for purposes of the rape-shield statute. *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 585 (1991). The rape-shield statute makes no distinction between public and private sexual conduct in its application. *Id*. at 584. Therefore, the "public nature" of the complainant's actions did not "remove them from the protection of the rape-shield statute." *Id*.

5. Consensual Sexual Conduct With Defendant

"Where the proposed evidence concerns consensual sexual conduct with third parties, the Legislature has determined that, with very limited exceptions, the balance overwhelmingly tips in favor of exclusion as a matter of law. However, where the proposed evidence concerns consensual sexual conduct with the defendant, the Legislature has left the determination of admissibility to a case-by-case evaluation." *People v Adair*, 452 Mich 473, 483 (1996).

"When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case." *People v Benton*, 294 Mich App 191, 198 (2011). "When a trial court exercises its discretion to determine whether evidence of a complainant's sexual conduct not within the statutory exceptions should be admitted, the court 'should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.'" *Id*. at 197-198, quoting *People v Hackett*, 421 Mich 338, 349 (1984).

6. Sexual Conduct Between Minor Siblings

"[E]vidence of sexual conduct between [two minor sisters] falls squarely within the rape-shield statute's exclusion for evidence of 'specific instances of the victim's sexual conduct . . . .'" *People v Masi*, 346 Mich App 1, 21-22 (2023), quoting MCL 750.520j(1).

J. Evidence Outside the Rape-Shield Statute

Evidence not within the purview of the rape-shield statute, MCL 750.520j, must satisfy the requirements of MRE 402 and MRE 403 before admission. *People v Sharpe*, 502 Mich 313, 331 (2018).

6.3 Other Crimes, Wrongs, or Acts Under Michigan Rule of Evidence 404(b)

A. Admissibility

"Under Michigan's rules of evidence, all logically relevant evidence is admissible at trial, except as otherwise prohibited by the state or federal constitutions or other court rules." *People v Ackerman*, 257 Mich App 434, 439 (2003). MRE 404(b)(1) states that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, other-acts evidence may, if material, be admissible for reasons other than to show that a defendant has a propensity to commit the offenses with which the defendant is charged. MRE 404(b)(2).

Accordingly, "MRE 404(b) . . . permits the admission of any logically relevant evidence, '*even if* it also reflects on a defendant's character,' so long as the evidence is not 'relevant *solely* to the defendant's character or criminal propensity.'" *People v Spaulding*, 332 Mich App 648, 649 (2020), quoting *People v Mardlin*, 487 Mich 609, 615-616 (2010). See also *People v Sabin (After Remand)*, 463 Mich 43, 55-59 (2000); *People v Katt (Katt I)*, 248 Mich App 282, 303-304 (2001).

Other-acts evidence offered for a reason other than to show propensity to commit the charged crime "must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial." *Sabin*, 463 Mich at 55. "To be relevant, the evidence must be material or probative of a fact of consequence to the action. To be material, the fact must be one 'in issue' or within the 'range of litigated matters in controversy.'" *Ackerman*, 257 Mich App at 439, quoting *Sabin*, 463 Mich at 57 (citation omitted). If the other-acts evidence is offered for a proper purpose and is relevant to a material fact, the court must determine "whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence[.]" *Sabin*, 463 Mich at 55-56 (quotation marks and citation omitted). Finally, if requested, the trial court may give the jury a limiting instruction under MRE 105.[10] *Sabin*, 463 Mich at 56.

"MRE 404(b) only applies to evidence of crimes, wrongs, or acts 'other' than the 'conduct at issue in the case' that risks an

impermissible character-to-conduct inference." *People v Jackson*, 498 Mich 246, 262, 265 (2015) ("Evidence that the defendant [charged with CSC-I involving a child who was a member of the church where the defendant served as a pastor] previously engaged in sexual relationships with other parishioners, above or below the age of consent, [fell] well within this scope of coverage.").

Other acts that are "so intertwined with the charged offense that they directly prove the charged offense, or their presentation is necessary to comprehend the context of the charged offense" may be admissible without regard to MRE 404(b). *Spaulding*, 332 Mich App at 650. "Such evidence is also admissible to fill what would otherwise be 'a chronological and conceptual void regarding the events' to the finder of fact." *Id*. (Citation omitted.) In *Spaulding*, the evidence of the defendant's prior communications with the victim did not expressly convey any threats and did not appear to support the victim's claim that she felt "terrorized, frightened, intimidated, threatened, harassed, or molested." *Id*.; M Crim JI 17.25. According to the Court, "[i]t was impossible to comprehend the *significance of* those communications without an understanding of the history of the relationship between [the victim] and defendant." *Spaulding*, 332 Mich App at 651. The evidence was "critical to understand[ing] why a reasonable person would have felt (and [the victim] did feel) scared by defendant's conduct under the circumstances." *Id*.

B. Notice Requirements

MRE 404(b)(3) requires the prosecution to

> "(A) provide notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
>
> (C) do so in writing at least 14 days before trial, unless the court, for good cause, excuses pretrial notice, in which case the notice may be submitted in any form."

C. Caselaw

The following cases address the admissibility of other-acts evidence under MRE 404(b) when sexual assault is alleged.

[10] On a timely request, MRE 105 *requires* the court to restrict use of the evidence and instruct the jury accordingly.

• *People v Kelly*, 317 Mich App 637 (2016):

The trial court improperly excluded evidence of defendant's seven other instances of criminal sexual conduct that did not result in convictions. "[T]he trial court neglected a fundamental responsibility in its MRE 404(b) evidentiary analysis . . . . by excluding the proposed testimony" without considering whether the evidence was offered for a proper purpose or its legal relevance. *Kelly*, 317 Mich App at 647-648. "Without considering the evidence's legal relevance for a proper purpose, the trial court could not conclude that the evidence's probative value was substantially outweighed by unfair prejudice or any of the other concerns identified in MRE 403," and thus, failed "to follow the proper legal framework[.]" *Kelly*, 317 Mich App at 647. Furthermore, "the trial court . . . abdicated the necessary relevancy analysis on the basis of impermissible credibility concerns" by allowing "defendant's protestations of 'consent' in respect to the other acts to control the MRE 404(b) analysis." *Kelly*, 317 Mich App at 645. "The only issue [was] whether [defendant's] conduct [on those other occasions] was consensual as claimed by defendant or constituted criminal sexual conduct as asserted by the alleged victims."[11] *Kelly*, 317 Mich App at 646. "[T]he trial court should not have dismissed the evidence . . . merely because there was a credibility dispute." *Id*.

• *People v Jackson*, 498 Mich 246 (2015):

MRE 404(b) governed the admissibility of testimony in the defendant's trial for CSC-I where "the prior sexual relationships to which [a witness's] testimony referred plainly did not constitute the 'conduct at issue' . . . [or] directly evidence or contemporaneously facilitate its commission[.]" *Jackson*, 498 Mich at 275. Rather, the testimony was "offered to provide inferential support for the conclusion that the 'conduct at issue' occurred as alleged." *Id*. at 275-276.

• *People v Smith*, 282 Mich App 191 (2009):

The defendant was convicted of CSC-I and CSC-II against his daughter when she was 10 or 11 years old. *Smith*, 282 Mich App at 193. Under MRE 404(b)(1), the trial court did not abuse its discretion in admitting evidence of defendant's prior acts of indecent exposure

[11] In *Kelly*, the Court "employ[ed] the doctrine of chances [to conclude that it was] extraordinarily improbable that eight unrelated women in four different states would fabricate reports of sexual assault after engaging in consensual sex with defendant." *Kelly*, 317 Mich App at 646. See also *People v Breidenbach*, 489 Mich 1, 12 (2011), where the Court stated, "Michigan has long recognized the doctrine of chances, which provides that rare or unusual events that occur frequently in relation to a single person are less likely to have an innocent explanation and more likely to demonstrate the probability of an *actus reus*."

involving the victim's stepsister who also lived with defendant at the time. *Smith*, 282 Mich App at 193-194, 206. The *Smith* Court discussed "sufficiently similar" prior bad acts:

> "[S]*ufficiently similar* prior bad acts can be used 'to establish a definite prior design or system which included the doing of the charged act as part of its consummation.' '[T]he result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.' . . . However, general similarity between the charged act and the prior bad act is not enough to show a pattern. Rather, there must be 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' A high degree of similarity is required—more than is needed to prove intent, but less than is required to prove identity—but the plan itself need not be unusual or distinctive." *Smith*, 282 Mich App at 196, quoting *People v Sabin (After Remand)*, 463 Mich 43, 65-66 (2000) (citations omitted; second alteration in original).

- *People v Kahley*, 277 Mich App 182 (2007):

The defendant was convicted of CSC-I against his four-year-old son. *Kahley*, 277 Mich App at 183, 185. At trial, evidence was properly admitted that the defendant had sexually abused his girlfriend's son. *Id*. at 186. The evidence was relevant, probative, and the danger of unfair prejudice did not substantially outweigh the evidence's probative value because the sexual assaults occurred within a four-month period, the victim and the defendant's girlfriend's son were both four years old, under the defendant's care and supervision, and sexually assaulted in the same manner. *Id*. at 184-185. The Court noted that "[d]istinctive and unusual features are not required to establish the existence of a common plan or scheme[.]" *Id*. at 185.

- *People v Drohan (Drohan I)*, 264 Mich App 77 (2004):[12]

The defendant was convicted of CSC-III and CSC-IV against a former coworker for rubbing the victim's breast, grabbing her wrist and making her touch his crotch on several occasions, and forcing her into the passenger seat of a car where he forced her to perform oral sex on him. *Drohan I*, 264 Mich App at 79-80, 86. Two additional witnesses testified to separate occasions when the defendant had

[12]Affirmed by *People v Drohan (Drohan II)*, 475 Mich 140 (2006). *Drohan II* was later overruled by *People v Lockridge*, 498 Mich 358 (2015). It is unclear how *Lockridge* affects *Drohan I*.

initiated unwanted contact with each of them. *Id*. at 81-82. The trial court admitted testimony regarding these former acts because "the evidence was 'relevant to show the existence of a scheme, plan, or method by which the defendant accomplished the sexual assault in that consent [was] an issue, therefore, showing a scheme, plan, or method by which he non-consentually [sic] engages in sexual assault with women[.]'" *Id*. at 84 (second alteration in original). The evidence was introduced for a proper purpose because each of the incidents had common features that allowed the inference "that defendant had a common scheme of suddenly grabbing unwilling women and seeking immediate sexual gratification from them." *Id*. at 87.

- *People v Ackerman*, 257 Mich App 434 (2003):

The defendant was the mayor of Port Huron and served as a supervisor at a community youth center during the time of his misconduct with three girls under the age of 13. *Ackerman*, 257 Mich App at 438. Several young females testified that the defendant allowed his pants to fall down to expose his genitals to the girls when they were at the youth center. *Id*. at 441. The trial court permitted the evidence because it agreed that the evidence "supported an inference that defendant's actions were part of a system of desensitizing girls to sexual misconduct." *Id*. The trial court did not abuse its discretion by admitting evidence against the defendant of his consensual relationships with two young women other than the complainants, as well as evidence of the defendant's indecent exposure convictions by jury at the defendant's first trial. *Id*. at 437 n 1, 441-442.

- *People v Katt (Katt I)*, 248 Mich App 282 (2001):

The defendant was convicted of three counts of CSC-I against a seven-year-old boy and a five-year-old girl (brother and sister) who lived with the defendant, their mother, the mother's ex-husband, and another person. *Katt I*, 248 Mich App at 285. The trial court permitted the prosecution *in rebuttal* to introduce evidence of an alleged prior sexual assault against a nine-year-old boy in which the defendant allegedly touched the boy's "privates" while the defendant and the boy were both disrobed after taking a bath together. *Id*. at 301-302. "[The evidence] was properly admitted under the common scheme, plan, or system of logical relevance." *Id*. at 306. The charged and the uncharged conduct was "sufficiently similar" to support an inference that they were manifestations of a common system. *Id*. The Court explained: "(1) the victims and defendant knew each other, (2) the victims were all of a tender age, (3) the alleged sexual abuse occurred when defendant was alone with the children, and (4) the improper contact allegedly involved

the touching of the children's sexual organs when defendant and the victims were disrobed." *Id*.

• *People v Watson*, 245 Mich App 572 (2001):

The defendant was convicted of CSC-I and assault with intent to commit CSC-II against his stepdaughter when she was between the ages of 11 and 13. *Watson*, 245 Mich App at 574-575. The trial court properly admitted into evidence a cropped photograph found in the defendant's wallet that showed the victim's naked buttocks. *Id*. at 575-578. The Court of Appeals ruled that the evidence was admissible under MRE 404(b) to show the defendant's motive: "[T]he other acts evidence showed more than defendant's propensity toward sexual deviancy; it showed that he had a specific sexual interest in his stepdaughter, which provided the motive for the alleged sexual assaults." *Watson*, 245 Mich App at 580.

• *People v Pesquera*, 244 Mich App 305 (2001):

The defendant was convicted of CSC-I and CSC-II against five children between the ages of four and six who lived in the same mobile home park as the defendant. *Pesquera*, 244 Mich App at 308. At trial, two other children testified to being sexually assaulted by the defendant. *Id*. at 316-317. The trial court properly admitted this testimony to show a scheme, plan, or system. *Id*. at 318-319. The common features identified by the Court of Appeals were: (1) the defendant and the victims knew each other; (2) the defendant and the victims were friends; (3) the victims were very young; (4) the assaults occurred after the defendant invited the children to play with him; and (5) the assaults involved the defendant's touching of the children's sexual organs. *Id*. at 319.

• *People v Sabin (After Remand)*, 463 Mich 43 (2000):

The defendant was convicted of CSC-I against his 13-year-old daughter. *Sabin*, 463 Mich at 47, 52. According to the complainant, the defendant told her after the assault that if she told her mother, her mother would be upset with her for breaking up the family again. *Id*. at 48-49. Over the defendant's objection, his *stepdaughter* testified that he performed oral sex on her from the time she was in kindergarten until she was in seventh grade. *Id*. at 49-50. She testified that the defendant told her not to tell anyone about his conduct because it would hurt the family and because her mother would be angry with them. *Id*. at 50.

The stepdaughter's testimony was properly admitted as relevant to the defendant's scheme, plan, or system. *Sabin*, 463 Mich at 66. The following common features beyond commission of the sexual conduct supported the trial court's discretionary ruling: (1) the

father-daughter relationship; (2) the similar age of the victims; and (3) the defendant's attempt to silence the victims by playing on their fears of breaking up the family. *Id*.

• *People v Starr*, 457 Mich 490 (1998):

The defendant was convicted of CSC-I and CSC-II against his nine-year-old adopted daughter; the sexual assaults were not reported until two years after they occurred. *Starr*, 457 Mich at 492-493. Accompanied by a limiting instruction, the trial court properly permitted the defendant's half-sister to testify that the defendant had subjected her to similar, uncharged sexual acts for 14 years, beginning when she was four years old and ending when she was around 18 years old, three years before the defendant's trial. *Id*. at 492-493, 503. The Court determined that admission of the evidence was permissible because it allowed the prosecution to "effectively rebut defendant's claim that the charges were groundless and fabricated by [the victim's] mother." *Id*. at 502.

The two-year delay between the time of the assaults and the time the victim told authorities about them was because the victim's mother herself did not find out about the assaults until two years after they occurred. *Starr*, 457 Mich at 501-503. Two years after the victim was assaulted, the victim's mother learned that the defendant had sexually assaulted his half-sister, which prompted the victim's mother to ask the victim questions about her relationship with the defendant. *Id*. at 501-502. According to the Court, "the half-sister's testimony was the only evidence to explain why the mother specifically questioned the victim about her relationship with her father, and why the victim waited two years before telling her mother about the abuse[.]" *Id*. at 501.

• *People v Layher*, 238 Mich App 573 (1999):

The defendant was convicted of CSC-I and CSC-II against his niece. *Layher*, 238 Mich App at 575-576. The charged assaults occurred while the victim and the defendant were living at the apartment of the victim's grandmother. *Id*. at 586. According to the victim, two of the charged assaults took place while other family members were in the apartment. *Id*. At trial, evidence of an earlier, uncharged sexual assault by the defendant against the victim during which the victim's mother was nearby was admitted. *Id*. The evidence was properly admitted under MRE 404(b) because it "was offered for a proper purpose and was relevant to an issue of consequence at trial." *Layher*, 238 Mich App at 586. The evidence enabled the prosecutor to rebut the defendant's theory that the victim's allegations were fabricated "by showing that defendant was, in both instances, willing to risk assaulting complainant while other family members were nearby." *Id*.

6.4 Other-Acts Evidence Under § 768.27

MCL 768.27 provides for the admission of other-acts evidence. MCL 768.27 states:

> "In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant."

"[W]hile MRE 404(b) and MCL 768.27 certainly overlap, they are not interchangeable." *People v Jackson*, 498 Mich 246, 269 (2015). MCL 768.27 authorizes the admission of other-acts evidence for the same purposes listed in [MRE 404(b)(2)] when one or more of the matters "is material." *Jackson*, 498 Mich at 269; MCL 768.27. "Unlike MCL 768.27, however, MRE 404(b)'s list of such purposes is expressly nonexhaustive, and thus plainly contemplates the admission of evidence that may fall outside the statute's articulated scope." *Jackson*, 498 Mich at 269. Accordingly, "MCL 768.27 does not purport to define the limits of admissibility for evidence of uncharged conduct." *Jackson*, 498 Mich at 269.

6.5 Other-Acts Evidence Under § 768.27a

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. Evidence that a defendant previously committed a listed offense against a minor is admissible against that defendant in a subsequent criminal case in which the defendant is accused of committing a listed offense against a minor. MCL 768.27a states in part:

> "(1) Notwithstanding [MCL 768.27],[13] in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

"MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts," and

[13] See Section 6.4 for a discussion of MCL 768.27.

"it does not violate the principles of separation of powers." *People v Pattison*, 276 Mich App 613, 619-620 (2007). Further, MCL 768.27a does not violate the Ex Post Facto Clause because the altered standard for admission of evidence does "not lower the quantum of proof or value of the evidence needed to convict a defendant." *Pattison*, 276 Mich App at 619.

"[T]o ensure that the jury properly employs [evidence admitted under MCL 768.27a]," the trial court may instruct the jury using M Crim JI 20.28a, the standard instruction on evidence of other acts of child sexual abuse. *People v Watkins (Watkins III)*, 491 Mich 450, 490 (2012). See also *People v Wisniewski*, ___ Mich App ___, ___ (2025), where the trial court alleviated "any danger of unfair prejudice" when it instructed the jury, "'*You must not convict the defendant here solely because you think he is guilty of other bad conduct*.'"

A. Notice Required

MCL 768.27a(1) states the time in which the prosecution must disclose any evidence under MCL 768.27a it intends to introduce:

> "If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered."

MCL 768.27a(1) only requires that the prosecution disclose to the defendant at least 15 days before trial is scheduled any evidence it intends to introduce. *People v Gaines*, 306 Mich App 289, 302 (2014). MCL 768.27a(1) does not require that the other-acts evidence be listed in the notice of intent. *Id*. That is, the statute does not preclude the prosecution from disclosing the evidence by reference to police reports or other discovery in the notice of intent. *Id*. See also *People v Wisniewski*, ___ Mich App ___, ___ (2025), where the Court concluded that the prosecution satisfied the notice requirements in MCL 768.27a(1) by having the witness testify at the preliminary examination, at which time the Court noted "defense counsel had an opportunity to perform a cross-examination after listening to [the witness's] direct examination."

B. Procedure for Determining Admissibility of Evidence

"MCL 768.27a permits the admission of evidence that MRE 404(b) precludes." *People v Watkins (Watkins III)*, 491 Mich 450, 470 (2012).

"[Specifically], the language in MCL 768.27a allowing admission of another listed offense 'for its bearing on any matter to which it is relevant' permits the use of evidence to show a defendant's character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes." *Watkins III*, 491 Mich at 470. "MCL 768.27a irreconcilably conflicts with MRE 404(b) and . . . the statute prevails over the court rule." *Watkins III*, 491 Mich at 496. Because MCL 768.27a "'does not principally regulate the operation or administration of the courts,'" it is a substantive rule of evidence and prevails over MRE 404(b). *People v Watkins (Watkins II)*, 277 Mich App 358, 363-364 (2007), aff'd 491 Mich 450 (2012), quoting *People v Pattison*, 276 Mich App 613, 619 (2007). "MCL 768.27a does not run afoul of [separation-of-powers principles], and in cases in which the statute applies, it supersedes MRE 404(b)." *Watkins III*, 491 Mich at 476-477.

> "[W]hile MCL 768.27a prevails over MRE 404(b) as to evidence that falls within the statute's scope, the statute does not mandate the admission of all such evidence, but rather 'the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the [non-MRE 404(b)] rules of evidence,' including MRE 403 and the 'other ordinary rules of evidence, such as those pertaining to hearsay and privilege[.]'" *People v Uribe*, 499 Mich 921, 922 (2016), quoting *Watkins III*, 491 Mich at 484-485 (second alteration in original).

While evidence admissible under MCL 768.27a remains subject to MRE 403, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Watkins III*, 491 Mich at 496. See, e.g., *People v Wisniewski*, ___ Mich App ___, ___ (2025), where testimony given by a victim who was sexually assaulted by defendant in the past "not only was supportive of the credibility of the multiple victims' testimony at trial, but it also provided the jury with a more complete picture of defendant's history, particularly regarding his sexual interest in young girls."

When deciding whether MRE 403 requires exclusion of other-acts evidence admissible under MCL 768.27a, a court's considerations may include:

> "(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the

> lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony." *Watkins III*, 491 Mich at 487-488.

See also *Uribe*, 499 Mich at 922 (noting "there are 'several considerations' that may properly inform a court's decision to exclude [MCL 768.27a] evidence under MRE 403, including but not limited to 'the dissimilarity between the other acts and the charged crime' and 'the lack of reliability of the evidence supporting the occurrence of the other acts'"), quoting *Watkins III*, 491 Mich at 487. A court may also "consider whether charges were filed or a conviction rendered when weighing the evidence under MRE 403." *Watkins III*, 491 Mich at 489.

"The list of 'considerations' in *Watkins* [*III*] provides a tool to facilitate, not a standard to supplant, [the] proper MRE 403 analysis, and it remains the court's 'responsibility' to carry out such an analysis in determining whether to exclude MCL 768.27a evidence under that rule." *Uribe*, 499 Mich at 922, quoting *Watkins III*, 491 Mich at 489-490. The trial court abused its discretion by excluding MCL 768.27a evidence where it failed to conduct an MRE 403 analysis and instead focused only on the considerations listed in *Watkins III*. *Uribe*, 499 Mich at 922.

> "In ruling the proposed testimony inadmissible under MRE 403, the trial court, citing the illustrative list of 'considerations' in *Watkins* [*III*], expressed concern regarding apparent inconsistencies between the proposed testimony and prior statements made by the witness, and certain dissimilarities between the other act and the charged offenses. The trial court, however, failed to explain . . . how or why these concerns were sufficient . . . to render the 'probative value [of the proposed testimony] . . . substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence,' as required for exclusion under MRE 403." *Uribe*, 499 Mich at 922, quoting *Watkins III*, 491 Mich at 481 (second alteration and third omission in original).

C. Caselaw

The following appellate cases address the admissibility of other-acts evidence under MCL 768.27a.

• *People v Wisniewski*, ___ Mich App ___ (2025):

Defendant was convicted by a jury of four counts of CSC-I (person under 13 years of age), and one count of CSC-II (person under 13 years of age). *Id*. at ___. The trial court admitted the testimony of woman who had been sexually abused by defendant when she was a minor but who was not a named victim in the case at trial. *Id*. at ___. The Court held that the testimony otherwise admissible under MCL 768.27a was "not unfairly prejudicial under MRE 403 because the evidence's propensity inferences weigh in favor of the evidence's probative value, as opposed to its prejudicial effect." *Wisniewski*, ___ Mich App at ___ (quotation marks and citation omitted). The witness's testimony "not only was supportive of the credibility of the multiple victims' testimony at trial, but it also provided the jury with a more complete picture of defendant's history, particularly regarding his sexual interest in young girls." *Id*. at ___.

• *People v Beck*, 510 Mich 1 (2022):

The defendant's first trial in 2016 for two counts of CSC-II was declared a mistrial. *Beck*, 510 Mich at 7. After the 2016 mistrial and before his retrial on those charges, the defendant was charged with CSC-I (two counts) and CSC-II (one count). *Id*. at 8-9. The defendant was tried at a single trial for the charges he faced at the first trial (that ended in a mistrial) *and* the charges that arose after the mistrial as he was awaiting retrial on the initial charges. *Id*. At the retrial in 2017, the defendant was convicted of all charges—those in the mistrial and those that arose in the interim. *Id*. at 10. Ultimately, however, the Michigan Supreme Court vacated the convictions resulting from the 2016 charges because "the trial court did not adequately find a justification for mistrial that outweighed the defendant's interest in continuing the trial." *Id*. at 15. Consequently, the prohibition against double jeopardy barred retrial on the original charges. *Id*. at 16.

The defendant asserted that he was entitled to a new trial on the 2017 charges because the 2016 convictions were vacated and evidence related to the 2016 charges would not have been admissible in a separate trial related to the 2017 charges. *Beck*, 510 Mich at 16. According to the defendant, the convictions for the 2017 charges were tainted by the admission of evidence of the 2016 charges at the defendant's joint retrial. *Id*.

When a defendant is charged with committing a listed offense against a minor, MCL 768.27a allows for the admission of evidence "for its bearing on any matter to which it is relevant" that the defendant committed *another* listed offense against a minor. *Beck*, 510 Mich at 19. The victim of the 2016 charges against the defendant and the victim of the 2017 charges testified at the defendant's retrial.

Id. at 19-20. Further, although the defendant objected, the court permitted the defendant's ex-wife and three of his other daughters to testify about their experiences with the defendant. *Id*. The evidence was relevant to the charges in the 2017 retrial, but the Court had also to examine the evidence as indicated by MRE 403. *Beck*, 510 Mich at 19. The Court analyzed the evidence under MRE 403 as instructed by the Court in *People v Watkins (Watkins III)*, 491 Mich 450 (2012). *Beck*, 510 Mich at 19-26. Admission of the other-acts evidence under *Watkins III* required the Court to consider the dissimilarity, temporal proximity, frequency of the intervening acts, reliability of evidence in support of the other acts, and whether there was a need for evidence other than the testimony of the defendant and a complainant. *Id*. at 21. Under MCL 768.27a, and after the probative/prejudicial test of MRE 403, the Court concluded that evidence of the defendant's conduct related to the 2016 charges and the testimony of other witnesses about the defendant's conduct with them was properly admitted to show the defendant's propensity to commit listed offenses against a minor. *Beck*, 510 Mich at 22. As a result, the convictions arising from the 2017 charges were valid. *Id*. at 32.

- *People v Hoskins*, 342 Mich App 194 (2022):

Other-acts evidence arising from a previous conviction of a listed offense against a minor. The defendant was charged with two counts of CSC-I, two counts of CSC-II, and two counts of accosting a child for an immoral purpose for allegedly sexually abusing his stepdaughter when she was 11 years old or younger. *Hoskins*, 342 Mich App at 197. Pursuant to MCL 768.27a, the prosecution sought to have admitted at the defendant's upcoming trial evidence that he had committed other listed offenses against a minor in 2002 when the defendant was age 18 and the victim involved was age 13. *Hoskins*, 342 Mich App at 198, 199. The defendant and the victim were not related "but had purportedly been in a dating relationship." *Id*. at 199. At trial, the jury convicted the defendant of assault with intent to commit CSC and acquitted him of two counts of CSC-III. *Id*. at 199. The defendant moved to exclude the other-acts evidence from 2002, and the trial court denied his motion with regard to both the conviction and the acquittals. *Id*. at 199. "[T]he trial court cited [*People v*] *Watkins* on the record, stated that it had considered the *Watkins* factors, and referred to a number of these factors in support of its decision to deny [the defendant's] motion."[14] *Id*. at 203. "The trial court also cited MRE 403 and

[14]According to the defendant, "the trial court erred by failing to analyze each of the *Watkins* factors on the record and to conduct an MRE 403 analysis." *Hoskins*, 342 Mich App at 203. However, *Watkins* does not indicate that a trial court *must* discuss the factors on the record. *Id*. at 203.

discussed its application to evidence admissible under MCL 768.27a." *Hoskins*, 342 Mich App at 203.

As applied to the facts in *Hoskins*, the Court of Appeals concluded that "the *Watkins* factors support admission of the evidence of [the defendant's] 2002 conviction of assault with intent to commit CSC, although the temporal gap between that conviction and the present case weighs in favor of exclusion." *Hoskins*, 342 Mich App at 209 (17 years had passed between the defendant's conduct in 2002 and the defendant's conduct involving his stepdaughter in 2019). "[T]he trial court did not abuse its discretion by finding that the probative value of this other-acts evidence was not substantially outweighed by the risk that it would unfairly prejudice [the defendant]." *Id*. at 210.

Other-acts evidence related to previous criminal charges against the defendant for commission of a listed offense against a minor, charges resulting in the defendant's acquittal. Under certain circumstances, evidence that a defendant previously committed a listed offense against a minor may be admitted against a defendant at trial, even when the defendant was acquitted of charges brought a result of that conduct. *Hoskins*, 342 Mich App at 208. However, as with other evidence offered under MCL 768.27a, evidence of a prior acquittal is subject to analysis under MRE 403. *Hoskins*, 342 Mich App at 203. In *Hoskins*, the trial court abused its discretion when it permitted the introduction of evidence for crimes resulting in the defendant's acquittal. *Id*. at 215, 216con. A defendant who has been acquitted of an offense "enjoys a number of constitutional protections that impact [the] calculus of unfair prejudice under MRE 403." *Hoskins*, 342 Mich App at 213. According to the Court, under the circumstances in *Hoskins*, the application of MRE 403 to evidence that arose from charges resulting in acquittals "present[ed] a particularly unique risk of unfair prejudice, one which substantially outweigh[ed] the evidence's probative value." *Hoskins*, 342 Mich App at 212-213.

When deciding on the admissibility of evidence arising from a charged offense for which a defendant was acquitted, the following factors merit consideration:

- **An acquitted individual is presumed innocent of the acquitted charge.** *Hoskins*, 342 Mich App at 213. An individual acquitted of an offense may not be tried again for that offense, and an individual acquitted of an offense may not be subject to an increased sentence based on the acquitted conduct. *Id*. at 213. Evidence of a prior conviction means that a fact-finder determined that a defendant was guilty of the offense beyond a reasonable doubt, while an acquittal means that the fact-finder was unable to

determine that a defendant was guilty of an offense beyond a reasonable doubt. *Id*. at 211, n 9. Consequently, "[a] jury considering other-acts evidence of acquitted conduct will make its own independent determination of whether the defendant committed the acquitted acts, despite a previous jury's unanimous verdict finding that defendant not guilty." *Id*. at 213.

- **Requiring a defendant to again defend against a matter previously decided.** Admitting evidence of a defendant's previous acquittal is unfairly prejudicial because the accused "must again defend against allegations of which he or she has already been acquitted." *Hoskins*, 342 Mich App at 213. In *Hoskins*, the 17 years that passed between the acquitted conduct and the conduct giving rise to the instant charges would make the acquitted conduct difficult to defend, and having to defend against conduct that occurred two decades before the instant conduct "risks prejudicing [the defendant's] ability to present a full and adequate defense against the charges that he currently faces." *Id*. at 214. The defendant would be required to invest time and money litigating a matter decided at his first trial involving a different victim, "an inequitable outcome that MRE 403 is designed to prevent." *Hoskins*, 342 Mich App at 214.

- **Possibility that a jury would convict on the basis of conduct involved in offenses for which the defendant was acquitted.** *Hoskins*, 342 Mich App at 214. When other-acts evidence is admitted against a defendant, there is "the danger that a jury will convict the defendant solely because it believes he committed other criminal conduct, a possibility that is particularly egregious when the defendant has been *acquitted* of these other acts." *Id*. at 214.

- *People v Watkins (Watkins III)*, 491 Mich 450 (2012), aff'g *People v Watkins (Watkins II)*, 277 Mich App 358 (2007):

The defendant was charged with CSC-I and CSC-II for the alleged sexual abuse of a 12-year-old girl in his neighborhood. *Watkins II*, 277 Mich App 359-360. The trial court refused to allow as similar-acts testimony, the testimony of a witness who was sexually assaulted by the defendant when she was 15 years old and who continued in a sexual relationship with the defendant for two years. *Id*. at 361. The trial court ruled that the witness's testimony was not admissible under either MRE 404(b) or MCL 768.27a because the proposed testimony was too different from the victim's description of the charged acts to prove a common plan or scheme. *Watkins II*,

277 Mich App at 362, 365. The *Watkins II* Court was ordered to consider "'whether MCL 768.27a conflicts with MRE 404(b) and, if it does, whether the statute prevails over the court rule.'" *Watkins II*, 277 Mich App at 362, quoting *People v Watkins (Watkins I)*, 479 Mich 853, 853 (2007). The Court of Appeals determined that MCL 768.27a controlled over MRE 404(b) "[b]ecause MCL 768.27a is a substantive rule of evidence deeply rooted in weighty policy considerations[.]" *Watkins II*, 277 Mich App at 365. Although the witness's testimony was inadmissible under MRE 404(b) because of the dissimilarities between the defendant's conduct with the witness and the defendant's conduct with the victim, similarity is not a consideration under MCL 768.27a. *Watkins II*, 277 Mich App at 365. The Court instructed the trial court, on remand, to determine which aspects of the witness's testimony were related to the commission of an offense to which MCL 768.27a applied, and to admit those aspects of the witness's testimony at the defendant's trial. *Watkins II*, 277 Mich App at 365.

The Michigan Supreme Court affirmed. *Watkins III*, 491 Mich at 456. The Court noted that "the language in MCL 768.27a allowing admission of another listed offense 'for its bearing on any matter to which it is relevant' permits the use of evidence to show a defendant's character and propensity to commit the charged crime, precisely that which MRE 404(b) precludes." *Watkins III*, 491 Mich at 470. "[MCL 768.27a] reflects a substantive legislative determination that juries should be privy to a defendant's behavioral history in cases charging the defendant with sexual misconduct against a minor," while MRE 404(b) is a procedural rule "designed to allow the adjudicatory process to function effectively," *Watkins III*, 491 Mich at 474, 476 (quotation marks and citation omitted). "Thus, the statute establishes an exception to MRE 404(b) in cases involving a charge of sexual misconduct against a minor." *Watkins III*, 491 Mich at 471. "MCL 768.27a does not run afoul of Const 1963, art 6, § 5[.]" *Watkins III*, 491 Mich at 476-477.

The *Watkins III* Court additionally held that "evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Watkins III*, 491 Mich at 481, quoting MRE 403. "[W]hen applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference." *Watkins III*, 491 Mich at 487.

- *People v Solloway*, 316 Mich App 174 (2016):

When a defendant is accused of committing a listed offense against a minor, "[MCL 768.27a] allows the prosecution to offer evidence of another sexual offense committed by the defendant against a minor without having to justify its admission under MRE 404(b)." *Solloway*, 316 Mich App at 192. At the defendant's trial for CSC-I against his nine-year-old son, the trial court properly admitted evidence under MCL 768.27a showing that the defendant had been convicted of CSC-IV after he inappropriately touched his nephew when his nephew was nine years old and living with the defendant. *Solloway*, 316 Mich App at 178-179, 192-193.

On appeal, the Court held that the other-acts evidence was relevant because evidence that the defendant had previously assaulted a nine-year-old relative "'[made] it more probable that he committed the charged offense' against [his son], who was also related to defendant and the same age as defendant's nephew at the time of the assault." *Solloway*, 316 Mich App at 193, quoting *Watkins III*, 491 Mich at 470. The evidence was also relevant to the victim's credibility because "[t]he fact that defendant committed a similar crime against his nephew made it more probable that [his son] was telling the truth." *Solloway*, 316 Mich App at 193.

The factors outlined in *Watkins* as applied to the facts in *Solloway* favored admission. *Solloway*, 316 Mich App at 194-196. First, the other acts and the charged crime were similar—the victims were the same age, the defendant was related to both of them, the offenses occurred at a time when the victims were living with the defendant, and both offenses "involved defendant entering the victim's bedroom in the middle of the night, climbing on top of him, and engaging in some sort of inappropriate touching." *Id*. at 194-195. Second, the fact that the acts occurred 12 years apart did not bar admission under MRE 403 in light of the similarity of the acts. *Solloway*, 316 Mich App at 195. Third, the defendant's nephew testified that the inappropriate touching occurred multiple times; "[t]herefore, it cannot be said that the other acts occurred so infrequently as to support exclusion of the evidence." *Id*. Fourth, there were no intervening acts that weighed against admissibility. *Id.* Fifth, the defendant did not challenge his nephew's credibility; instead, the defendant's nephew's reliability was supported because the defendant pleaded guilty to CSC IV against his nephew. *Id.* at 195-196. Sixth, "because there were no eyewitnesses to corroborate [his son's] testimony and to refute defendant's theories in regard to the physical evidence of the crime, there was a need for evidence beyond [his son's] and defendant's testimony." *Id.* at 196.

- *People v Duenaz*, 306 Mich App 85 (2014):

After application of the *Watkins* factors, the Court of Appeals concluded that the trial court did not abuse its discretion by admitting evidence under MCL 768.27a that the defendant allegedly assaulted his 13-year-old stepdaughter a few months before he was charged with assaulting a nearly eight-year-old child, and that he was convicted in Arizona of child molestation against a different child after the conduct in the charged offenses occurred. *Duenaz*, 306 Mich App at 97-98, 100-101. The assaults in the charged offenses and the assaults of his stepdaughter were similar—both involved anal and vaginal penetration, the defendant threatened both victims with harm to them or their families if they told anyone of the assaults, and less than six months had elapsed between assaults of his stepdaughter and assaults of the victim of the charged offenses. *Id.* at 100. The age difference between the victims was not "very" material. *Id*. Evidence of the defendant's previous conviction was also properly admitted even without detailing the offense because the offense in Arizona and the charged offenses were of the same general category (sex crimes against a child), the evidence tended to make the victim's story more believable, and the evidence was not "too far removed temporally from the instant offenses in Michigan." *Id.* at 101.

- *People v Gaines*, 306 Mich App 289 (2014):

The trial court did not abuse its discretion by admitting evidence of uncharged offenses involving each of the three victims in a consolidated trial. *Gaines*, 306 Mich App at 301-303. "[I]n each case defendant formed a relationship with a much-younger girl at his high school," the defendant and the victims each "used cell phones and text messaging to communicate," and the defendant's misconduct with each victim "occurred close together in time[.]" *Id*. at 303. "The other-acts evidence was also reliable because much of it was confirmed by the messages exchanged between defendant and the victims." *Id*.

- *People v Mann*, 288 Mich App 114 (2010):

Evidence that the defendant previously committed a listed offense against a minor was properly admitted under MCL 768.27a in the defendant's trial for CSC-I and CSC-II involving two minor victims. *Mann*, 288 Mich App at 117-119. "The challenged evidence was relevant because it tended to show that it was more probable than not that the two minors in this case were telling the truth . . . . The challenged evidence also made the likelihood of [the defendant's] behavior toward the minors . . . more probable." *Id*. at 118. In addition, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *Id*. Notably, "the trial court specifically instructed the jury on two occasions that the only purpose for which the evidence could be considered was to help

them judge the believability of the testimony regarding the acts for which [the defendant] was on trial." *Id*. The trial court further limited any prejudicial effect of the evidence "by ensuring that the videotape of [the defendant's] guilty plea to the prior offense was not played for the jury." *Id*. at 119.

6.6 Other-Acts Evidence Under § 768.27b

In a criminal action against a defendant for an offense involving domestic violence or sexual assault, evidence that a defendant committed other acts of domestic violence or sexual assault is admissible "for any purpose for which [the evidence] is relevant, if [the evidence] is not otherwise excluded under [MRE 403]," and, unless any condition stated in the statute applies, the act of domestic violence or sexual assault occurred not "more than 10 years before the charged offense[.]" MCL 768.27b(1), (4)(a)-(d).[15] The statutory provisions of MCL 768.27b "do[] not limit or preclude the admission or consideration of evidence under any other statute, including, but not limited to, under [MCL 768.27a], rule of evidence, or case law." MCL 768.27b(3). [16]

A. Notice

MCL 768.27b(2) requires the prosecuting attorney to disclose an intent to offer evidence under this statute, "including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown."

B. Caselaw

The following appellate cases address the admissibility of other acts evidence under MCL 768.27b.

- *People v Berklund*, ___ Mich App ___ (2024):

"[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of sexual assault is admissible under MCL 768.27b(1) so long as the evidence is not excluded by MCL 768.27b(4) or MRE 403, and is relevant." *Berklund*, ___ Mich App at ___, citing MCL 768.27b(1). On interlocutory appeal by leave

[15] Applicable to trials and evidentiary hearings started or in progress on or after May 1, 2006. MCL 768.27b(7).

[16] For detailed information about the admission of evidence under MCL 768.27b, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 4.

granted, defendant unsuccessfully "challenge[d] the trial court's decision under MCL 768.27b(1) to allow the prosecution to introduce evidence that defendant previously committed sexual assault." *Berklund*, ___ Mich App at ___. Defendant, who faced a charge of assault with intent to commit great bodily harm less than murder or by strangulation (MCL 750.84(1)(a) or (b)) against a person who used to live with defendant and his wife, argued that the evidence of his prior sexual assault was only admissible under MCL 768.27b(1) if he were on trial for *another sexual assault*, not when he was on trial for *domestic violence*. *Berklund*, ___ Mich App at ___. The Court disagreed, stating that "the manner in which the Legislature chose to construct MCL 768.27b makes plain that it intended for evidence that a defendant previously committed an offense involving sexual assault to be admissible in a current prosecution in which the defendant is accused of an offense involving domestic violence, and vice versa." *Id*. at ___.

- *People v Propp (Propp II)*, 508 Mich 374 (2021), reversing in part and vacating in part *People v Propp (Propp I)*, 330 Mich App 151 (2019):

In *Propp I*, the defendant argued that specific evidence should not be admitted against him because it was inadmissible hearsay." *Propp I*, 330 Mich App at 156, 171."[R]ules of evidence not specifically mentioned in MCL 768.27b may nonetheless be considered when determining whether evidence is admissible." *Propp II*, 508 Mich at 385. "MCL 768.27b(3) states: "*This section does not limit or preclude the admission or consideration of evidence under* any other statute, *rule of evidence*, or case law." *Propp II*, 508 Mich at 385 (emphasis added). "Although this provision appears to be primarily directed to allow the *admission* of evidence under other sources of law, the plain language of [MCL 768.27b] allows for the *consideration* of evidence under any other rule of evidence." *Propp II*, 508 Mich at 385. Consequently, the Supreme Court concluded that the Court of Appeals had erred in concluding that "the Legislature intended for evidence to be admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence." *Propp II*, 508 Mich at 380. See *Propp I*, 330 Mich at 180-181. The Supreme Court reversed Part IV of the opinion in *Propp I* and remanded the case to the Court of Appeals to consider whether the evidence at issue was admissible when it was examined under other applicable rules of evidence. *Propp II*, 508 Mich at 386. The Supreme Court specifically noted that "MCL 768.27b does not limit or preclude the consideration of MRE 802, which states that hearsay is generally not admissible." *Propp II*, 508 Mich at 386.

- *People v Propp (On Remand) (Propp III)*, 340 Mich App 652 (2022):

On remand, the Court determined that the evidence the defendant claimed was inadmissible as hearsay was in fact either admissible under other applicable rules of evidence or did not constitute hearsay and so was properly admitted against the defendant at trial. *Propp III*, 340 Mich App at 666-668.

- *People v Pattison*, 276 Mich App 613 (2007):

Evidence of CSC-I against the defendant's ex-fiancee was admissible under MCL 768.27b because the evidence was "probative of whether he used those same tactics to gain sexual favors from his daughter" against whom the defendant was charged with committing four counts of CSC-I over two years when she lived with him. *Pattison*, 276 Mich App at 615, 616. The Court of Appeals affirmed the trial court's order allowing the prosecutor to introduce evidence of the defendant's other alleged sexual assaults against his ex-fiancee. *Id*. at 615-616. However, rather than reviewing the evidence's admissibility under MRE 404(b), as did the trial court, the Court of Appeals relied on MCL 768.27b to make this determination. *Pattison*, 276 Mich App at 615-616. The Court disagreed with the trial court's order permitting evidence of the defendant's alleged assaults against a coworker because there was no evidence of a "personal or familial relationship" between the defendant and his coworker. *Id*.[17] Furthermore, the defendant's conduct directed at his coworker involved "surprise, ambush, and force," while the defendant's conduct directed at his daughter involved "manipulation and abuse of parental authority." *Id*. at 617.

6.7 Declarant Statements Under § 768.27c[18]

MCL 768.27c provides statutory authority for the admission under certain circumstances of a declarant's statement about injuries caused, or threats made, by the alleged perpetrator in cases involving domestic violence,[19] which are cases that may involve sexual assault. See MCL 768.27c(5)(b)(*iii*).

> "(1) Evidence of a statement by a declarant is admissible if all of the following apply:

[17] Note that effective March 17, 2019, MCL 768.27b was amended to expand, under specific circumstances, the admissibility of prior sexual assaults to include assaults occurring more than 10 years before the charged offense. See 2018 PA 372. *Pattison* was decided before this statutory amendment.

[18] For more information about the admissibility of a declarant's statements under MCL 768.27c, see the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 4, and the *Evidence Benchbook*, Chapter 5.

[19] MCL 768.27c(5)(b)(*iii*) defines domestic violence to include "[c]ausing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force or duress."

> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer." MCL 768.27c(1).

MCL 768.27c(1)(a) "places a factual limitation on the admissibility of statements[, and MCL 768.27c](1)(c) places a temporal limitation on admissibility." *People v Meissner*, 294 Mich App 438, 446 (2011). Together, these provisions "direct that a hearsay statement can be admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury." *Id*. at 447.

"MCL 768.27c contains no requirement that the complainant-declarant be unavailable in order to admit evidence of a statement that otherwise satisfies the statutory requirements." *People v Olney*, 327 Mich App 319, 326, 328 (2019) ("The circuit court erred as a matter of law in holding that there is an 'unavailability' requirement under MCL 768.27c.").

6.8 Selected Hearsay Rules and Exceptions

This section discusses hearsay issues that may arise in CSC cases. For a more detailed discussion of hearsay issues, including evidence excluded from the definition of hearsay, as well as exceptions to the rule against the admission of hearsay, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

A. Hearsay Rules

Except as provided in the Michigan Rules of Evidence, hearsay is not admissible. MRE 802. Exceptions to the rule against the admission of hearsay are found in MRE 803, MRE 803A, MRE 804, and MRE 807.

B. Exceptions to the Rule Against Hearsay Regardless of Declarant's Availability

1. Excited Utterance

An *excited utterance* is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." MRE 803(2). An excited utterance is admissible even if the declarant is available as a witness. *Id*.

"To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion." *People v Skippergosh*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted).

A sexual assault is a startling event. *People v Straight*, 430 Mich 418, 425 (1988).

"The plain language of MRE 803(2) . . . does not require that a startling event or condition be established solely with evidence independent of an out-of-court statement before the out-of-court statement may be admitted. Rather, MRE 1101(b)(1) and MRE 104(a)[20] instruct that when a trial court makes a determination under MRE 803(2) about the existence of a startling event or condition, the court may consider the out-of-court statement itself in concluding whether the startling event or condition has been established." *People v Barrett*, 480 Mich 125, 139 (2008).

"The focus of MRE 803(2), given a startling event, is whether the declarant spoke while still under the stress caused by the startling event." *Straight*, 430 Mich at 425-426 (ruling that statements made by the alleged victim "approximately one month after the alleged assault, immediately after a medical examination of the child's pelvic area, and after repeated questioning by her parents" were inadmissible hearsay). The justification for the excited utterance rule is lack of *capacity* to fabricate, not lack of *time* to fabricate. *Straight*, 430 Mich at 425. See also *Skippergosh*, ___ Mich App ___, ___ (witness testified that the complainant appeared "scared" at the time she made

[20] MRE 1101(b)(1) states that the rules of evidence do not apply to preliminary questions of fact; MRE 104(a) states that a trial court is not bound by the rules of evidence when determining a preliminary question of admissibility.

the utterance, "[t]he fact that [she] was 'scared' suggest[ed] that she did not have sufficient time after the assault to gather her thoughts to create a misrepresentation").

"[T]here is no express time limit for excited utterances." *Smith*, 456 Mich at 551. In *Smith*, 456 Mich at 552-553, the statement made by the CSC-I victim ten hours after the sexual assault was admissible as an excited utterance because the circumstances under which the statement was made "describe[d] a continuing level of stress arising from the assault that precluded any possibility of fabrication." However, the Court noted that the statement was "nearing the outer limits of admissibility under the excited utterance exception, and trial courts should be so cautioned." *Id*. at 554 n 4. See also, e.g., *Skippergosh*, ___ Mich App at ___ ("testimony indicated that [complainant] was actively bleeding when she made the statements, which suggested that the statements were made shortly after the assault").

But see *People v Layher*, 238 Mich App 573, 583-584 (1999), where a statement made by a 15-year-old victim during therapy one week after the alleged assault was an excited utterance because the victim was in a continuing state of emotional shock precipitated by the assault. According to the *Layher* Court: "The[] circumstances, combined with complainant's young age, mental deficiency, and the relatively short interval between the assault and the statement, militate against the possibility of fabrication and support an inference that the statement was made out of a continuing state of emotional shock precipitated by the assault." *Id.* at 584.

A statement that identifies the perpetrator of an assault relates to the circumstances of the startling occasion and may satisfy the third criterion of the excited-utterance hearsay exception under MRE 803(2). See *Skippergosh*, ___ Mich App at ___ ("[T]he statements made by [the victim] related to the circumstances of the startling occasion, as they noted the perpetrator of the assault.").

2. Statements Made for Purposes of Medical Treatment or Diagnosis in Connection With Treatment

MRE 803(4) allows admission of statements made for purposes of medical treatment or diagnosis. A statement is admissible under MRE 803(4) if it:

> "(A) is made for—and is reasonably necessary to—medical treatment or diagnosis in connection [with] treatment; and

(B) describes medical history, past or present symptoms or sensations, their inception, or their general cause."

"'Particularly in cases of sexual assault, in which the injuries might be latent . . . a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment.'" *People v Johnson*, 315 Mich App 163, 193 (2016), quoting *People v Mahone*, 294 Mich App 208, 215 (2011).

The rationale for admitting statements under MRE 803(4) is: "'(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.'" *Merrow v Bofferding*, 458 Mich 617, 629 (1998), quoting *Solomon v Shuell*, 435 Mich 104, 119 (1990). See also *People v Shaw*, 315 Mich App 668, 675 (2016), where the Court held that the victim's statements to a pediatrician regarding alleged sexual abuse were not made for the purposes of medical treatment and were therefore inadmissible under MRE 803(4). In *Shaw*, the pediatrician's examination "did not occur until seven years after the last alleged instance of abuse, thereby minimizing the likelihood that the complainant required treatment." *Shaw*, 315 Mich App at 675. In addition, "the complainant did not seek out [the pediatrician] for gynecological services. Rather, she was specifically referred to [the pediatrician] by the police in conjunction with the police investigation into the allegations of abuse by defendant." *Id*.

a. Trustworthiness of Statements Based on Declarant's Age

In assessing the trustworthiness of a declarant's statements, Michigan appellate courts have drawn a distinction based upon the declarant's age. There is a rebuttable presumption that declarants older than the age of 10 understand the need to speak truthfully to medical personnel. *People v Garland*, 286 Mich App 1, 9 (2009). For declarants aged 10 and younger, a trial court must "investigat[e] . . . the circumstances surrounding the making of the hearsay statements . . . in order to establish whether the child understood the need to be truthful to the physician." *People v Meeboer (After Remand)*, 439 Mich 310, 326 (1992).

To determine the trustworthiness of a statement made by a child aged 10 or younger, the trial court must "consider

the totality of circumstances surrounding the declaration of the out-of-court statement." *Meeboer*, 439 Mich at 324. In *Meeboer*, the Supreme Court announced ten factors to consider when examining the totality of circumstances in cases involving declarants 10 years of age and younger:

> "(1) the age and maturity of the declarant,
>
> (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement),
>
> (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness),
>
> (4) use of terminology unexpected of a child of similar age,
>
> (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment),
>
> (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress),
>
> (7) the timing of the examination in relation to the trial (involving the purpose of the examination),
>
> (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable),
>
> (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and
>
> (10) the existence of or lack of motive to fabricate." *Meeboer*, 439 Mich at 324-325.

"In addition to the [*Meeboer*] ten-factor test, the reliability of the hearsay is strengthened when it is supported by other evidence, including the resulting diagnosis and treatment." *People v McElhaney*, 215 Mich App 269, 282 (1996) (finding that results from a physical examination corroborated the victim's account of the sexual abuse), citing *Meeboer*, 439 Mich at 325-326.

Application of the *Meeboer* factors. The following caselaw applies the *Meeboer* factors to assess the trustworthiness of statements made by declarants 10 years of age or younger:

- *People v Johnson*, 315 Mich App 163, 194-195 (2016):

In applying the *Meeboer* factors, the court found a six-year-old declarant's statements to a sexual assault nurse examiner (SANE) were trustworthy and thus admissible under MRE 803(4) to prosecute the defendant for CSC-I and CSC-II where the defendant (1) admitted that the declarant was "smart," which indicated the maturity of the declarant, (2) the SANE asked the declarant open-ended questions when eliciting the declarant's statements, (3) the purpose of the examination was to ensure declarant's health and safety in her home, (4) the declarant's statements were phrased in a childlike manner, (5) the declarant initially did not want to talk about the alleged assault to the SANE, which may have indicated that the declarant was still distressed about the sexual acts, (6) the examination occurred less than one month after the declarant disclosed the incident and more than four months before trial, and (7) the declarant was not likely to be mistaken in her identification because the defendant identified was the declarant's uncle, a person with whom she was familiar. *Johnson*, 315 Mich App at 194-195.

In *Johnson*, the Court noted two of the *Meeboer* factors that did not support a finding that the statements made to the SANE were trustworthy: (1) CPS (child protective services) initiated the medical examination, which could have suggested that the examination was not for the purpose of treatment or diagnosis, and (2) testimony given at trial indicated "that the victim did not like it when defendant babysat because he would make [the victim] clean and do chores, thus suggesting a motive to fabricate." *Johnson*, 315 Mich App at 195. In applying all of the *Meeboer* factors, the Court decided that "the totality of the circumstances support[ed] the admission of the victim's statements because they were trustworthy[.]" *Id*.

- *People v Duenaz*, 306 Mich App 85, 94, 96-97 (2014):

In applying the *Meeboer* factors, the court found that the eight-year-old declarant's statements to a board-certified

emergency physician and medical director of a child advocacy center were trustworthy and thus admissible under MRE 803(4) to prosecute the defendant for CSC-I and CSC-II where the declarant, age eight (1) was mature enough to tell the physician the details of the assault, (2) the physician did not ask the declarant leading questions to elicit the statements, (3) the declarant's statements were phrased in childlike terms, (4) the examination occurred when the declarant was still suffering from the pain and distress caused by the incident, (5) the examination was medical rather than psychological, and (6) nothing indicated that the declarant was mistaken in her identification of defendant or that she had a motive to fabricate. In addition, although the prosecution initiated the examination, its purpose may have been in part the investigation of an alleged sexual assault, and so the prosecution's initiation of the examination was not dispositive. *Duenaz*, 306 Mich App at 94, 96.

- *People v McElhaney*, 215 Mich App 269, 280-282 (1996):

In applying the *Meeboer* factors, the Court found the nine-year-old declarant's statements to a physician's assistant about being sexually assaulted were trustworthy and thus admissible under MRE 803(4) to prosecute the defendant for CSC-I where (1) there was no evidence that the declarant was immature, (2) the manner in which the declarant's responses were elicited—the questions posed to the declarant were neutral—does not undermine their credibility, (3) the declarant's use of words was not scientifically complex and did not suggest that she had been influenced by an adult, (4) the examination was conducted to determine whether the declarant had been injured, (5) the declarant made the statements at the hospital only hours after the assault and before a suspect was identified, (6) the examination was for medical purposes, not for psychological purposes, (7) the declarant did not identify a perpetrator, and (8) no evidence was presented indicating that declarant had a motive to fabricate. *McElhaney*, 215 Mich App at 280-282.

b. Statements Identifying Defendant as Perpetrator

When a victim of sexual assault seeks medical treatment for an injury, it is possible that the victim's statements to the treating medical professional may identify the assailant as the "general cause" of "past or present

symptoms or sensations, [or] their inception[.]" MRE 803(4). If this occurs, trial courts may be called upon to determine whether the assailant's identity is reasonably necessary to medical diagnosis or treatment.

Generally, statements of identification are not admissible under MRE 803(4) because "the identity of an assailant cannot fairly be characterized as the '*general* cause' of an injury." *People v LaLone*, 432 Mich 103, 113 (1989). In *LaLone*, the fact that the declarant's statements were made to a psychologist rather than a physician "suggest[ed] that the statement by the victim . . . may [have been] less reliable than a statement made to a physician." *Id*. That is, the statement did not qualify for the hearsay exception in MRE 803(4) because it did not occur in the context of "medical treatment or medical diagnosis" or other information "necessary to such diagnosis or treatment." *LaLone*, 432 Mich at 114; MRE 803(4).

However, in *People v Meeboer (After Remand)*, 439 Mich 310, 322 (1992), the Michigan Supreme Court determined that a child-declarant's statements of identification are "necessary to adequate *medical* diagnosis and treatment." (Emphasis added.) A child's statement identifying a perpetrator

> "may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics . . . . Furthermore, certain diseases, such as acquired immune deficiency syndrome, cannot be detected in the early stages after a sexual assault." *Meebooer*, 439 Mich at 328-329.

3. Records of a Regularly Conducted Activity

MRE 803(6) allows for the admission of records of regularly conducted activity.[21] MRE 803(6) specifically indicates that the following records are not excluded by the hearsay rule, even though the declarant is available as a witness:

[21] Police reports may be admissible under this rule, or under MRE 803(8), as public records. See Section 6.8(B)(5)

> "A record of an act, transaction, occurrence, event, condition, opinion, or diagnosis [is not excluded by the rule against hearsay] if:
>
> > (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
> >
> > (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> >
> > (C) making the record was a regular practice of that activity;
> >
> > (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule prescribed by the Supreme Court or with a statute permitting certification; and
> >
> > (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

"[E]xtrinsic evidence is not required to authenticate a record admissible under MRE 803(6) if the record was accompanied by a written declaration under oath by a qualified person certifying that" the record meets the requirements of MRE 803(6)(A)-(C). *People v Dingee*, ___ Mich App ___, ___ (2025), citing MRE 902(11). "Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them." MRE 902(11).

The trial court did not abuse its discretion when it allowed a prosecutor to admit Facebook records under MRE 902(11) without providing "a separate, formal notice to the defense in which she related that she intended to admit the Facebook records as self-authenticating documents under MRE 902(11) . . . ." *Dingee*, ___ Mich App at ___. The prosecutor did the following: listed the Facebook records in the notice of evidence that she intended to admit, *id*. at ___; "provided the defense with all 'written or recorded statements' by lay witnesses and had already provided the defense with copies of all 'documents, photographs or other papers that the People

may introduce,'" *id*. at __; and "made it amply clear that the Facebook records were the social media posts that were certified" at the defendant's preliminary examination. *Id*. at ___. The Court held that the prosecutor's actions met "the minimum requirements" of MRE 902(11), even though the prosecutor did not provide the separate, formal, and written notice prescribed by the rule. *Dingee*, ___ Mich App at ___.

A medical record was admitted into evidence under MRE 803(6) in *Merrow v Bofferding*, 458 Mich 617, 626-627 (1998), where the Court held that part of the plaintiff's "History and Physical" hospital record was admissible under MRE 803(6) because it was compiled and kept by the hospital in the regular course of business.

Even if a document is admissible under MRE 803(6), every statement contained in the document may not be admissible. *Merrow*, 458 Mich at 627; MRE 805 (hearsay within hearsay rule). If the document contains a hearsay statement, that statement is admissible only if it qualifies under an exception to the hearsay rule or is admissible as nonhearsay. See MRE 805.

Although it otherwise meets the foundational requirements of MRE 803(6), a business record may be excluded from evidence when the record was prepared "solely for purposes of litigation," because the circumstances of preparation undermine the record's trustworthiness. *People v Huyser*, 221 Mich App 293, 298-299 (1997).

4. Absence of Record Entry

MRE 803(7) contains a hearsay exception for the absence of an entry in certain records. "Evidence that a matter is not included in a record described in [MRE 803(6) is not excluded by the rule against hearsay] if:

> (A) the evidence is admitted to prove that the matter did not occur or exist;
>
> (B) a record was regularly kept for a matter of that kind; and
>
> (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness." MRE 803(7).

Evidence that there existed no record of a report of sexual assault may be elicited when that kind of information is regularly reported and preserved in some kind of business

record. *People v Marshall*, 497 Mich 1023, 1023 (2015). "[E]vidence that no report was ever made was admissible 'to prove the nonoccurence or nonexistence of the matter[.]'" *Id.*, quoting MRE 803(7).

5. Public Records

MRE 803(8) allows the admission of public records.

> "A record or statement of a public office [is not excluded by the rule against hearsay] if it sets out:
>
> (A) the office's activities; or
>
> (B) a matter observed while under a legal duty to report, but not including:
>
> (i) in a criminal case, a matter observed by law-enforcement personnel; and
>
> (ii) information to which the limitations in MCL 257.624 apply."[22] MRE 803(8).

C. Residual Hearsay Exception

A party may seek admission under MRE 807 of hearsay statements not covered under one of the firmly established exceptions in MRE 803 or MRE 804.

MRE 807 provides:

> "**(a) In General.** Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in [MRE 803 or MRE 804]:
>
> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
>
> (2) it is offered as evidence of a material fact;
>
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
>
> (4) admitting it will serve the purposes of these rules and the interests of justice.

[22] MCL 257.624 prohibits the use of an accident report required by Chapter VI of the Michigan Vehicle Code, MCL 257.601–MCL 257.624b, in a court action.

The party offering the evidence must provide advance notice of its intent to produce the evidence. *People v Katt (Katt II)*, 468 Mich 272, 279 (2003).According to MRE 807:

> **(b) Notice.** The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name and address—so that the party has a fair opportunity to meet it."

The following cases discuss the residual hearsay exception.[23]

- *People v Douglas*, 496 Mich 557 (2014):

The defendant was convicted of CSC-I and CSC-II for sexually abusing his then-three-year-old daughter. *Douglas*, 496 Mich at 561-563. Statements made by the victim were inadmissible as hearsay not covered by the tender-years exception of MRE 803A, because the statements were not the first corroborative statements. *Douglas*, 496 Mich at 575-576. The prosecution argued that the statements were nonetheless admissible under MRE 803(24). *Douglas*, 496 Mich at 576, 578. The Court rejected the prosecution's argument because the victim's statements were not the most probative evidence reasonably available. *Douglas*, 496 Mich at 576-577. Moreover, the testimony about the victim's statements during the forensic interview did not demonstrate circumstantial guarantees of trustworthiness because the statements were not the first corroborative statements, the statements were delayed, the victim's mother's motives in connection with the victim's disclosure were disputed, and the statements were not spontaneous; rather, the statements were given in response to questions posed in the forensic interview in order to investigate the victim's prior disclosure of sexual abuse. *Id.* at 578-579.

- *People v Katt (Katt I)*, 248 Mich App 282 (2001); *People v Katt (Katt II)*, 468 Mich 272 (2003):

The defendant was convicted of CSC-I against a seven-year-old boy and the boy's five-year-old sister. *Katt I*, 248 Mich App at 285. The defendant claimed the trial court erred by admitting under MRE 803(24) testimony from a child protective services (CPS) specialist that was not admissible under MRE 803A. *Katt I*, 248 Mich App at 285. The defendant argued that MRE 803A "covered the field" so that evidence not admissible under MRE 803A could not be considered for admission under the catch-all hearsay rule. *Katt I*,

[23]The *residual hearsay exception* was previously referred to as the "catch-all" exception and found in MRE 803(24) and MRE 804(b)(7). This exception to the hearsay rule now appears in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

248 Mich at 288-290. The defendant's argument characterized the "near miss" theory, which "'states that a piece of hearsay evidence may be offered only under the exception that most nearly describes it. If it is excluded under that exception, it may not be offered under the residual exception.'" *Katt II*, 468 Mich at 281 (citations omitted). The Court declined to adopt the near-miss rule and instead held that "the residual exceptions may be used to admit statements that are similar to, but not admissible under, the categorical hearsay exceptions." *Id*. at 290.

"[W]here the trial court concludes that [a] statement possesses the requisite 'particular guarantee[s] of trustworthiness,' and otherwise meets the requirements of MRE 803(24) it may properly admit the statement into evidence, in spite of its inability to meet the requirements of another firmly rooted exception to the hearsay rule." *Katt I*, 248 Mich App at 294 (citations omitted; second alteration in original). See also *Katt II*, 468 Mich at 289-290. In this case, the Court found the boy's statements trustworthy because he voluntarily and spontaneously told the CPS specialist about the sexual abuse, his recitation of the relevant facts involving the assaults remained consistent, he had personal knowledge of the sexual abuse against him and his sister because he was present when it occurred, he freely recounted the circumstances without leading questions or coaxing, he often used terminology not expected from a child of his age, he was not shown to have a motive to fabricate, and he and his sister testified at trial and were subject to extensive cross-examination. *Katt I*, 248 Mich App at 297-299.

- *People v Geno*, 261 Mich App 624 (2004):

The defendant was convicted of CSC-I against the defendant's girlfriend's two-year-old daughter. *Geno*, 261 Mich App at 625. During an assessment and interview at a children's assessment center, the child asked the interviewer to go to the bathroom with her, where the interviewer observed blood in the child's pull-up. *Id*. The interviewer asked the child if she "had an owie," and the child answered, "yes, [the defendant] hurts me here" and pointed to her vaginal area. *Id.* at 625 (alteration in original). The defendant argued that the child's statement was improperly admitted under MRE 803(24). *Geno*, 261 Mich App at 629-630. The Court of Appeals held that the "residual or 'catch-all'" exception to the hearsay rule, . . . allows for the admission of '[a] statement not specifically covered by any of the [other] exceptions but having equivalent circumstantial guarantees of trustworthiness.'" *Id*. at 632, quoting MRE 803(24) (first alteration in original). The child's statement was properly admitted because the statement was not covered by any other MRE 803 hearsay exception, and the statement met the

requirements outlined in *Katt II*, 468 Mich [at 279]. *Geno*, 261 Mich App 632.

6.9 Tender-Years Exception

MRE 803A codifies the Michigan common-law hearsay exception known as the "tender-years" rule.[24] Although a prosecutor need not corroborate the victim's testimony under the CSC Act, MRE 803A permits corroborative testimony in cases where the sexual assault victim is under age 10 at the time the statement was made. "'[T]he tender-years rule prefers a child's first statement over later statements' because, '[a]s time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks.'" *People v Douglas*, 496 Mich 557, 577 (2014), quoting *People v Katt (Katt II)*, 468 Mich 272, 296 (2003) (alterations in original).

In criminal and juvenile delinquency proceedings only,[25] a child's statement regarding certain sexual acts involving the child is admissible, provided it corroborates the declarant's testimony during the same proceeding and:

> "(1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance;
>
> (4) the statement is introduced through the testimony of someone other than the declarant; and
>
> (5) the proponent of the statement makes known to the adverse party the intent to offer it and its particulars sufficiently before the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it." MRE 803A(b).

"If the declarant made more than one corroborative statement about the incident, only the first is admissible under [MRE 803A]." MRE 803A(b).

---

[24] For more information about hearsay issues, including evidence excluded from the definition of hearsay, as well as exceptions to the rule against admitting hearsay, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

[25] MRE 803A(a). See also MCR 3.972(C), which applies to child protective proceedings and contains a rule similar to MRE 803A. For additional information on MCR 3.972(C), see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 11.

"MRE 803A . . . permits only the first corroborative statement as to each 'incident that included a sexual act performed with or on the declarant by the defendant.' Though the [rule] does not define the term 'incident,' it is commonly understood to mean 'an occurrence or event,' or 'a distinct piece of action, as in a story.'" *Douglas*, 496 Mich at 575 (citation omitted). Consequently, when a child discloses two separate incidents of abuse in the same interview and the child's statement about the first incident is inadmissible under MRE 803A because it was not the child's first corroborative statement about the incident, that inadmissible statement does not become admissible simply because immediately following the inadmissible statement, the child disclosed a second incident and that disclosure *was* the first corroborative statement of the second incident. *Douglas*, 496 Mich at 575-576 (also holding that the evidence was inadmissible under the residual hearsay exception in MRE 803(24)[26] and ultimately concluding that the evidentiary errors required reversal and a new trial).

"MRE 803A generally requires the declarant-victim to initiate the *subject of sexual abuse*." *People v Gursky*, 486 Mich 596, 613 (2010). Admitting a child's statements given as answers to an adult's questioning is not necessarily "incompatible with a ruling that the child produced a spontaneous statement." *Id*. at 614. Questions asked when talking to a child about alleged sexual abuse must be open-ended and nonleading "in order for the statement to be considered the creation of the child." *Id*. at 614, 626.

In *Gursky*, 486 Mich at 598, the child's hearsay statements were made in response to questioning by her mother's friend and used at trial to corroborate the child's testimony. *Id*. at 598, 600. The Michigan Supreme Court held that "the child's statements were not 'spontaneous' and . . . should not have been admitted under the limited 'tender years' hearsay exception created by MRE 803A." *Gursky*, 486 Mich at 598-599.[27] The Court explained:

> "Trial courts [must] review the totality of the circumstances surrounding the statement in order to determine the issue of spontaneity. Even though courts should look at the *surrounding circumstances* and *larger context* in order to understand whether the statement was spontaneously made, . . . this review is not solely determinative of the question of admissibility. As MRE 803A requires, the

[26]Provisions previously found in MRE 803(24) appear in MRE 807. See ADM File No. 2021-10, effective January 1, 2024.

[27] The Court affirmed the defendant's convictions because the improper admission of the hearsay statements constituted harmless error—the statements were only used to show consistency in the victim's testimony, were cumulative to the victim's testimony, and other evidence corroborating the defendant's guilt existed. *Gursky*, 486 Mich at 626.

> statement must be 'shown to have been spontaneous *and* without indication of manufacture.' The language of MRE 803A(2) clearly demonstrates that spontaneity is an independent requirement of admissibility rather than one factor that weighs in favor of reliability or admissibility. Thus, even if, considering the totality of the circumstances, the trial court determines that a statement is spontaneous for the purposes of MRE 803A(2), it must nevertheless also conduct the separate analyses necessary to determine whether the statement meets the other independent requirements of MRE 803A." *Gursky*, 486 Mich at 615-616.

In *People v Dunham*, 220 Mich App 268, 271-272 (1996), the Court of Appeals concluded that the victim's statements were spontaneous and upheld the admission of testimony from a Friend of the Court mediator corroborating the six-year-old victim's statements. According to the mediator, the victim's statements were in response to open-ended questions typically asked of the children of divorcing parents. *Id*. at 272. Further, the eight- or nine-month delay in reporting the alleged sexual abuse was justified given the victim's fear of the defendant. *Id*.

The Court of Appeals also concluded in *Dunham*, 220 Mich App at 272, that the defendant was not prejudiced by notice—one day before trial started—of the prosecutor's intent to offer the testimony. *Id*. The defendant should have anticipated the testimony because the victim's mother testified at the preliminary examination that she became aware of the abuse after the victim spoke with the mediator, and the mediator's name appeared on the witness list for trial. *Id*. at 272-273.

6.10 Witness Testimony

A. Witness Credibility

> "[W]itness credibility is a question for the fact-finder[.]" *People v Solloway*, 316 Mich App 174, 182 (2016).
>
> "Questions regarding credibility are not sufficient grounds for relief *unless* the 'testimony contradicts indisputable facts or laws,' the 'testimony is patently incredible or defies physical realities,' the 'testimony is material and . . . so inherently implausible that it could not be believed by a reasonable juror,' or the 'testimony has been seriously impeached and the case is marked by uncertainties and discrepancies.'" *Solloway*, 316 Mich App at 183, quoting *People v Lemmon*, 456 Mich 625, 643-644 (1998). In *Solloway*, the "defendant failed to establish that the evidence 'preponderate[d] heavily' against the trial court's verdict." *Solloway*, 316 Mich App at 183, quoting *People v Brantley*, 296 Mich App 546, 553 (2012) (alteration in

original). "The trial court found that [the minor-victim's] testimony of [the] assault was 'very clear and very credible.'" *Solloway*, 316 Mich App at 183. In addition, "[t]he trial court found that [the sexual assault nurse examiner's (SANE)] testimony of the victim's injuries was consistent with the victim's account of the sexual assault." *Id*. "In particular, the trial court noted [the SANE's] testimony that the victim's injuries, as a whole, were 'inconsistent with difficult bowel movements' as defendant attempted to claim." *Id*.

"The jury was permitted to infer that [defendant's] implausible testimony was evidence of guilt." *People v Skippergosh*, ___ Mich App ___, ___ (2024). In *Skippergosh*, defendant testified that one assault against the victim was committed by "four anonymous women in the living room while they were covering his eyes." *Id*. at ___. Regarding another assault, defendant testified that the victim "was screaming for help . . . because she required assistance removing taco meat from the refrigerator." *Id*. at ___. At defendant's sentencing, the trial court described defendant's testimony about the assaults as "almost laughable." *Id*. at ___. "As the trier of fact, the jury was entitled to disbelieve the defendant's uncorroborated and confused testimony. And if the jury did disbelieve the defendant, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Id*. at ___ (cleaned up).

B. Prosecutorial Discretion and the Nonparticipating Witness

The prosecutor has exclusive authority to decide whether to dismiss or go forward with a case when the complaining witness is absent or does not want to participate. *People v Morrow*, 214 Mich App 158, 165 (1995). In *Morrow*, the complainant testified at the preliminary examination that the defendant repeatedly raped her; however, the complainant testified that she lied during the preliminary examination and that she actually had consensual sex with the defendant. *Id*. at 159. The Court of Appeals found that under the "unique facts of this case," the trial court impinged on the prosecutor's executive branch powers when the court dismissed the information. *Id*. at 165-166. The trial court also found that the complainant's decision to recant her previous testimony before trial should not alone preclude the prosecution from reaching the jury:

> "It is the province of the jury to determine which of the victim's accounts is the truth, and there is no abuse of power in the prosecutor relying upon and arguing for the victim's earlier sworn testimony in support of the

> criminal charges against defendant." *Morrow*, 214 Mich App at 165.

Although crime victims have rights under Const 1963, art 1, § 24, and under the Crime Victim's Rights Act, MCL 780.751 *et seq.*,[28] a crime victim may not "determine whether [the Penal C]ode has been violated or whether the prosecution of a crime should go forward or be dismissed." *People v Williams*, 244 Mich App 249, 251, 254 (2001) (finding error in the trial court's decision to dismiss the charges against the defendant "[a]fter concluding that the victim [who failed to appear to testify] did not want defendant prosecuted and that the . . . offense was a private crime rather than a public crime").

C. Corroboration of Sexual Assault Victim's Testimony Not Required

"The testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b] to [MCL 750.520g]." MCL 750.520h. "'It is a well-established rule that a jury may convict on the uncorroborated evidence of a CSC victim.'" *People v Hallak*, 310 Mich App 555, 564 (2015), rev'd in part on other grounds 499 Mich 879 (2016),[29] quoting *People v Lemmon*, 456 Mich 625, 642 n 22 (1998). "Moreover, 'because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented.'" *Hallak*, 310 Mich App at 564, quoting *People v Kanaan*, 278 Mich App 594, 622 (2008).

The purpose of the noncorroboration rule[30] was explained by the Court of Appeals in *People v Norwood*, 70 Mich App 53, 57 (1976):

> "The purpose of the anti-corroboration rule is not to save verdicts in which inadmissible corroborating evidence is introduced. It is designed to permit a verdict to withstand a challenge to the sufficiency of the evidence in a case in which the only testimony against the defendant is that of the complainant."

See, e.g., *People v Phelps*, 288 Mich App 123, 133 (2010), where the Court of Appeals, quoting MCL 750.520h, held that "[e]ven without

---

[28]For information regarding crime victims and the Crime Victim's Rights Act, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

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

[30]The noncorroboration rule is also expressed in a criminal jury instruction. See M Crim JI 20.25, *Testimony of the Victim Need Not Be Corroborated*.

additional evidence, the complainant's testimony that she did not give [the defendant] permission to have penile-vaginal intercourse, was engaged in a different consensual act with him, and was surprised when he inserted his penis into her vagina was sufficient to sustain a conviction of CSC I because '[t]he testimony of a victim need not be corroborated[.]'" (Third alteration in original.)

"'[T]he question is not whether there was conflicting evidence, but rather whether there was evidence that the jury, sitting as the trier of fact, could choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant.'" *People v Bailey*, 310 Mich App 703, 714 (2015), quoting *People v Smith*, 205 Mich App 69, 71 (1994) (alteration in original). "[T]he prosecutor 'is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury "in the face of whatever contradictory evidence the defendant may provide."'" *Bailey*, 310 Mich App at 713, quoting *People v Nowack*, 462 Mich 392, 400 (2000), quoting *People v Konrad*, 449 Mich 263, 273 n 6 (1995). "Further, '"[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."'" *Bailey*, 310 Mich App at 713, quoting *People v Carines*, 460 Mich 750, 757 (1999), quoting *People v Allen*, 201 Mich App 98, 100 (1993) (alteration in original).

D. Evidence of Sexual Assault Victim's Resistance Not Required

"A victim need not resist the actor in prosecution[s] under [MCL 750.520b to MCL 750.520g]."[31] MCL 750.520i.

See, e.g., *People v Phelps*, 288 Mich App 123, 135 (2010),[32] where the Court of Appeals, quoting MCL 750.520i, held that "[a]lthough the complainant did not testify that she tried to physically resist [the defendant] or try to get up from the bed, '[a] victim need not resist the actor in a prosecution [for criminal sexual conduct].'" (Third and fourth alterations in original.)

---

[31] The cited statutes describe offenses under the CSC Act. See Chapter 2 for a discussion of these offenses. Also note that M Crim JI 20.26, *The Victim Need Not Resist*, instructs the jury that a conviction for an offense described in MCL 750.520b to MCL 750.520g does not require evidence of resistance. MCL 750.520i.

[32] *Phelps*, 288 Mich App at 135, states that a guidelines scoring decision will be upheld when there is any evidence in support of it. *People v Hardy*, 494 Mich 430, 438 n 18 (2013), noted that "[t]he 'any evidence' standard does not govern review of a circuit court's factual findings for the purposes of assessing points under the sentencing guidelines." This has caused some later unpublished appellate opinions to classify *Phelps* as overruled in part on other grounds. See e.g., *People v Risbridger*, unpublished per curiam opinion of the Court of Appeals, issued March 3, 2020 (Docket No. 347170), p 3. Unpublished opinions are not binding precedent. MCR 7.215(C)(1). The "any evidence" statement does not affect the issue for which *Phelps* is cited in this section.

For three additional Michigan cases addressing CSC victims where there was no evidence of resistance to the sexual assault, see *People v Carlson*, 466 Mich 130, 132 (2002) (a CSC-III case where the victim did not physically restrain or push the defendant away, but did verbally tell him "no" and "I don't want to" repeatedly before penetration); *People v Makela*, 147 Mich App 674, 678 (1985) (a CSC-IV case where the victim was frightened to try to get away from the defendant); *People v Jansson*, 116 Mich App 674, 679 (1982) (a CSC-III case where the victim was unwilling to engage in intercourse but was frightened and panicked and did not know what action to take to prevent the forcible sexual intercourse).

6.11 False Allegations of Sexual Assault

A. Expert Testimony on False Reporting of Sexual Abuse

"[E]xpert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity."[33] *People v Thorpe*, 504 Mich 230, 235 (2019) (reversing the judgment of the Court of Appeals and remanding the case to the circuit court for a new trial). In *Thorpe*, the expert "identified only two specific scenarios in his experience when children might lie, neither of which applie[d to the] case. As a result, although he did not actually say it, one might reasonably conclude on the basis of [the expert's] testimony that there was a 0% chance [the complainant] had lied about sexual abuse. In so doing, [the expert] for all intents and purposes vouched for [the complainant's] credibility." *Id*. at 259. "Because the trial turned on the jury's assessment of [the complainant's] credibility, the improperly admitted testimony wherein [the expert] vouched for [the complainant's] credibility likely affected the jury's ultimate decision." *Id*. at 260. See also *People v Sattler-VanWagoner*, ___ Mich App ___, ___ (2024) (an expert's statement "that false reports are 'statistically very rare,' though lacking a numeric value, was essentially the statistical vouching described in *Thorpe*, 504 Mich at 252"; nonetheless, "[t]he isolated nature of the statement and substantial other evidence of [defendant's] guilt indicates that this error did not affect the outcome").

[33] See *People v Peterson*, 450 Mich 349, 352 (1995) (expert witnesses may not (1) testify that sexual abuse occurred, (2) vouch for the veracity of a victim, or (3) testify to the defendant's guilt or innocence). For additional discussion of expert testimony, see Chapter 7.

B. Complainant's History of False Accusations of Sexual Assault

1. Issues Regarding Admissibility

Testimony concerning prior false allegations of sexual misconduct does not implicate the rape-shield statute. *People v Williams*, 191 Mich App 269, 272-273 (1991).[34]

In fact, prior false accusations of sexual assault may bear directly on the victim's credibility and the credibility of the victim's accusations, and "preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation. *Williams*, 191 Mich App at 272.

See also *People v Jackson*, 477 Mich 1019 (2007), where the Michigan Supreme Court reiterated that the rape-shield statute does not apply to evidence of a complainant's prior false allegations:

> "[T]he defendant must be afforded the opportunity to introduce testimony that the complainant has previously been induced by his father to make false allegations of sexual abuse against other persons disliked by the father. MRE 404(b). Such testimony concerning prior false allegations does not implicate the rape[-]shield statute. MCL 750.520j."

A trial court must explicitly state on the record whether a defendant's offer of proof regarding the complainant's prior false allegations of sexual assault sufficiently implicated the defendant's constitutional right of confrontation and if so, the trial court must then hold the *in camera* evidentiary hearing required by *People v Hackett*, 421 Mich 338 (1984). *People v Butler*, ___ Mich ___, ___ (2024) (holding that "the Court of Appeals erred by analyzing the admissibility of defendant's proffered evidence without first ordering the trial court to conduct the *in camera* evidentiary hearing required by *Hackett*").[35]

---

[34] In cases where this is an issue, "the defendant is obligated initially to make an offer of proof with regard to the proposed evidence and to demonstrate its relevance to the purpose for which the evidence is sought to be admitted." *Williams*, 191 Mich App at 273. "If necessary, the trial court should conduct an evidentiary hearing *in camera* to determine the admissibility of the evidence[.]" *Id.* (Emphasis added.) See Section 7.2 for more information on *in camera* hearings.

[35] For more information, see the Michigan Judicial Institute's Crime Victim Rights Benchbook, Chapter 6.

2. Newly Discovered Evidence of False Allegations

"[N]ewly discovered impeachment evidence ordinarily will not justify the grant of a new trial." *People v Grissom*, 492 Mich 296, 317-318, 321 (2012). However, newly discovered evidence that a rape victim raised false allegations of rape against other individuals "may be grounds for a new trial if it satisfies the four-part test set forth in [*People v Cress*, 468 Mich 678, 692 (2003)]." *Grissom*, 492 Mich at 299-300.

"Newly discovered impeachment evidence concerning immaterial or collateral matters cannot satisfy *Cress*." *Grissom*, 492 Mich at 321. "But if [the evidence] has an exculpatory connection to testimony concerning a material matter and a different result is probable, a new trial is warranted." *Id*. "[The evidence] may be of a general character and need not contradict specific testimony at trial." *Id*. at 300.

"[G]ranting a new trial on the basis of newly discovered evidence requires a defendant to show that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the newly discovered evidence is not cumulative, (3) using reasonable diligence, the party could not have discovered and produced the evidence at trial, and (4) the new evidence makes a different result probable on retrial." *Grissom*, 492 Mich at 320.

6.12 Defendant's Right of Confrontation

"[A] statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial."[36] *Ohio v Clark*, 576 US 237, 245 (2015). "'Where no such primary purpose exists, the admissibility of a statement is the concern of [the applicable] rules of evidence, not the Confrontation Clause.'" *Id*., quoting *Michigan v Bryant*, 562 US 344, 359 (2011).[37]

"[F]or testimonial evidence, [the face-to-face] requirement [of the Confrontation Clause] may be dispensed with only when the witness is unavailable and the defendant had a prior chance to cross-examine the witness."[38] *People v Jemison*, 505 Mich 352, 365-366 (2020) (deciding that *Crawford v Washington*[39] applied to the witness testimony at issue and that *Maryland v Craig*,[40] as it was applied in cases involving child victims,

[36] For a thorough discussion of what constitutes a testimonial statement, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

[37] For information about interpreters and the language conduit rule, and about the admission into evidence of statements made during 911 calls, to law enforcement officials, and to mandatory reporters, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

did not except adult expert witnesses from complying with the face-to-face requirement of the Confrontation Clause).

A. Balancing the Rape-Shield Statute Against Defendant's Right of Confrontation

Under US Const, Am VI and Const 1963, art 1, § 20, a defendant in a criminal case has a right to confront the witnesses against him or her. "When applying the rape-shield statute, trial courts must balance the rights of the victim and the defendant in each case." *People v Benton*, 294 Mich App 191, 198 (2011). In "recognizing that application of the statute's evidentiary exclusion might in some instances violate a defendant's Sixth Amendment right to confrontation, our Supreme Court has indicated that such evidence may be admissible when offered for [a] narrow purpose[.]" *People v Powell*, 201 Mich App 516, 519 (1993) (evidence admissible "for the narrow purpose of showing a victim's bias or motive for filing a false claim").

> "The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *People v Hackett*, 421 Mich 338, 349 (1984).

In *Hackett*, the Michigan Supreme Court also noted:

> "We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual

[38] Note that the right of confrontation does not apply during a preliminary examination. *People v Olney*, 327 Mich App 319, 331 (2019) (finding that "the circuit court abused its discretion when it granted defendant's motion to quash on the basis that defendant's right of confrontation was violated" during his preliminary examination even though the testimony at the examination would have likely violated the Confrontation Clause and been inadmissible at trial).

[39] *Crawford v Washington*, 541 US 36, 68 (2004).

[40] *Maryland v Craig*, 497 US 836 (1990).

conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past." *Hackett*, 421 Mich at 348 (citations omitted).

1. No Violation of Right to Confrontation When Evidence Sought Was Not Relevant to Defense

The defendant argued that he was denied his right to confrontation when the trial court prevented him from inquiring into "(1) the *identities* of other boys [to whom] the victims sent naked photographs, and (2) whether the victims had similar sexual contact with other boys." *People v Gaines*, 306 Mich App 289, 315 (2014). Although evidence showing that the victims sent naked photographs to others was arguably relevant to the defendant's defense against the accosting charge—the defendant claimed that the victims were the first to suggest sending the defendant naked photographs—"the identities of the other alleged recipients would not have had any significant tendency to make the defense more or less probable," and thus, the trial court did not err by precluding inquiry into the recipients' identities. *Id*. at 316, 318.

Additionally, "evidence of the other instances of sexual contact [was not] admissible [even though] the victims were not just testifying as victims in their own cases, but were testifying as witnesses in the other cases[.]" *Gaines,* 306 Mich App at 317-318. The Court held that regardless of whether the victims were testifying in their own cases or as witnesses in other cases, the victims remained "victims" under MCL 750.520a(s) because they still alleged that they were "'subjected to criminal sexual conduct[.]'" *Gaines*, 306 Mich App at 317-318, quoting MCL 750.520a(s).

Finally, even though accosting is not protected by MCL 750.520j, the other instances of sexual contact were inadmissible in the accosting prosecutions because "[w]hether the victims had sexual contact with others was not relevant to his defense to th[e accosting] charges." *Gaines*, 306 Mich App at 318. Accordingly, the defendant was not denied his constitutional right to confrontation by the exclusion of the evidence, because the "[d]efendant had no right of confrontation with regard to irrelevant issues." *Id*.

2. No Violation of Right to Confrontation When Prejudicial Nature of Evidence Outweighs Probative Value

The defendant was convicted of three counts of CSC-I arising out of incidents involving an eight-year-old boy. *People v Arenda*, 416 Mich 1, 5, 6 (1982). The defendant argued that evidence of the victim's sexual conduct with others "was relevant and admissible to explain the witness's ability to describe vividly and accurately the sexual acts that allegedly occurred." *Id*. at 6. The defendant further claimed that evidence of the victim's sexual conduct with others would "dispel any inference that this ability resulted from experiences with defendant." *Id*. at 11. The trial court ruled that the evidence was inadmissible under the rape-shield statute. *Id*. at 6, 7. The Supreme Court balanced the potential prejudicial nature of this evidence against its probative value and found that application of the rape-shield statute to preclude admission of the evidence did not infringe on the defendant's right to confrontation. *Id*. at 12-13. The Court noted that other means were available by which the defendant could cross-examine the complainant as to his ability to describe the alleged conduct. *Id*. at 13, 14.

3. Limitations on Cross-Examination

A defendant's right of cross-examination does not entitle the defendant to cross-examine a witness on irrelevant issues. *People v Gaines*, 306 Mich App 289, 316 (2014). But "[a] limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644 (1998).

B. Statements Made to SANEs

"[I]n order to determine whether a sexual abuse victim's statements to a SANE [Sexual Assault Nurse Examiner] are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *People v Spangler*, 285 Mich App 136, 154 (2009). The Court set out the following nonexhaustive list of factual indicia to assist in deciding whether a victim's statements are testimonial:

"(1) the reason for the victim's presentation to the SANE, e.g., to be checked for injuries or for signs of abuse;

(2) the length of time between the abuse and the presentation;

(3) what, if any, preliminary questions were asked of the victim or the victim's representative, or what preliminary conversations took place, before the official interview or examination;

(4) where the interview or examination took place, e.g., a hospital emergency room, another location in the hospital, or an off-site location;

(5) the manner in which the interview or examination was conducted;

(6) whether the SANE conducted a medical examination and, if so, the extent of the examination and whether the SANE provided or recommended any medical treatment;

(7) whether the SANE took photographs or collected any other evidence;

(8) whether the victim's statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made;

(9) whether the SANE completed a forensic form during or after the interview or examination;

(10) whether the victim or the victim's representative signed release or authorization forms, or was privy to any portion of the forensic form, before or during the interview or examination;

(11) whether individuals other than the victim and the SANE were involved in the interview or examination and, if so, the level of their involvement;

(12) if and when law enforcement became involved in the case, how they became involved, and the level of their involvement; and

(13) how SANEs are used by the particular hospital or facility where the interview or examination took place." *Id*. at 155-156.

6.13 Photographic Evidence

The admissibility of photographic evidence, which includes digital and analog images, concerns two issues that commonly arise when such evidence is introduced at trial:

- Authentication (MRE 901).
- Relevancy questions (MRE 401 and MRE 403).

A. Authentication

Authentication of photographic evidence is governed by MRE 901(a), which states:

> "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is."

MRE 901(b)(1)-(10) provide a nonexhaustive list of evidence that satisfies the authentication or identification requirement of MRE 901(a), two of which are listed here:

> "(1) *Testimony of Witness with Knowledge*. Testimony that an item is what it is claimed to be.
>
> * * *
>
> (10) *Methods Provided by a Statute or Rule*. Any method of authentication or identification allowed by a Michigan statute or a rule prescribed by the Supreme Court."

Authentication involves two questions. *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017). The trial judge is solely responsible for deciding the first question, and the fact-finder is solely responsible for answering the second question. *Id*. at 154-156.

> "[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been *authenticated*—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is *actually authentic* or *genuine*—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability." *Id*. at 154.

A videotape depicting a three-year-old girl and a one-year-old boy who were forced to engage in sexual acts was properly authenticated under MRE 901(a) by the testimony of two witnesses who stated that it reflected events they had seen on the day in question. *People v Hack*, 219 Mich App 299, 302, 308-310 (1996).

See also *People v Riley*, 67 Mich App 320 (1976), rev'd on other grounds 406 Mich 1016 (1979),[41] where a photograph of the victim's "bruised backside" was properly admitted into evidence. *Riley*, 67 Mich App at 322. The victim testified that the photograph accurately reflected the condition of her body at the time the picture was taken. *Id*. The photographer's testimony was not necessary. *Id*. "All that is required for the admission of a photograph is testimony of an individual familiar with the scene photographed that it accurately reflects the scene photographed." *Id*.

B. Relevance

"'Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403.'" *People v Brown*, 326 Mich App 185, 192 (2018), quoting *People v Gayheart*, 285 Mich App 202, 227 (2009). MRE 401 defines *relevant evidence* as evidence that:

> "(a) . . . has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action."

"Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Michigan Constitution;
- [the Michigan Rules of Evidence]; or
- other rules prescribed by the [Michigan] Supreme Court." MRE 402.

"Irrelevant evidence is not admissible." MRE 402. Exceptions to the admissibility of relevant evidence appear in MRE 403, which states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the

[41] *Riley* was reversed because the trial court failed in the jury instructions to define the offense with which the defendant was charged. For more information on the precedential value of an opinion with negative subsequent history, see our note.

following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

"Because application of MRE 403 to any photographs that a party seeks to admit requires a balancing of factors, . . . sexually explicit photographs used as evidence of a sexual assault of a minor *cannot be unfairly prejudicial per se*." *Brown*, 326 Mich App at 194. "[T]rial courts must weigh the prohibitive value against the danger of any unfair prejudice that admission might cause," and "[a] decision on the admissibility of photographs in such cases cannot be based solely on the graphic nature of the photographs." *Id*. In *Brown*, "shocking, indecent, and unsettling" photographs of the sexual assault of a child were properly admitted. *Id*. at 193. "The photographs corroborated the victim's testimony that defendant took the photographs, given the victim's ability to identify defendant's hands, and that he had a sexual interest in her." *Id*. at 193-194. "[A]ny prejudicial taint [was] more than overcome by [the photographs'] probative value, regardless of how lurid and despicable the photographs themselves [were]." *Id*. at 194.

In *People v Watson*, 245 Mich App 572, 575 (2001), the defendant was convicted of sexually assaulting his stepdaughter. The defendant argued that the trial court improperly admitted into evidence a cropped photograph and an 8" x 10" enlargement of the same photograph, which showed the victim's naked buttocks. *Id*. at 575, 578. The defendant asserted that the photograph (the cropped one and the enlargement were of the same subject) "was inadmissible under MRE 404(b) because it was offered simply to show that defendant was a sexual pervert, which made it more likely that the victim's allegations of sexual abuse were true."*Watson*, 245 Mich App at 577. The Court of Appeals concluded that the evidence was admissible under MRE 404(b) to show the defendant's motive to have sexual relations with his stepdaughter. *Watson*, 245 Mich App at 579-581. According to the Court, the evidence had strong probative value, and the defendant did not show that the danger of unfair prejudice substantially outweighed that value. *Id*. at 581-582.

6.14 Polygraph Examinations[42]

A. Polygraph Examinations for Defendants Charged With CSC Offenses

A person who allegedly committed one of the offenses prohibited by MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), MCL 750.520d (CSC-III), MCL 750.520e (CSC-IV), or MCL 750.520g (assault with intent to commit CSC),[43] must be given a polygraph examination (lie detector test), if he or she requests it. MCL 776.21(5).

"MCL 776.21(5) extends the right to demand a polygraph examination only to a defendant 'who allegedly has committed' an enumerated criminal-sexual-conduct violation." *People v Phillips*, 469 Mich 390, 396 (2003). "Because the statute does not otherwise provide for a time limit within which to exercise the right, under the clear and unambiguous language of MCL 776.21(5), the right is lost only when the presumption of innocence has been displaced by a finding of guilt, i.e., when an accused is no longer 'alleged' to have committed the offense." *Phillips*, 469 Mich at 396. In *Phillips*, the defendant asserted his right to a polygraph examination during jury deliberations, and the Supreme Court concluded that the defendant's motion was timely because "he was still alleged to have committed the offense[.]" *Id*. However, failure to grant a defendant's timely request does not require a new trial unless it is more probable than not that the error was outcome-determinative. *Id*. at 396-397.

A defendant's statutory right to a polygraph examination does not include the right to have the examination tape-recorded. *People v Manser*, 250 Mich App 21, 32 (2002), overruled on other grounds by *People v Miller*, 482 Mich 540, 561 n 26 (2008).[44] Furthermore, information that a defendant did not receive a tape-recorded polygraph examination is inadmissible at trial because it is "not relevant to any material fact but only to a collateral legal matter[.]" *Manser*, 250 Mich App at 32.

A defendant has the right to have counsel present during a polygraph examination and during any questioning following the examination when the examination occurs after the Sixth Amendment right to counsel has attached. *People v Leonard*, 125

[42]See the Michigan Judicial Institute's *Evidence Benchbook* for a detailed discussion of polygraph examinations.

[43]See Chapter 2 for more information about these offenses.

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

Mich App 756, 759 (1983); *Wyrick v Fields*, 459 US 42, 46 (1982).[45] However, a defendant may waive the right to have counsel present at a polygraph examination, and this waiver may extend to the defendant's right to counsel at any post-examination questioning. *Leonard*, 125 Mich App at 760; *Wyrick*, 459 US at 46-47. See also *People v McElhaney*, 215 Mich App 269, 274-277 (1996).

B. Victims of CSC Offenses and Polygraph Examinations

Under MCL 776.21(2), "[a] law enforcement officer shall not request or order a victim to submit to a polygraph examination or lie detector test." Additionally, MCL 776.21(2) prohibits a law enforcement officer from informing a victim of the option of taking a polygraph examination or lie detector test, unless the victim asks about such a test. MCL 776.21(2). "A law enforcement officer shall inform the victim when the person accused of a crime specified in [MCL 776.21(1)(b)] has voluntarily submitted to a polygraph examination or lie detector test and the test indicates that the person may not have committed the crime." MCL 776.21(3).

C. Admissibility of Results

"[T]estimony concerning a defendant's polygraph examination is not admissible in a criminal prosecution." *People v Kahley*, 277 Mich App 182, 183 (2007). "It is plain error for the jury to be presented with the results of a polygraph examination." *Id*. However, the error does not necessarily require reversal. *Id*. at 183-184. In *Kahley*, reversal was not required because (1) "reference to defendant's refusal to take a polygraph examination was brief," (2) "the reference to defendant's refusal was not repeated," (3) "the prosecutor did not argue that defendant was guilty because he had refused to take a polygraph examination," (4) "defendant himself later testified that he asked to take a polygraph test but was never given one," and (5) "defendant confessed to the crime." *Id*. at 184.

[45] The defendant's attorney was not allowed in the examination room in *People v McElhaney*, 215 Mich App 269, 274 (1996), but the defendant was informed that he had the right to stop the examination at any time to consult with his attorney.

6.15 Privileges

A. Privileges Related to the Marital Relationship

1. Spousal Privilege

"In a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent, except as provided in [MCL 600.2162](3)."[46] MCL 600.2162(2).

2. Confidential Communications Privilege

MCL 600.2162(7) states:

> "Except as otherwise provided in [MCL 600.2162](3), a married person or a person who has been married previously shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage without the consent of the person to be examined."

3. When Privileges Do Not Apply

The legal rights established in MCL 600.2162(1)-(2) stating that a spouse shall not testify against his or her spouse in a criminal prosecution, civil action, or administrative proceeding do not apply in the specific circumstances listed in MCL 600.2162(3). *People v Szabo*, 303 Mich App 737, 747 (2014).

The spousal privilege does not apply to cases that arise from a personal wrong or injury committed by one spouse against the other spouse. *Szabo*, 303 Mich App at 748. In *Szabo*, the victim-wife could have been compelled to testify because the charges against her defendant-husband—felonious assault and felony-firearm—"[grew] out of a personal wrong or injury done by one [spouse] to the other." *Id*. at 748-749. See MCL 600.2162(3)(d).

The "personal wrong or injury exception" to spousal privilege appearing in MCL 600.2162(3)(d) does not require that a defendant-spouse be charged with an offense against the victim-spouse related to the personal wrong or injury. *People v*

[46] MCL 600.2162(3) lists situations in which the spousal and confidential communication privileges do not apply, including suits for divorce, separate maintenance, and annulment. MCL 600.2162(3)(a)-(f).

Hill, 335 Mich App 1, 12-13 (2020). In *Hill*, the defendant-spouse shot a third party who was attempting to intervene in a physical altercation between the defendant-spouse and the victim-spouse. *Id*. at 4. The charges against the defendant-spouse were a result of conduct directed at the third party that "occurred contemporaneously with (or after)" the defendant-spouse's initial assault of the victim-spouse and that constituted conduct intended to facilitate the defendant-spouse's continued assault of the victim-spouse; therefore, the charges against the defendant-spouse arose "[i]n a cause of action that [grew] out of a personal wrong or injury done by one [spouse] to the other . . . ." *Id*. at 12; MCL 600.2162(3)(d). Consequently, the spousal privilege did not apply, and the victim-spouse could be compelled to testify against the defendant-spouse in a criminal prosecution. *Hill*, 335 Mich App at 13.

B. Sexual Assault and Domestic Violence Counselors

Except as provided in MCL 722.631 (addressing privileged communications in child protective proceedings), communications between a victim and a sexual assault or domestic violence counselor are protected under MCL 600.2157a(2):

> "[A] confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim."

The privilege in MCL 600.2157a is abrogated in child protective proceedings. See MCL 600.2157a(2); MCL 722.631. It is also abrogated if the sexual assault or domestic violence counselor has a duty to report suspected child abuse or child neglect under MCL 722.623.[47] See MCL 722.631.

If a sexual assault or domestic violence counselor is licensed, certified, or identified as a social worker, psychologist, or other specified professional, other privileges may also apply:

- Social workers, MCL 333.18513;
- Psychiatrists and psychologists, MCL 330.1750;

[47] See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook* for detailed information.

- Psychologists, MCL 333.18237;
- Physicians, MCL 600.2157; and
- Clergy, MCL 767.5a(2).[48]

With the exception of a member of the clergy acting in that capacity, or the protected communication between an attorney and his or her client, these privileges are abrogated in child protective proceedings. See MCL 722.631.[49]

[48] MCL 600.2156 (a provision often cited in support of the cleric-congregant privilege) "does not qualify as an evidentiary privilege." *People v Bragg*, 296 Mich App 433, 453 (2012). In *Bragg*, the trial court correctly excluded evidence of the defendant's admission to his pastor that the defendant had sexually assaulted his young cousin because the defendant's conversation with his pastor was "privileged and confidential under MCL 767.5a(2)[.]" *Bragg*, 296 Mich App at 236-237, 463. Notwithstanding the fact that the pastor had initiated the conversation at which the defendant's mother was present, "the content of the communication" fell within the scope of MCL 767.5a(2). *Bragg*, 296 Mich App at 463-465. For discussion of the cleric-congregant privilege and *Bragg*, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 3.

[49] See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook* for detailed information.

Chapter 7: Expert Testimony & Scientific Evidence

Part I—Expert Testimony

7.1 Expert Testimony[1]

Admission of expert testimony at trial is governed by MRE 702:

[1]See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4 for more information about expert testimony.

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." MRE 702.

In *People v Muhammad*, 326 Mich App 40, 51-52 (2018), the Court described in detail the inquiry a trial court must conduct under MRE 702 before admitting expert testimony. According to the Court, "MRE 702 incorporates the standards of reliability that the United States Supreme Court established in [*Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993)], in interpreting the equivalent federal rule of evidence." *Muhammad*, 326 Mich App at 51-52.[2] Factors to be considered in the trial court's inquiry are (1) whether the scientific knowledge has been tested, (2) whether it has been subjected to peer review and publication, (3) the proven or potential rate of error, (4) whether standards of controlling the scientific operation exist and are maintained, and (5) whether the scientific operation has gained general acceptance. *Id*. at 52, citing *Daubert*, 509 US at 593-594. "However, these factors are not exclusive[.]" *Muhammad*, 326 Mich App at 52. "Although the *Daubert* gatekeeping function applies to all experts, the list of factors in *Daubert* is flexible and nonexhaustive: '*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.'" *Danhoff v Fahim*, ___ Mich ___, ___ (2024), quoting *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 141 (1999). "[E]ach case will present unique circumstances for a trial court to determine whether the expert's opinion is reliable." *Danhoff*, ___ Mich at ___.

As with all evidence, the proposed expert testimony must also be relevant under MRE 401 and MRE 402, and its probative value must not be "substantially outweighed" by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." MRE 403. On request, the trial judge may decide that a limiting instruction is appropriate. See *People v Christel*, 449 Mich 578, 600 (1995) (finding expert testimony

[2]See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782 (2004).

regarding battered woman syndrome irrelevant and not helpful to explain any fact in issue).

A. Expert Must Be Qualified

According to MRE 702, a qualified expert witness is "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education [who] may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that [the requirements of MRE 702(a)-(d) are met]."MRE 702 does not require that an expert be certified by the state in the particular area in which the expert is qualified." *People v Brown*, 326 Mich App 185, 196 (2018). Accordingly, a nurse who "held an associate's degree in nursing and a nursing license, received sexual assault training through an online course, had worked at [a program that assists sexual assault victims] since 2009, and had performed approximately 30 examinations as a sexual assault nurse examiner" was properly qualified as an expert witness even though she had not yet received her certification as a SANE nurse. *Id*.

How a witness's expertise compares to that of others in the field is relevant to the weight rather than the admissibility of the witness's testimony and is a question for the jury. See *Grow v W A Thomas Co*, 236 Mich App 696, 713-714 (1999) (trial court properly permitted a certified social worker to testify as an expert in post-traumatic stress disorder). "In cases involving sexual abuse of children, expert testimony has been presented by physicians, crisis counselors, social workers, police officers, and psychologists." *People v Beckley*, 434 Mich 691, 711 (1990) (opinion by BRICKLEY, J.). The individuals in those categories or groups, and others in similar positions, are sometimes referred to as "skilled witnesses." *Id*.

B. Expert Testimony Will Assist the Trier of Fact

A trial court acts as a gatekeeper to assure that expert testimony is properly admitted in a case. See *People v Muhammad*, 326 Mich App 40, 52 (2018). "'[T]he trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes.'" *Id*. (quotation marks and citations omitted).

Before admitting expert testimony, "[t]he trial court must also ensure that the expert's testimony is relevant. Even when an expert's testimony is relevant, it remains subject to the limits imposed by MRE 403."[3] *People v McFarlane*, 325 Mich App 507, 518 (2018) (citation omitted).

"'The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case.'" *People v Ackerman*, 257 Mich App 434, 445 (2003) (affirming the trial court's conclusion "that testimony about the typical patterns of behavior exhibited by child sexual abuse offenders would aid the jury"), quoting *People v Coy*, 243 Mich App 283, 294-295 (2000) (quotation marks and citation omitted). Deciding "whether an untrained layman could determine intelligently and to the best possible degree the issue involved without the aid of experts" requires only common sense. *Ackerman*, 257 Mich App at 445.

C. Expert Testimony Is Based on Sufficient Facts or Data

Sufficient facts or data must form the basis for a witness's expert testimony. MRE 702.

> "'This gatekeeper role applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.'" *People v Yost*, 278 Mich App 341, 394 (2008), quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782 (2004).

1. Facts Must Be In Evidence

MRE 703 requires that the facts or data on which an expert's opinion is based be in evidence. MRE 703 states:

> "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. The facts or data must be in evidence—or, in the court's discretion, be admitted in evidence later."

"This rule permits an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into

[3] MRE 403 states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

evidence in some way other than through the expert's hearsay testimony." *People v Alexander*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). "To the extent that [an expert] relied on hearsay to formulate a diagnosis, and no hearsay exception applied, an expert is allowed to recount and rely on hearsay if it was used as a basis to form an opinion." *Id*. at ___ (holding that the trial court did not err by allowing the expert testify as to her opinion of alleged abuse to one of defendant's children because "[t]he facts and data underlying [the expert's] testimony were fundamentally presented in testimony, documents, and photographs admitted [at trial]"). *Id*. at ___.

2. Disclosure of Facts in Support of Expert Testimony

MRE 705 governs disclosure of facts or data underlying an expert's opinion. MRE 705 states:

> "Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination."

D. Expert Testimony Results From Reliable Principles and Methods

"Under MRE 702, a trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable." *People v Steele*, 283 Mich App 472, 481 (2009). "'MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony—*including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data*—is reliable.'" *Steele*, 283 Mich App at 481, quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779 (2004) (emphasis added). "'Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible.'" *Danhoff v Fahim*, ___ Mich ___, ___ (2024) (citation omitted).[4]

[4] MRE 702 was amended by ADM 2022-30, effective May 1, 2024. In *Danhoff v Fahim*, ___ Mich ___ (2024), the Michigan Supreme Court analyzed the prior version of MRE 702 applied in that case by the lower courts. *Id.* at ___ n 11. The rule in effect then stated: "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Id.* at ___.

A physician expert may testify concerning the alleged abuse of a victim when the opinion is made "on the basis of admitted evidence detailing physical findings and [the victim's] medical history, in addition to the [victim's] statements." *People v Alexander*, ___ Mich App ___, ___ (2024), citing MRE 702. In *Alexander*, defendant was convicted of one count of torture, one count of second-degree child abuse, one count of second-degree child abuse in the presence of another child, and one count of third-degree child abuse. *Alexander*, ___ Mich App at ___. On appeal, defendant argued that the trial court plainly erred by allowing the prosecution's expert witness—an expert in general pediatrics and child abuse pediatrics—to testify regarding the diagnosis of "medical torture" for two of the child victims. *Id*. at ___. The Court concluded that no error occurred, and stated that "an examining physician, if qualified by experience and training relative to treatment of the complainant, can opine with respect to the cause of the complainant's injuries when the opinion is based on physical findings *and* the complainant's medical history." *Id*. at ___ (cleaned up).

"Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data." *People v Dobek*, 274 Mich App 58, 94 (2007). The Court explained why the expert testimony in *Dobek* was excluded:

> "[T]he proffered expert testimony regarding sex-offender profiling was properly excluded because it [had] not reached a level of scientific reliability sufficient to permit admission, there was insufficient supporting data, and the testimony would not have assisted the jury in understanding the evidence or in determining a fact in issue; rather, the proffered evidence would have confused the issues, misled the jury, and caused unfair prejudice to the prosecutor." *Dobek*, 274 Mich App at 107.

"Determining that [an] expert is unreliable and granting summary disposition without first considering [the] applicable factors [in MRE 702 and MCL 600.2955] is an abuse of discretion." *Danhoff*, ___ Mich at ___ (a medical malpractice action where the trial court rejected plaintiff's expert's standard-of-care opinion testimony because it was not supported by published, peer-reviewed medical literature). According to the Court, "scientific literature is not always required to support an expert's standard-of-care opinion, but . . . scientific literature is one of the factors that a trial court should consider when determining whether the opinion is reliable." *Id.* at ___. "[T]he guidepost for admissibility is reliability, and trial courts must consider MRE 702 as well as the statutory reliability

factors presented in MCL 600.2955 [for tort actions] when determining if an expert is reliable." *Danhoff*, ___ Mich at ___.

Determining whether to permit expert testimony requires a trial court to consider whether "'the opinion is rationally derived from a sound foundation.'" *People v Muhammad*, 326 Mich App 40, 52 (2018), quoting *People v Unger*, 278 Mich App 210, 217 (2008) (quotation marks and citation omitted). "'The standard focuses on the scientific validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony.'" *Muhammad*, 326 Mich App at 52-53, quoting *Unger*, 278 Mich App at 217-218.

E. Expert Reliably Applied Principles and Methods to the Facts

MRE 702(d) requires that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." See also *People v McFarlane*, 325 Mich App 507, 518 (2018).

F. Syndrome Evidence

Although the Michigan Supreme Court does "not endorse or adopt the use of the term 'syndrome,'" it has stated that "the admissibility of syndrome evidence is limited to a description of the uniqueness of a specific behavior brought out at trial." *People v Peterson*, 450 Mich 349, 363 (1995). "[S]yndrome evidence is not admissible to demonstrate that abuse occurred and . . . an expert may not give an opinion whether the complainant is being truthful or whether the defendant is guilty." *Id*. at 369. In addition, "where syndrome evidence is merely offered to explain certain behavior, the *Davis*/*Frye*[5] test for recognizing admissible science is inapplicable." *Peterson*, 450 Mich at 369. See also *People v Beckley*, 434 Mich 691, 710 (1990); *People v Smith*, 205 Mich App 69, 73 (1994). In *Beckley*, the Court summarized its holding: "[E]vidence of behavioral patterns of sexually abused children is admissible 'for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape.'" *Beckley*, 434 Mich at 710 (citation omitted). "[O]nly those aspects of 'child sexual abuse accommodation syndrome,' which specifically relate to the particular behaviors which become an issue in the case are admissible." *Id*.

[5] "The *Davis–Frye* rule, adopted from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 US App DC 46, 47 (1923), limits the admissibility of novel scientific evidence by requiring the party offering the evidence to demonstrate that it has gained general acceptance in the scientific community." *People v Haywood*, 209 Mich App 217, 221 (1995).

G. Delayed Disclosure

Although a detective's testimony was admitted as lay testimony, "[he] was more than qualified to give an expert opinion on delayed disclosure[6] to the extent of the testimony actually presented. [He] testified at length about his extensive knowledge, experience, training, and education concerning the sexual abuse of children. [He] ha[d] personally participated in the investigation of hundreds of criminal sexual conduct cases involving child victims. And [he] had received training in the investigation of cases involving delayed disclosure." *People v Dobek*, 274 Mich App 58, 79 (2007).

H. Disqualification of Expert Witness

"'[C]ourts are generally reluctant to disqualify expert witnesses, especially those . . . who possess useful specialized knowledge.'" *Teutsch Estate v Van De Ven*, 336 Mich App 604, 609 (2021), quoting *Rhodes v E I Du Pont de Nemours & Co*, 558 F Supp 2d 660, 664 (SD W Va, 2008) (quotation marks and citations omitted). An expert witness may be disqualified for conflict of interest when the party seeking disqualification claims to have shared confidential information with the expert witness before the opposing party ultimately procured the expert's testimony for its own case. *Teutsch Estate*, 336 Mich App at 609-610.

I. Jury Instructions Related to Expert Testimony

M Crim JI 5.10, *Expert Witness*, is the jury instruction given at a criminal trial when expert testimony has been presented. M Crim JI 5.10 should not be used when expert testimony is presented "regarding the characteristics of sexually abused children and about whether the complainant's behavior is consistent with those characteristics."[7] M Crim JI 5.10, *Use Note*.

7.2 Expert Testimony Involving an Ultimate Issue[8]

MRE 704 states:

---

[6] "'Delayed disclosure' refers to sex abuse victims, including children, not immediately informing others of the abuse that transpired." *Dobek*, 274 Mich App at 76 n 8.

[7] In these types of cases, it may be appropriate to use M Crim JI 20.29, which is a limiting instruction directed at expert testimony in cases of criminal sexual conduct involving a child. M Crim JI 5.10, *Use Note*. See Section 7.5 for more information on expert testimony in cases involving a child-victim.

[8] See Section 7.6 for more information on an examining physician's opinion on the ultimate issue and Section 7.5 for more information on expert testimony in cases involving a child-victim.

> "An opinion is not objectionable just because it embraces an ultimate issue."

However, an expert witness may not testify to his or her opinion about the defendant's guilt or the defendant's state of mind. *People v Zitka*, 335 Mich App 324, 345-346 (2021). Further, an expert witness is not permitted to "'testify about the requirements of law which apply to the particular facts in the case or to phrase his opinion in terms of a legal conclusion.'" *Id*. at 346, quoting *People v Drossart*, 99 Mich App 66, 75 (1980).

"[O]ur Supreme Court has imposed strict limits on expert testimony that 'comes too close' to findings that are left exclusively to the jury." *People v McFarlane*, 325 Mich App 507, 521 (2018), quoting *People v Peterson*, 450 Mich 349, 374 (1995) "For example, in cases involving criminal sexual conduct, an expert may not offer an opinion that the alleged victim had in fact been sexually abused, may not offer testimony that vouches for the victim's veracity, and may not offer an opinion that the defendant is guilty." *McFarlane*, 325 Mich App at 521-522.

In cases involving a child who has sustained injuries unlikely to have been caused by accident, "any use of the word 'abuse' in the context of a medical diagnosis, irrespective of whether that is in fact an accepted medical diagnosis, constitutes plain error in a criminal proceeding involving charges of abuse." *People v Ackley (On Remand)*, 336 Mich App 586, 594 (2021) (case involving child abuse). In *Ackley*, the defendant's trial involved medical testimony about injuries sustained by a child who died as a result of injuries allegedly caused by the defendant. *Id*. at 590. To describe the child's condition, some expert witnesses used the phrase, "abusive head trauma"—a phrase that uses the word "abusive," which is "a word forbidden because of its emotional and suggestive connotations[.]" According to the *Ackley* Court:

> "[E]xperts are permitted to draw and testify regarding conclusions that encompass a question to be decided by the jury, so long as the expert does not purport—or, importantly for this matter, even appear to purport—to draw a legal conclusion. Thus, where it is possible to draw a medical diagnosis based on a physical examination, as opposed to a complainant's self-reporting, an expert is fully permitted to testify that, in their opinion, a particular injury was not accidentally self-inflicted. The expert may not call that manner of injury 'abuse,' because, even if that is a term used in the medical community, it is also a legal conclusion and would be understood by laypersons to connote something different from what another doctor might understand." *Ackley*, 336 Mich App at 595 (citations omitted).

7.3 Presenting Expert Testimony Using Video Communication Equipment[9]

Under certain circumstances, expert testimony may be presented using video communication equipment. MCL 600.2164a(1).[10] MCL 600.2164a provides:

> "(1) If a court has determined that expert testimony will assist the trier of fact and that a witness is qualified to give the expert testimony, the court may, with the consent of all parties, allow the expert witness to be sworn and testify at trial by video communication equipment that permits all the individuals appearing or participating to hear and speak to each other in the court, chambers, or other suitable place. A verbatim record of the testimony shall be taken in the same manner as for other testimony.
>
> (2) Unless good cause is shown to waive the requirement, a party who wishes to present expert testimony by video communication equipment under subsection (1) shall submit a motion in writing and serve a copy of the motion on all other parties at least 7 days before the date set for the trial.
>
> (3) A party who initiates the use of video communication equipment under this section shall pay the cost for its use, unless the court otherwise directs." See also MCR 2.407 (defining and governing videoconferencing and its use in Michigan courts, providing basic standards for the use of videoconferencing technology, and setting forth the criteria for determining whether a case or proceeding is suited for videoconferencing). Except as MCR 6.006 otherwise provides, the use of videoconferencing technology in criminal cases is governed by MCR 2.407. MCR 6.006(A)(1).

Generally, the use of videoconferencing technology is prohibited in bench or jury trials held in circuit court, as well as in any circuit-court proceeding in which "the testimony of witnesses or presentation of evidence may occur . . . ." MCR 6.006(B)(4). The court has discretion to allow the use of videoconferencing technology in bench or jury trials in circuit court or in other circuit-court proceedings at which witness testimony or the presentation of evidence may occur "after all parties

---

[9] For more information on presenting expert testimony via video communication equipment, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

[10] ADM File No. 2020-08, effective September 9, 2022, amended MCR 2.407 and MCR 6.006 regarding the definition of videoconferencing, the circumstances appropriate to the use of videoconferencing technology, and the requirements for employing videoconferencing technology in criminal cases cognizant in circuit and district courts. MCR 6.001(A)-(B).

have had notice and an opportunity to be heard on the use of videoconferencing technology." *Id*.

Similarly, notwithstanding other provisions of the court rules, and subject to constitutional rights, the use of videoconferencing technology is prohibited in district and municipal courts "in evidentiary hearings, bench trials or jury trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence may occur, except in the discretion of the court." MCR 6.006(C)(3).

However, notwithstanding anything to the contrary in the court rules and "as long as the defendant is either present in the courtroom or has waived the right to be present, district courts may use videoconferencing to take testimony from *any witness* in a preliminary examination." MCR 6.006(C)(4) (emphasis added).

7.4 Court-Appointed Expert Witnesses[11]

A. To Assist the Court

MRE 706 details the requirements for appointing an expert witness for the purpose of assisting the trial court; the rule does not apply to an expert witness the trial court appoints to assist an indigent defendant. *In re Yarbrough Minors*, 314 Mich App 111, 121, 121 n 7 (2016).

MRE 706 provides:

> "(a) *Appointment Process*. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.
>
> (b) *Expert's Role*. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
>
> > (1) must advise the parties of any findings the expert makes;

[11] See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, for more information on court-appointed expert witnesses.

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) *Compensation*. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) *Disclosing the Appointment to the Jury*. The court may authorize disclosure to the jury that the court appointed the expert.

(e) *Parties' Choice of Their Own Experts.* This rule does not limit a party in calling its own experts."

B. To Assist an Indigent Defendant

When considering whether to appoint an expert witness for an indigent defendant, trial courts must apply the due process analysis set forth in *Ake v Oklahoma*, 470 US 68 (1985). *People v Kennedy*, 502 Mich 206, 228 (2018). Under *Ake*, for an indigent criminal defendant to merit the appointment of an expert witness, the "'defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.'" *People v Kennedy*, 502 Mich 206, 228 (2018),[12] quoting *Moore v Kemp*, 809 F 2d 702, 712 (CA 9, 1987). "'In addition, the defendant should inform the court why the particular expert is necessary.'" *People v Warner*, ___ Mich ___, ___ (2024), quoting *Kennedy*, 502 Mich at 227.

[12] *Ake* clearly indicates that fundamental fairness requires that an indigent defendant who is unable to pay for assistance be provided with the basic tools needed to present "an adequate defense or appeal[.]" *Ake v Oklahoma*, 470 US 68, 77 (1985) (quotation marks and citation omitted). Therefore, the *Kennedy* analysis extends to "postjudgment motions seeking an expert and discovery to aid in [an] appeal." *People v Ulp*, 504 Mich 964, 964 (2019) (remanding case to trial court because trial court wrongly concluded that *Kennedy* applied only to an indigent defendant's pretrial requests).

"[W]hen a defendant requests an expert to present an affirmative defense, a defendant must make the additional showing of a substantial basis for the defense." *People v Propp (Propp II)*, 508 Mich 374, 381 (2021), reversing in part and vacating in part *People v Propp (Propp I)*, 330 Mich App 151 (2019). In *Propp*, the defendant was charged with open murder and requested an expert to assist him in advancing the defense that the victim's death was an accident. *Propp II*, 508 Mich at 381. The Michigan Supreme Court held that the Michigan Court of Appeals erred by requiring the defendant to show a substantial basis for the defense because the defense of accident was not an affirmative defense; rather, it negated the element of intent for the charge of first-degree premeditated murder, which the prosecutor had the burden to prove. *Id*. at 381-382. The *Propp II* Court specifically instructed the Court of Appeals on remand to apply the due-process analysis laid out in *Ake* and adopted in *Kennedy* when determining whether to grant an indigent defendant's request for the assistance of an expert witness at government expense. *Propp II*, 508 Mich at 382-383.

On remand in *Propp*, the Court of Appeals applied the proper standard and expressed its conclusion that the defendant in *Propp* had satisfied the first portion of the "reasonable-probability standard" in part because the defendant's burden of production in that regard was not "overly burdensome[.]" *People v Propp (On Remand) (Propp III)*, 340 Mich App 652, 660 (2022). The *Propp III* Court determined that the defendant had failed to meet the second portion of the *Ake* standard; according to the Court, "in the end it [was] not reasonably probable that the denial of this expert assistance resulted in a fundamentally unfair trial." *Id*. at 660. The defendant claimed that the victim's death was an accident that occurred during the practice of erotic asphyxiation and asserted that he required an expert witness to testify in support of his claim. *Id*. at 659-661. The *Propp III* Court concluded that the trial court did not err in refusing to appoint an expert witness to testify for the defendant at government expense. *Id*. at 660. According to the Court, "[A]lthough the practice of erotic asphyxiation may have been unfamiliar—or entirely unknown—to certain jurors, the essence of the defense was not so technical or complex that testimony from an expert would have been particularly helpful to the defense or the jury." *Id*. at 660.

"[A] defendant is not required to show that he is unable to present his defense without expert assistance." *Warner*, ___ Mich at___. According to the Court, "here, defendant has established that the veracity of his confession was a significant factor at trial," and that "[h]is confessions were the only corroborating evidence of the complainant's allegations. Thus, a central focus of the defense was to cast doubt on his confessions." *Warner*, ___ Mich at ___.

Defendant's expert in false confessions was needed "to explain to the jury that his confession had the characteristics of coercion" and to "provid[e] defendant valuable information about how to otherwise understand evidence that would be presented to the jury . . . ." *Id*. at ___. "Thus, defendant showed a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Id*. at ___ (quotation marks and citation omitted).

7.5 Expert Testimony in Childhood Sexual Abuse Cases

In childhood sexual abuse cases, "the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse." *People v Peterson*, 450 Mich 349, 373 (1995). "The prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case." *Id*. However, "'courts should be particularly insistent in protecting innocent defendants in child sexual abuse cases' given 'the concerns of suggestibility and the prejudicial effect an expert's testimony may have on a jury.'" *People v Musser*, 494 Mich 337, 363 (2013) (holding that a detective who was not qualified as an expert witness was still subject to the same limitations as an expert because he "'gave . . . the same aura of superior knowledge that accompanies expert witnesses in other trials,'" and because, as a police officer, jurors may have been inclined to place undue weight on the officer's testimony), quoting *State v Cordova*, 137 Idaho 635, 641 (2002).

A. Expert Testimony Prohibited

In childhood sexual abuse cases:

> "(1) an expert may *not* testify that the sexual abuse occurred,
>
> (2) an expert may *not* vouch for the veracity of a victim,[13] and

[13] See *People v Thorpe*, 504 Mich 230, 235 (2019) ("expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity"; "examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury").

See also *People v Sattler-VanWagoner*, ___ Mich App ___, ___ (2024) (an expert's statement "that false reports are 'statistically very rare,' though lacking a numeric value, was essentially the statistical vouching described in *Thorpe*, 504 Mich at 252"; nonetheless, "[t]he isolated nature of the statement and substantial other evidence of [defendant's] guilt indicates that this error did not affect the outcome").

(3) an expert may *not* testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352 (1995) (emphasis added).[14]

See *People v Garrison (On Remand)*, 187 Mich App 657, 659 (1991) (the expert witness improperly vouched for the child-victim when he testified that based on his experience, the victim's reaction to the anatomically correct dolls "demonstrated that [*the victim*] *had indeed been sexually abused*").

B. Expert Testimony Permitted

In childhood sexual abuse cases, "an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent[15] with that of an actual abuse victim[.]" *People v Peterson*, 450 Mich 349, 352 (1995). See also *People v Sattler-VanWagoner*, ___ Mich App ___, ___ (2024), citing *Peterson*, 450 Mich at 352, and *People v Thorpe*, 504 Mich 230, 258 (2019).

In addition, "an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson*, 450 Mich at 352-353.[16] However, testimony regarding a child-victim's "consistent" behaviors may only be admissible in the following two circumstances:

- when a defendant raises the issue of the child victim's post-incident behavior; or
- when a defendant attacks the child victim's credibility. *People v Lukity*, 460 Mich 484, 501 (1999), citing *Peterson*, 450 Mich at 373-374.

See *People v Draper (On Remand)*, 188 Mich App 77-79 (1991) (testimony from two experts that indicated the victim had been sexually abused went "beyond merely relating whether the victim's

---

[14]The *Peterson* Court expressly reaffirmed its holding in *People v Beckley*, 434 Mich 691 (1990) (opinion by BRICKLEY, J.), concerning testimony an expert is prohibited from offering. *Peterson*, 450 Mich at 352.

[15] When expert testimony is presented at a criminal trial for criminal sexual conduct involving a child, M Crim JI 20.29, *Limiting Instruction on Expert Testimony (in Child Criminal Sexual Conduct Cases)*, may be appropriate if the testimony is presented "to rebut an inference that a child complainant's behavior is inconsistent with that of actual victims of child sexual abuse." M Crim JI 20.29, *Use Note*. See Section 7.1 for information on syndrome evidence. See also the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

[16]The *Peterson* Court expressly clarified its holding in *People v Beckley*, 434 Mich 691 (1990) (opinion by BRICKLEY, J.), concerning testimony an expert is permitted to offer. *Peterson*, 450 Mich at 352.

behavior [was] consistent with that found in other child sexual abuse victims"; rather, "[t]hey [were] opinions on an ultimate issue of fact, which is for the jury's determination alone").

Before admitting any expert testimony regarding the child's behaviors, the court must determine its relevance and probative value under MRE 401 and MRE 403. See *Peterson*, 450 Mich at 374-375.

In *Lukity*, 460 Mich at 486-487, the defendant was convicted of CSC-I against his 14-year-old daughter. The victim testified that the defendant had sexually assaulted her more than 40 times during two years, and that after she reported her father's conduct to a teacher (a year after the last reported incident of abuse), the victim attempted suicide. *Lukity*, 460 Mich at 487. The defendant argued that his daughter had serious emotional problems unrelated to the alleged sexual abuse that affected her ability to "recount and describe" the events she claimed had taken place. *Id*. at 501.

Because the defendant questioned the victim's credibility and attributed her suicide attempt to problems other than the alleged abuse, expert testimony was properly admitted to explain the general characteristics of sexual abuse victims, including the expert's opinion that the victim's behavior was consistent with other sexual abuse victims. *Lukity*, 460 Mich at 501. The expert also acknowledged that some characteristics of sexual abuse victims—suicide attempts, for example—were also consistent with other types of trauma. *Id*. at 501-502.

7.6 Admission of Expert Testimony By Physicians

Generally, "the examining physician in a rape case is a proper witness as long as his testimony may assist the jury in their determination of the existence of either of two crucial elements of the offense charged, (1) penetration itself and (2) penetration against the will of the victim." *People v McGillen #2*, 392 Mich 278, 284 (1974). An examining physician "may not testify that [a] complainant was raped by the defendant on the alleged date, nor may [the physician] render an opinion as to the complainant's veracity[.]" *People v Byrd*, 133 Mich App 767, 779-780 (1984) (citations omitted).

A. Determining the Need for Examining Physician Testimony

Like other expert testimony, an examining physician's testimony is admissible if the physician possesses specialized knowledge that will assist the trier of fact in understanding the evidence or

determining a fact in issue under MRE 702. *People v Smith*, 425 Mich 98, 112 (1986).

B. Physician's Opinion Testimony on Ultimate Issue

Expert physician testimony may include an expert's opinion on the ultimate issue of whether the victim was sexually assaulted, as long as the opinion is based on findings within the realm of the expert's medical capabilities or expertise, and not simply on the emotional state of, or the history given by, the victim. *People v Smith*, 425 Mich 98, 112-113 (1986) (expert's testimony that the complainant had been sexually assaulted was improperly admitted because the testimony "was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant"). See also MRE 704.[17]

Further, "[the] examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings *and* the complainant's medical history." *People v Thorpe*, 504 Mich 230, 255 (2019). "[E]xamining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury." *Id*. at 235. In addition, "an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the 'conclusion [is] nothing more than the doctor's opinion that the victim had told the truth.'" *Id*. at 255, 262, quoting *Smith*, 425 Mich at 109 (alteration in original). "Such testimony is not permissible because a 'jury [is] in just as good a position to evaluate the victim's testimony as' the doctor." *Thorpe*, 504 Mich at 255, quoting *Smith*, 425 Mich at 109 (alteration in original).

In *Thorpe*, expert testimony regarding

> "'probable pediatric sexual abuse' was based solely on [the expert's] own opinion that [the complainant's] account of the assaults was 'clear, consistent, detailed and descriptive.' [The expert's] testimony clearly falls within *Smith*'s[18] holding that an examining physician cannot give an opinion on whether a complainant had

[17] MRE 704 states that "[a]n opinion is not objectionable just because it embraces an ultimate issue."

> been sexually assaulted if the 'conclusion [is] nothing more than the doctor's opinion that the victim had told the truth.' An examining physician's opinion is objectionable when it is solely based 'on what the victim . . . told' the physician. Such testimony is not permissible because a 'jury [is] in just as good a position to evaluate the victim's testimony as' the doctor." *Thorpe*, 504 Mich at 262 (fifth alteration in original).

In the companion case to *Thorpe*, the Michigan Supreme Court found plain error that affected the defendant's substantial rights and stated that "[r]egardless of whether 'probable pediatric sexual abuse' is a term of art that can be used as a diagnosis with or without physical findings, . . . [the expert's] testimony had the clear impact of improperly vouching for [the complainant's] credibility." *Thorpe*, 504 Mich at 264.

"'*Possible* pediatric sexual abuse' is not significantly different from 'probable pediatric sexual abuse' in terms of the physician's endorsement of the accusation." *People v Del Cid (On Remand)*, 331 Mich App 532, 547 (2020) (emphasis added). Accordingly, "a diagnosis of 'possible pediatric sexual abuse' is . . . also inadmissible without corroborating physical findings. *Id*.

The physician's testimony that the victim had been sexually assaulted was properly admitted because "he testified that his opinion was based upon what he observed medically. Although his observation of the victim's emotional state was part of his medical evaluation, [he] did not base his opinion on the victim's emotional state. [His] opinion was based on objective facts obtained from his medical examination of the victim, such as the red mark on her neck and motile sperm in her body." *People v Swartz*, 171 Mich App 364, 377 (1988).

"In a criminal sexual conduct case, an examining physician's testimony is admissible for the limited purposes of establishing penetration or penetration against the will of the victim." *People v Vasher*, 167 Mich App 452, 459 (1988). In *Vasher*, the physician's "testimony was confined to the issue of whether penetration occurred. [He] did not express an opinion as to a place, specific time or by whom the rape occurred. Furthermore, the doctor's opinion was grounded upon objective evidence within the realm of her expertise as an obstetrician/gynecologist." *Id*. at 459-460. Specifically, the examining physician "testified that the physical

[18] In *People v Smith*, 425 Mich 98, 112 (1986), the expert testimony was improperly admitted where the expert's "opinion that the complainant had been sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but rather, on the emotional state of, and the history given by, the complainant."

examination revealed healed tears in the vaginal area as well as lacerations and signs of chronic irritation in the perianal area. In the doctor's opinion, the three-year-old child had been sexually penetrated." *Id*. at 458.

C. Qualifications of Examining Physician

The trial court properly determined that the examining physician was qualified as an expert witness even though the physician had no previous experience with examining sexual assault victims. *People v Swartz*, 171 Mich App 364 (1988). The Court of Appeals noted that "he had studied medicine, graduated from medical school and was licensed to practice medicine in Michigan. He had attended a lecture in medical school partially devoted to the examination of sexual assault victims. Moreover, he had experience in examining sperm in infertility cases." *Id*. at 375-376.

7.7 Expert Testimony by Sexual Assault Nurse Examiners (SANEs)

"A sexual assault nurse examiner is a registered nurse specially trained to provide care to sexual assault patients. The sexual assault nurse examiner conducts medical forensic examinations and can serve as an expert witness." Sparrow Hospital, *Sexual Assault Nurse Examiner Program*.

In *People v McLaughlin*, 258 Mich App 635, 657 (2003), the defendant claimed that the trial court erred by permitting a SANE to testify as an expert witness because the prosecution failed to designate her as an expert during pretrial discovery under MCR 6.201(A)(1). However, the Court of Appeals concluded that the SANE's testimony did not rise to the level of that required of an expert so that any error in the SANE's classification as an expert was harmless. *McLaughlin*, 258 Mich App at 658.

The Court noted that "MRE 701 permits lay witnesses to testify about opinions and inferences that are '(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.'" *McLaughlin*, 258 Mich App at 657. The Court further found that the only statements in the SANE's testimony that could be construed as "specialized knowledge" were her statements that the victim's physical state and demeanor were consistent with that of a recent rape victim. *Id*. at 658. The Court concluded that these statements did not involve "highly specialized knowledge" and were "largely based on common sense." *Id*. Accordingly, the defendant was "not entitled to a new trial on the basis of the prosecutor's failure to designate [the SANE] as an expert witness." *Id*. at 658-659.

"MRE 702 does not require that an expert be certified by the state in the particular area in which the expert is qualified. Rather, an expert may be qualified on the basis of 'knowledge, skill, experience, training, or education . . . .'" *People v Brown*, 326 Mich App 185, 196 (2018), quoting MRE 702. Accordingly, a licensed nurse may give expert testimony even though the nurse has not yet received a SANE certification. See *Brown*, 326 Mich App at 196. In *Brown*, the Court stated: "With regard to [the nurse's] testimony regarding the lack of injury in most sexual assault cases, this testimony was properly admitted because it was based on [the nurse's] specialized knowledge and assisted the jury in understanding the evidence in this case." *Id*. at 197.

Part II—Scientific Evidence

"Evidence refers to information or objects that may be admitted into court for judges and juries to consider when hearing a case. Evidence can come from varied sources—from genetic material or trace chemicals to dental history or fingerprints." National Institute of Justice (NIJ), *Evidence Analysis and Processing*.[19]

"Forensic science is the application of sciences such as physics, chemistry, biology, computer science and engineering to matters of law." NIJ, *Forensic Sciences*.[20]

7.8 Bite-Mark Evidence

For a detailed and comprehensive analysis of bite-mark evidence, see 2009 National Academy of Sciences report of the National Research Council's evaluation of forensic odontology, pp 173-176.[21]

"Although the Michigan courts previously found that bite mark evidence had gained general acceptance in the scientific community," see *People v Marsh*, 177 Mich App 161 (1989), "the testimony of the most frequently used expert . . . was later discredited both because his testimony lacked

[19]The NIJ is the research, development, and evaluation agency of the U.S. Department of Justice. The links to these resources were created using Perma.cc and directs the reader to an archived record of the page.

[20] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. A detailed discussion of the scientific methods, definitions of terms relevant to the processes involved in the analysis of evidence and about forensic science in general, is beyond the scope of this benchbook. A comprehensive list of terms and detailed information about trace evidence, hair analysis, and other relevant matters, may be found on NIJ's website. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[21] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. See also Examination of Witnesses § 12.39 (2020-2021 ed).

foundation and because his mathematical probability testimony [was] flawed, resulting in unfounded opinion testimony," see *Ege v Yukins*, 380 F Supp 2d 852, 879 (2005). 1A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 18.230. The Michigan Supreme Court, in two separate cases, reversed and remanded for a new trial the conviction of the defendants because it questioned the value of bite-mark evidence as a means of identification in those cases. See *People v Moldowan*, 466 Mich 862 (2002) (remanding after the prosecution's bite-mark analysis experts "either recanted testimony which concluded that bite marks on the victim were made by the defendant or presented opinion evidence which has now been discredited), and *People v Wright (Wright I)*, 461 Mich 906 (1999) (remanding "to the trial court to conduct a *Davis-Frye* hearing on the matter of [the expert witness's] testimony regarding the application of statistical probabilities to the comparison between defendant's dentition and the bite marks on the victim"). After remand and again on appeal from the trial court, the Supreme Court considered the trial court's findings in *Wright I* and vacated the defendant's conviction and remanded the case for a new trial, an outcome to which all parties agreed. *People v Wright (Wright II)*, 463 Mich 993 (2001).

7.9 Hair Analysis

A. In General

"Fibers, hair, soil, wood, gunshot residue and pollen are only a few examples of trace evidence that may be transferred between people, objects or the environment during a crime." See National Institute for Justice (NIJ), *Trace Evidence*.[22]

"Characteristics of race, body area, damage, decomposition, alteration (e.g., bleaching, dyeing), and whether a hair has been forcibly removed or naturally shed can be determined through human hair analysis. Comparisons of the microscopic characteristics in hairs can determine if a person can be included as a possible source of a questioned hair but cannot provide personal identification." See Federal Bureau of Investigation (FBI), *Handbook of Forensic Services*, p 57.

For detailed analyses of hair and the many ways it is tested, identified, and used in the criminal justice system, see FBI, *Forensic Science Communications*.[23] In addition, "the FBI has concluded that the [FBI forensic] examiners' testimony in at least 90 percent of trial transcripts the Bureau analyzed as part of its Microscopic Hair

[22]The NIJ is the research, development, and evaluation agency of the U.S. Department of Justice.

[23]As indicated on the FBI's website, it contains archived material and may be outdated.

Comparison Analysis Review [prior to 2000] contained erroneous statements." FBI, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases (Ongoing Review)*. Since 2000, the FBI has routinely conducted mitochondrial DNA testing on hair, and "[t]he practice [of using microscopic hair comparison to link a criminal defendant to a crime] was deemed 'highly unreliable' in the 2009 National Academy of Sciences report on forensic science, *Strengthening Forensic Science in the United States: A Path Forward*. Nevertheless, some jurisdictions continue to use hair analysis where mitochondrial DNA testing is deemed too expensive, time consuming or is otherwise unavailable." FBI, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*. Despite the National Academy of Sciences' finding, the FBI found it "important to note that microscopic hair comparison analysis is a valid scientific technique[.]" FBI, *FBI/DOJ Microscopic Hair Comparison Analysis Review*.

Currently in Michigan, "[a]ny human hair characterization, screening or evaluation for DNA testing will be performed by the [Michigan State Police (MSP)] Biology Unit." MSP, *Trace-PM 11.0 Hair Analysis* (2018). The information provided by MSP's document *Trace-PM 11.0 Hair Analysis* states that MSP's Trace Evidence Unit does not conduct "[m]icroscopic animal hair analysis/comparison." *Id*. The document clearly indicates that any differentiation made between animal and human hairs must "be reported out as conclusions such as 'apparent animal hairs observed', or 'possible human hairs observed.'" *Id*. See also MSP, *Biology & DNA* (summary of DNA testing performed by the Forensic Science Division's Biology Unit in the multiple forensic laboratories in Michigan).

Committee Tip:

A number of committee members stated that microscopic hair analysis was rarely offered as evidence in cases with which they were familiar or in which they had participated. Another committee member's discussion with an analyst at a Michigan State Police Forensic Science laboratory confirmed that a piece of evidence resembling a strand of hair or a piece of fiber was first evaluated to determine whether the piece of evidence was a hair or a fiber or some other material. Depending on the education and training of a laboratory analyst, further hair analysis might enable an analyst to determine whether the hair is a human hair or a canine hair.

B. Caselaw

Published opinions involving microscopic hair analysis have not been common in Michigan. The leading case and precedential authority in matters involving hair analysis is *People v Vettese*, 195 Mich App 235 (1992).[24] According to the *Vettese* Court, "microscopic hair analysis satisfies the *Davis-Frye*[25] test for admissibility of scientific opinion testimony." *Id*. at 240-241.

In *Vettese*, 195 Mich App at 241, hair-matching evidence was properly admitted to show "that the pubic hair found in the victim's bed was similar in all relevant respects to the defendant's pubic hair[.]" In addition to approving the hair-matching analysis as admissible scientific opinion testimony, the *Vettese* Court discussed the hair-matching analysis in terms of its relevancy under MRE 401. *Vettese*, 195 Mich App at 241. The Court noted that the matching hair placed the defendant in the group of persons who could have committed the crime. *Id*. The Court further found that statistical probability was unnecessary where the hair-matching analysis did not eliminate the defendant from the group of individuals from whom the hair could have originated. *Id*. Finally, because there existed additional substantial evidence of the defendant's guilt, the Court concluded that the probative value of the hair-match was not substantially outweighed by the danger of unfair prejudice as prohibited by MRE 403. *Vettese*, 195 Mich App at 241.

Few published opinions involving microscopic hair analysis performed in the same manner as in *Vettese* have been issued since *Vettese* was released, but a number of unpublished opinions have been issued since *Vettese*. Unpublished opinions are not binding precedent, but they may be persuasive. MCR 7.215(C)(1).

One of those unpublished cases discusses microscopic hair analysis in detail. *Watkins v State*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2020 (Docket No. 348855), p 2. In that case, the Court summarized the testimony of two witnesses who were assigned to the serology and trace evidence area of Detroit's crime lab and offered an explanation of the process. *Id*. at 2. The Court reiterated the witnesses' testimony:

[24] See e.g., *People v Hayden*, 125 Mich App 650 (1983), and *People v Watkins*, 78 Mich App 89 (1977).

[25] "The *Davis–Frye* rule, adopted from *People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 US App DC 46, 47 (1923), limits the admissibility of novel scientific evidence by requiring the party offering the evidence to demonstrate that it has gained general acceptance in the scientific community." *People v Haywood*, 209 Mich App 217, 221 (1995).

> "[M]icroscopic hair analysis involve[s] the comparison of known and unknown hair samples on the basis of 15 different characteristics . . . . [K]nown and unknown hair could be microscopically similar and have a common origin . . . . [It is] not possible to say with reasonable scientific certainty that an unknown hair came from a known suspect." *Id*.

In its study of the evidentiary value of microscopic hair analysis, the *Watkins* Court noted several factors the FBI discussed with regard to hair analysis:

> "In 2013, the Federal Bureau of Investigation (FBI) agreed that examiners regularly overstated the conclusions that could be drawn from microscopic hair analysis evidence. It concluded that a forensic examiner could state that a known hair sample could be included or excluded as a possible source of unknown hair at a crime scene, but it was not possible to attach a probability to this possible inclusion or exclusion because the size of the pool of people who could have been a source for the hair was unknown." *Watkins*, unpub op at 2-3.

7.10 Evidence of Blood Type

Currently in Michigan, the Michigan State Police Forensic Biology Unit conducts serology, which "may best be described as the examination of bulk evidence (swabs, fabric cuttings, tools, various weapons, sexual assault kits, clothing, masks, etc.) using a variety of microscopic, chemical, immunological, and enhancement techniques to locate and characterize bodily fluids," including blood. Michigan State Police, *Forensic Biology & DNA*.[26]

In Michigan, blood-typing evidence, "like other pieces of physical evidence that show possible connections between defendants and criminal acts, [is] admissible, the weight to be given the evidence being subject to the jury's determination." *People v Punga*, 186 Mich App 671, 673 (1991). In *Punga*, 186 Mich App at 672, the Court of Appeals concluded that the trial court properly admitted blood-type evidence "indicating defendant was among thirty-four percent of the male population that could have produced the semen found on the victim's clothing." The Court explained:

[26] The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. A detailed discussion of the scientific methods and definitions of terms relevant to the processes involved in forensic science is beyond the scope of this benchbook.

> "Evidence of blood type that places a defendant within a certain group of the population is relevant according to the definition of relevant evidence contained in MRE 401, in that it has some tendency to make the existence of a fact of consequence to the determination of the action more or less probable than it would be without the evidence." *Punga*, 186 Mich App at 673.

"[F]rom eighty to eighty-five percent of the population are secretors, defined as persons who secrete their blood grouping within their body fluids. Nonsecretors do not secrete their blood grouping within their body fluids." *People v Trevino*, 155 Mich App 10, 13 (1986).

Evidence of the defendant's blood type and secretor status was properly admitted against the defendant at trial where "[p]hysical evidence overwhelmingly established that the child had been sexually abused and corroborated defendant's identity as the perpetrator." *People v Hackney*, 183 Mich App 516, 529 (1990). The Court explained:

> "Sperm was detected on the child's underpants and on paper towels discarded at the location of the sexual assault. Tests conducted on samples of the sperm indicated that the source, in all likelihood, was a secretor with an AB blood type, which is characteristic of only 3.2 percent of the fertile male population. Because the victim had type O blood, it was impossible that he could have been the source of the sperm. Tests done on samples of defendant's blood and saliva indicated he was a type AB secretor." *Hackney*, 183 Mich App at 529.

7.11 DNA (Deoxyribonucleic Acid)

A. DNA Identification Profiling System Act (DNA Profiling Act)

This section contains a very brief discussion of the DNA Identification Profiling System Act (DNA Profiling Act), MCL 28.171 *et seq*. For a comprehensive discussion of this topic, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

Among other requirements and provisions, the DNA Profiling Act facilitates the collection of a DNA sample:

- by the department of corrections from prisoners incarcerated in a state correctional facility and from probationers placed at an SAI (Special Alternative Incarceration) program, MCL 28.173(a)(*i*);[27]

- by the county sheriff or the investigating law enforcement agency from individuals arrested for committing or attempting to commit a felony or certain juveniles arrested for an offense that would be a felony if committed by an adult, MCL 28.173(a)(*ii*);[28]

- by the county sheriff or the law enforcement agency from individuals convicted of or found responsible for a felony, attempted felony, or any of the enumerated misdemeanors or substantially corresponding local ordinances (e.g., indecent exposure and offenses involving prostitution, etc.), MCL 28.173(a)(*ii*);[29]

- by the department of health and human services (DHHS) or a county juvenile agency from a juvenile who is a public ward under a youth agency's jurisdiction and who meets the criteria set out in MCL 803.307a(1)(a) or MCL 803.307a(1)(b), MCL 28.173(a)(*iii*); and

- by DHHS or a county juvenile agency from a juvenile who is under the supervision of DHHS or a county juvenile agency and who meets the criteria set out in MCL 803.225a(1)(a) or MCL 803.225a(1)(b), MCL 28.173(a)(*iii*).

The DNA Profiling Act also sets out requirements for the collection of samples, the permissible use of collected DNA samples, the disclosure and retention of DNA profiles, and the proper disposal of DNA profiles. See MCL 28.173(a), MCL 28.175, and MCL 28.176(1).

B. DNA (Deoxyribonucleic Acid) Testing and Admissibility

A discussion of the scientific methods involved in DNA testing and the admissibility at trial of DNA test results is beyond the scope of this benchbook. For a comprehensive discussion about DNA testing and admissibility, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4. For a detailed discussion of DNA testing in general, see the Federal Bureau of Investigation, *Handbook of Forensic Services*.[30]

[27] See MCL 791.233d.

[28] See MCL 750.520m(1)(a); MCL 750.520m(3); MCL 712A.18k.

[29] See MCL 750.520m(1)(b)(*i*)-(*iv*); MCL 750.520m(3).

[30] The link to this resource was created using Perma.cc and directs the reader to an archived record of the document.

7.12 Sexual Assault Evidence Kit

A. Administration of Sexual Evidence Kit

MCL 333.21527(1) governs the requirements for administration of sexual assault evidence kits:

> "If an individual alleges to a physician or other member of the attending or admitting staff of a hospital that within the preceding 120 hours the individual has been the victim of criminal sexual conduct under . . . MCL 750.520a to [MCL] 750.520*l*, the attending health care personnel responsible for examining or treating the individual immediately shall inform the individual of the availability of a sexual assault medical forensic examination, including the administration of a sexual assault evidence kit. If consented to by the individual, the attending health care personnel shall perform or have performed on the individual the sexual assault medical forensic examination, including the procedures required by the sexual assault evidence kit. The attending health care personnel shall also inform the individual of the provisions for payment for the sexual assault medical forensic examination under . . . MCL 18.355a."

B. Release or Destruction of Sexual Assault Kit Evidence

The Sexual Assault Kit Evidence Submission Act, MCL 752.931 *et seq.*, sets out certain procedures the health care facility and the law enforcement agency must follow regarding the collection, handling, and disposition of sexual assault kit evidence.

"A health care facility that has obtained written consent to release sexual assault kit evidence shall notify the investigating law enforcement agency, if known, or the law enforcement agency having jurisdiction in that portion of the local unit of government in which the medical facility is located of that fact within 24 hours after obtaining that consent." MCL 752.933(1).

"A health care facility that has not obtained written consent to release any sexual assault kit evidence shall inform the individual from whom sexual assault kit evidence was obtained of its sexual assault kit evidence storage policy. The information provided under this subsection shall include a statement of the period for which that evidence will be stored before it is destroyed and how the individual can have the evidence released to the investigating law enforcement agency at a later date. Any sexual assault kit evidence

that is not released to a law enforcement agency under this section shall be stored for a minimum of 1 year before it is destroyed." MCL 752.933(2).

1. Release of Sexual Assault Kit Evidence to Law Enforcement Agency

"A law enforcement agency that receives notice under [MCL 752.933] that sexual assault kit evidence has been released to that law enforcement agency shall take possession of the sexual assault kit evidence from the health care facility within 14 days after receiving that notice." MCL 752.934(1).

> **Note:** "If [the] law enforcement agency [that was notified by a health care facility about sexual assault kit evidence] determines that the alleged sexual assault occurred within the jurisdiction of another law enforcement agency and that it does not otherwise have jurisdiction over that assault, that law enforcement agency shall notify the other law enforcement agency of that fact within 14 days after receiving the kit from the health care facility that collected the sexual assault kit evidence." MCL 752.934(2). "A law enforcement agency that receives notice under [MCL 752.934(2)] shall take possession of the sexual assault kit evidence from the other law enforcement agency within 14 days after receiving that notice." MCL 752.934(3).

"The investigating law enforcement agency that takes possession of any sexual assault kit evidence shall assign a criminal complaint number to that evidence in the manner required by that agency and shall submit that evidence to the department or another accredited laboratory for analysis within 14 days after that law enforcement agency takes possession of that evidence under [MCL 752.934]." MCL 752.934(4). "Each submission of sexual assault kit evidence for analysis under th[e Sexual Assault Kit Evidence Submission Act] shall be accompanied by the criminal complaint number required under [MCL 752.934(4)]." MCL 752.934(5).

> **Note:** Sexual assault kit evidence that was received by a law enforcement agency within 30 days before [March 31, 2015[31]] shall also be submitted to the department or other accredited laboratory as provided in [MCL 752.934]." MCL 752.934(4).

[31] The Sexual Assault Kit Evidence Submission Act, effective March 31, 2015. See 2014 PA 227.

MCL 752.934(6) requires "[a]ll sexual assault kit evidence submitted to the department or an accredited laboratory on or after [March 31, 2015[32]] [to] be analyzed within 90 days after all of the necessary evidence is received by the department or other accredited laboratory, provided that sufficient staffing and resources are available to do so." "The DNA profiles of all sexual assault kit evidence analyzed [under MCL 752.934] on or after [March 31, 2015[33]] shall be uploaded only into those databases at the state and national levels specified by the department." MCL 752.934(7).

a. Failure to Comply With Requirements of Act

"The failure of a law enforcement agency to take possession of sexual assault kit evidence as provided in this act or to submit that evidence to the department or other accredited laboratory within the time prescribed under this act does not alter the authority of the law enforcement agency to take possession of that evidence or to submit that evidence to the department or other accredited laboratory under this act and does not alter the authority of the department or other accredited laboratory to accept and analyze the evidence or to upload the DNA profile obtained from that evidence into state and national DNA databases under this act." MCL 752.934(8).

"The failure to comply with the requirements of this act does not constitute grounds in any criminal proceeding for challenging the validity of a database match or of any database information, and any evidence of that DNA record shall not be excluded by a court on those grounds." MCL 752.934(9).

b. No Remedy for Accused or Convicted

"A person accused or convicted of committing a crime against the victim has no standing to object to any failure to comply with the requirements of this act, and the failure to comply with the requirements of this act is not grounds for setting aside the conviction or sentence." MCL 752.934(10).

[32] The Sexual Assault Kit Evidence Submission Act, effective March 31, 2015. See 2014 PA 227.

[33] The Sexual Assault Kit Evidence Submission Act, effective March 31, 2015. See 2014 PA 227.

2. Notification to Victim of Destruction or Disposal of Sexual Assault Kit Evidence

"If a law enforcement agency intends to destroy or otherwise dispose of any sexual assault kit evidence in a sexual assault offense case before the expiration for the limitation period applicable under . . . MCL 767.24, and its destruction does not otherwise conflict with the requirements of . . . MCL 770.16, the law enforcement agency with the primary responsibility for investigating the case shall notify the victim of that intention in writing at least 60 days before the evidence is destroyed or otherwise disposed of." MCL 752.935.

Chapter 8: Postconviction and Sentencing Matters

Part I—Postconviction Matters

8.1 Postconviction Bail

Before conviction, a defendant has a right to bail with certain exceptions. See Const 1963, art 1, § 15; Const 1963, art 1, § 16; ("[e]xcessive bail shall not be required"); MCL 765.6 ("amount of bail shall not be excessive") MCR 6.106(A). However, after conviction, a defendant is "no longer entitled to the presumption of innocence and release on bail or bond becomes a matter of discretion, not of right." *People v Tate*, 134 Mich App 682, 693 (1984).

For more information about postconviction bail, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 8.

A. After Conviction and Before Sentencing

1. Convictions For Assaultive Crimes

If a defendant was convicted of an assaultive crime and is awaiting sentence, the court must detain the defendant and deny bail "unless the trial court finds by clear and convincing evidence that the defendant is not likely to pose a danger to other persons and that [MCL 770.9b] does not apply."

2. Convictions For Sexual Assault of a Minor

If a defendant was convicted of sexual assault of a minor and is awaiting sentence, the court must detain the defendant and deny him or her bail. MCL 770.9b(1). A minor is an individual under the age of 16. MCL 770.9b(3)(a).

B. After Sentencing and Pending Appeal

1. Convictions For Assaultive Crimes

If a defendant convicted of an assaultive crime has been sentenced to a term of imprisonment and has filed an appeal (or leave to appeal), the court must detain the defendant and deny bail "unless the trial court or the court to which the appeal is taken finds by clear and convincing evidence that

[MCL 770.9b] does not apply and that both of the following exist":

- The defendant is unlikely to be a danger to other persons.
- The defendant's appeal or application for leave to appeal presents a substantial question of law or fact. See also MCL 770.9.

"[D]uring the pendency of [the prosecution's] application for leave to appeal to [the Michigan Supreme Court] from a Court of Appeals reversal of a criminal conviction, a motion by the defendant for bond pending appeal [is] governed by [MCL 770.8 and MCL 770.9, or MCL 770.9a(2)], as applicable"[1] and not by the statute governing appeals by the prosecution, MCL 765.7. *People v Sligh*, 431 Mich 673, 682 (1988).

2. Convictions For Sexual Assault of a Minor

If a defendant convicted and sentenced for committing sexual assault against a minor files an appeal or an application for leave to appeal, the court must detain the defendant and deny bail. MCL 770.9b(2). See also MCL 770.9.

8.2 Motion for Relief From Judgment

For a more detailed discussion of motions for relief from judgment, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3, and the Michigan Judicial Institute's Quick Reference Materials:

- Motion for Relief From Judgment Flowchart
- Motion for Relief From Judgment Checklist

"Unless otherwise specified by [the Michigan Court Rules], a judgment of conviction and sentence entered by the circuit court not subject to appellate review under [MCR 7.200 *et seq*.[2] or MCR 7.300 *et seq*.[3]] may be

[1] All statutes cited were first written before the Court of Appeals was formed (Const 1963, art 6, § 1) and began hearing cases (1965), so no original version of the statutes specifically addresses the circumstances involved in the *Sligh* case. *Sligh*, 431 Mich at 677. "[A]mendments of the statutes relied on by plaintiff contain slight but sufficient indications of legislative intent to apply to this situation." *Id*. (determining which statute applied to defendant's motion for bond following reversal of defendant's conviction by the Court of Appeals and pending the prosecution's appeal of the reversal to the Supreme Court).

[2] Court rules governing procedure in the Court of Appeals.

[3] Court rules governing procedure in the Supreme Court.

reviewed only in accordance with the provisions of [MCR 6.500 *et seq*]." MCR 6.501. See also *People v Gibson*, 503 Mich 1034, 1035 (2019). "The defendant initiates proceedings under [MCR 6.500 *et seq*.] by filing a motion for relief from judgment."[4] 1989 Staff Comment to MCR 6.502.

"Under MCR 6.502(G)(1), a criminal defendant may file one motion for relief from judgment after August 1, 1995, notwithstanding the defendant's having filed one or more such motions before that date." *Ambrose v Recorder's Court Judge*, 459 Mich 884 (1998).

> "A defendant may file a second or subsequent motion based on any of the following:
>
> > (a) a retroactive change in law that occurred after the first motion for relief from judgment was filed,
> >
> > (b) a claim of new evidence that was not discovered before the first such motion was filed,[5] or
> >
> > (c) a final court order vacating one or more of the defendant's convictions either described in the judgment from which the defendant is seeking relief or upon which the judgment was based." MCR 6.502(G)(2).

"The court may waive the provisions of [MCR 6.502] if it concludes that there is a significant possibility that the defendant is innocent of the crime. For motions filed under both (G)(1) and (G)(2), the court shall enter an appropriate order disposing of the motion." MCR 6.502(G)(2).

8.3 Postconviction Testing and Counseling About Sexually Transmitted Infection, Hepatitis, and HIV[6]

Unless otherwise provided in MCL 333.5129, *after* a defendant has been *convicted* of an offense listed in MCL 333.5129(4) or a juvenile has been *found responsible for* one of the offenses found in MCL 333.5129(4),[7] the court with jurisdiction over the matter must order the defendant or the

---

[4] See SCAO Form CC 257, *Motion for Relief from Judgment*.

[5] "For purposes of [MCR 6.502(G)(2)], 'new evidence' includes new scientific evidence." MCR 6.502(G)(3). New scientific evidence "includes, but is not limited to, shifts in science entailing changes: (a) in a field of scientific knowledge, including shifts in scientific consensus; (b) in a testifying expert's own scientific knowledge and opinions; or (c) in a scientific method on which the relevant scientific evidence at trial was based." *Id*.

[6] See the Michigan Judicial Institute's *Domestic Violence Benchbook*, Chapter 3, for information about determining pretrial bail.

[7] For discussion of the statutory requirements pertaining to preconviction or preadjudication testing and counseling about sexually transmitted infection, hepatitis, or HIV, see Section 5.6.

juvenile to be examined or tested for sexually transmitted infection, hepatitis B infection, hepatitis C infection, and for the presence of HIV or an antibody to HIV.[8] MCL 333.5129(4).

The offenses enumerated in MCL 333.5129(4) are:

- Accosting or encouraging a child for an immoral purpose, MCL 750.145a.
- Gross indecency between males, MCL 750.338.
- Gross indecency between females, MCL 750.338a.
- Gross indecency between members of the opposite sex, MCL 750.338b.
- Soliciting or accosting, MCL 750.448.
- Receiving a person into a place for the purpose of prostitution, MCL 750.449.
- Engaging services for the purpose of prostitution, MCL 750.449a.
- Aiding and abetting certain prostitution offenses, MCL 750.450.
- Keeping a house of prostitution, MCL 750.452.
- Procuring a person for prostitution, MCL 750.455.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct involving penetration and assault with intent to commit CSC-II, MCL 750.520g.
- Intravenous use of a controlled substance, MCL 333.7404.[9]

---

[8] See SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

[9] A person charged with or convicted of violating MCL 333.7404 (intravenous use of a controlled substance), or a corresponding local ordinance, is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not sexually transmitted infection. MCL 333.5129(9).

- A local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance.[10]

A. Confidentiality of Testing, Test Results, and Other Medical Information

"Except as provided in [MCL 333.5129(5)-(7)], or as otherwise provided by law, the examinations and tests must be confidentially administered by a licensed physician, the department, or a local health department. MCL 333.5129(4). In addition, the examination, test results, and any other medical information obtained from the defendant or juvenile are confidential and may only be disclosed as set out in MCL 333.5129(6).

A person or agency receiving a defendant's or a juvenile's test results or other medical information related to HIV infection or AIDS is subject to the provisions in MCL 333.5131 and is prohibited from disclosing that information, except as specifically permitted under MCL 333.5131. MCL 333.5129(7).[11] Under MCL 333.5131(2), the test results and the fact that testing had been ordered specifically to determine the presence of HIV infection or AIDS is information subject to the physician-patient privilege under MCL 600.2157. Violation of MCL 333.5131 is a misdemeanor punishable by imprisonment for not more than one year or a maximum fine of $5,000, or both. MCL 333.5131(8). In addition, a person who violates MCL 333.5131 "is liable in a civil action for actual damages or $1,000.00, whichever is greater, and costs and reasonable attorney fees." MCL 333.5131(8). The employer of a person who violates MCL 333.5131 is subject to the same penalties, "unless the employer had in effect at the time of the violation reasonable precautions designed to prevent the violation." *Id*.

B. Disclosure of Test Results and Other Medical Information

MCL 333.5129(5)-(7) contain exceptions to the general confidentiality requirement; MCL 333.5129 expressly authorizes disclosure to one or more of the listed individuals or entities while MCL 333.5129(5) and MCL 333.5129(7) expressly obligate the person or agency conducting the examination to disclose the defendant's or

[10] A person charged with or convicted of intravenous use of a controlled substance is subject to the testing, counseling, and information distribution requirements regarding hepatitis B, hepatitis C, HIV, and AIDS, but not sexually transmitted infection. MCL 333.5129(9).

[11] See MCL 333.5131 for additional permissions to disclose information about HIV and AIDS under specific circumstances.

the juvenile's examination or test results, and other medical information as specified.

Under MCL 333.5129(5), the victim or individual involved in the offense who was exposed to a body fluid during the course of the crime or who engaged in sexual penetration or sexual contact with a defendant or juvenile offender, may consent to have the court disclose his or her name, address, and telephone number[12] to the person or agency conducting the testing. If the victim or individual provide consent, the person or agency examining or testing the defendant or juvenile for the presence of sexually transmitted infection, hepatitis B infection, hepatitis C infection, or HIV or an antibody to HIV (including a follow-up test) must immediately disclose the examination or test results to the victim or individual. *Id*. In addition, the person or agency examining or testing the defendant or juvenile must refer the victim or individual for appropriate counseling. *Id*.

Under MCL 333.5129(6), the person or agency responsible for the examinations and tests must report the results of the exams or tests, and any other medical information obtained from the defendant or juvenile, to the court or probate court.[13] The results and other medical information must be made part of the court record *after* the defendant is sentenced or an order of disposition is entered for the juvenile. *Id*. This information is confidential and may only be disclosed to one or more of the following:

- The defendant or juvenile. MCL 333.5129(6)(a).
- The local health department. MCL 333.5129(6)(b).
- The department. MCL 333.5129(6)(c).
- "The victim or other individual required to be informed of the results . . . or, if the victim or other individual is a minor or otherwise incapacitated, to the victim's or other individual's parent, guardian, or person *in loco parentis*." MCL 333.5129(6)(d).
- When the defendant or the juvenile, or the juvenile's parent, guardian, or person *in loco parentis* has given written authorization for disclosure. MCL 333.5129(6)(e).

---

[12] If the victim or individual is a minor or otherwise incapacitated, "the victim's or individual's parent, guardian, or person *in loco parentis* may give consent for purposes of [MCL 333.5129(5)]." MCL 333.5129(5).

[13] Juvenile matters are subject to the jurisdiction of the family division of circuit court. MCL 333.5129 does not yet reflect this fact.

- As otherwise provided by law. MCL 333.5129(6)(f).

Under MCL 333.5129(7), the court must transmit a copy of the examination and test results to the department of corrections if the defendant has been placed there. Similarly, for a juvenile who has been placed with a relative, a public or private agency, an institution, or a facility, the court must transmit a copy of the examination and test results to that person or the director that entity. MCL 333.5129(7).

"A person or agency that discloses information in compliance with [MCL 333.5129(6) or MCL 333.5129(7)] is not civilly or criminally liable for making the disclosure." MCL 333.5129(7).

C. Positive Test Results Require Referral for Appropriate Medical Care

A person counseled, examined, or tested under MCL 333.5129 whose results indicate the presence of a sexually transmitted infection, hepatitis B, hepatitis C, or HIV must be referred for appropriate medical care by the agency providing the counseling or testing. MCL 333.5129(8). The referring agency is not financially responsible for the cost of any medical care provided to an individual as a result of the referral. *Id*.

D. Payment for the Costs of Examination and Testing

After conviction or juvenile adjudication, the court may "order an individual who is examined or tested under this section to pay the actual and reasonable costs of that examination or test incurred by the licensed physician or local health department that administered the examination or test." MCL 333.5129(10). MCL 333.5129(11) prescribes the process of paying the costs:

- The individual ordered to pay the costs must pay them within 30 days after the order is issued or as the court otherwise permits. MCL 333.5129(11).

- The individual must pay the amount ordered to the court clerk who must distribute the appropriate amount to the physician or local health department named in the order. MCL 333.5129(11).

- If the court orders the individual "to pay a combination of fines, costs, restitution, assessments, probation or parole supervision fees, or other payments upon conviction in addition to the costs ordered under [MCL 333.5129(10)], the payments must be allocated as provided . . . MCL

710.21 to [MCL 712B.41], . . . MCL 760.1 to [MCL] 777.69, and . . . MCL 780.751 to [MCL] 780.834." MCL 333.5129(11).

- "An individual who fails to pay the costs within the 30-day period or as otherwise ordered by the court is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $100.00, or both." MCL 333.5129(11).

8.4 Payment for Sexual Assault Evidence Collection Kits

A health care provider is eligible to be paid for a sexual assault medical forensic examination under this section only if that examination" meets the criteria set out in MCL 18.355a. MCL 18.355a(1). However, "[a] health care provider shall not submit a bill for any portion of the costs of a sexual assault medical forensic examination, to the victim of the sexual assault, including the administration of a sexual assault evidence kit, to the victim of the sexual assault, including any insurance deductible or co-pay, denial of claim by an insurer, or any other out-of-pocket expense." MCL 18.355a(2).

If a health care provider seeks payment for a sexual assault medical forensic examination, the health care provider must comply with an established process:

- The health care provider must "[a]dvise the victim, orally and in writing, that a claim shall not be submitted to his or her insurance carrier without his or her express written consent, and that he or she may decline to consent if he or she believes that submitting a claim to the insurance carrier would substantially interfere with his or her personal privacy or safety." MCL 18.355a(3)(a).

- If the victim consents to the submission of a claim to an insurance provider the health care provider must submit to the insurance provider a claim for the expense of a sexual assault medical forensic examination. MCL 18.355a(3)(b). The insurance provider may be Medicaid or Medicare or another authorized insurance provider. *Id*.

- If the health care provider cannot get reimbursement from the victim's insurance or insurance is not available, the health care provider may seek payment from the Crime Victim Services Commission (CVSC), or another entity that is not the victim, or both. MCL 18.355a(4).

- If the victim's insurance carrier or another entity reimburses the health care provider for a sexual assault medical forensic examination, the health care provider is prohibited from submitting to the CVSC any part of the

claim that is reimbursable by the insurance carrier or another entity. MCL 18.355a(5); MCL 18.355a(6).

8.5 Postconviction Request for DNA Testing

There is no constitutional substantive due process right to postconviction access to the State's evidence for DNA testing. *Dist Attorney's Office for the Third Judicial Dist v Osborne*, 557 US 52, 72 (2009) (Supreme Court limited its holding to the circumstances of the case before it).

A defendant serving a prison sentence for a felony conviction obtained at trial *before* January 8, 2001, may petition the circuit court to order two kinds of relief: (1) DNA testing of biological material that was identified during the investigation that led to the defendant's conviction, and (2) a new trial based on the results of the DNA testing. MCL 770.16(1).[14] See *People v Poole*, 497 Mich 1022, 1022 (2015) ("[N]o provision set forth in MCL 770.16 prohibits the issuance of an order granting DNA testing of previously tested biological material.").[15]

A defendant convicted of a felony at trial *on or after* January 8, 2001, may also petition the court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that DNA testing if (1) the DNA testing was done in the case or pursuant to the Code of Criminal Procedure, (2) the results were inconclusive, and (3) current DNA technology is likely to yield conclusive results. MCL 770.16(1)(a)-(c).

If the name of the victim involved in the felony conviction stated in MCL 770.16(1) is known, the prosecutor must send written notice of the defendant's petition for DNA testing by first-class mail to the victim's last known address. MCL 770.16(11). If requested by a victim, the prosecutor must also give the victim notice of the time and place of any hearing on the petition. *Id*. Further, the prosecutor must inform the victim whether the court granted or denied the defendant a new trial. *Id*.

8.6 Sex Offenders Registration Act (SORA)

For a comprehensive discussion of the SORA and its requirements, MCL 28.721 *et seq*., see Chapter 9.

---

[14] For more information about postconviction DNA testing, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

[15] See e.g., MCL 770.16(4)(b)(*ii*), which contemplates the testing of previously-tested biological material if it "will be subject to DNA testing technology that was not available when the defendant was convicted." MCL 770.16(4)(b)(*ii*). Note that other requirements must be met before testing this material. See MCL 770.16(4).

Part II—Sentencing Matters

8.7 Sentencing Hearing

"A defendant is entitled to assistance of counsel at sentencing because it is a critical stage of the criminal proceedings at which substantial rights may be affected." *People v Smith*, 423 Mich 427, 452 (1985); *Mempa v Rhay*, 389 US 128, 134 (1967).[16] See also *In re Parole of Hill*, 298 Mich App 404, 413 (2012); MCR 6.005(A); MCR 6.005(E).

A. Before Sentencing Hearing

A sentencing court "is afforded broad discretion in the sources and types of information to be considered when imposing a sentence, including relevant information regarding the defendant's life and characteristics." *People v Albert*, 207 Mich App 73, 74 (1994).

A defendant's sentence must be based on accurate information; a defendant's constitutional right to due process is implicated if his or her sentence is based on inaccurate information. US Const, Am XIV; Const 1963, art 1, § 17; *Townsend v Burke*, 334 US 736, 740-741 (1948); *People v Haugh*, 435 Mich 876 (1990). The content of a defendant's presentence investigation report (PSIR) is properly considered by the sentencing court in making its sentencing decision. *People v Armstrong*, 305 Mich App 230, 245 (2014); *People v Fleming*, 428 Mich 408, 418 (1987). A victim has the right to provide a written victim impact statement to be included in a defendant's PSIR.[17] MCR 6.425(A)(1)(g). See also MCL 771.14(2)(b); MCL 780.764 (victim may provide an oral statement for use in the PSIR).

All parties (prosecutor, defendant, and defense attorney) must be given an opportunity to read and discuss the defendant's PSIR and explain or challenge the accuracy or relevancy of any information contained in the PSIR.[18] MCL 771.14(5)-(6); MCR 6.425(B). See also *People v Miles*, 454 Mich 90, 100 (1997); *People v Eason*, 435 Mich 228, 233 (1990).

---

[16] For a comprehensive discussion of sentencing hearings and related topics, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*.

[17] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a comprehensive discussion of crime victim statements and a crime victim's rights before, during, and after a defendant's prosecution and conviction.

[18] MCL 771.14(6) and MCR 6.425(D)(1)-(2) discuss the procedural requirements for disposing of any contemporaneous objections to the PSIR. For a detailed discussion about resolving a party's challenges to information contained in the PSIR, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 6.

B. Right to Allocution at Sentencing Hearing

"'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). Additionally, allocution "ensures that sentencing reflects individualized circumstances," and "maximiz[es] the perceived equity of the process." *Petty*, 469 Mich at 121 (cleaned up). Denial of the right to allocute constitutes plain error and requires resentencing. See *People v Bailey*, 330 Mich App 41, 67-68 (2019) (because failure to give defendant the opportunity to allocute "most certainly affected the fairness of the judicial proceeding," "it [was] necessary to vacate [defendant's] sentence and remand for the limited purpose of providing [defendant] with the opportunity for allocution at resentencing").

MCR 6.425(D)(1)(c) governs allocution procedure. According to MCR 6.425(D)(1)(c)(*ii*), at the sentencing hearing and before imposing sentence, the court must, on the record, "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence[.]"[19]

A juvenile's right to address the court in designated proceedings. A juvenile defendant involved in a designated proceeding must be given an opportunity to speak at the hearing held to determine whether the court will enter an order of disposition, or impose or delay imposition of sentence.[20] *Petty*, 469 Mich at 121-122. See also MCR 3.955(A). The juvenile, the juvenile's attorney, the prosecutor, and the victim must be given "an opportunity to advise the court of any circumstances they believe the court should consider in deciding whether to enter an order of disposition or to impose or delay imposition of sentence." *Id*. If the court decides to sentence the juvenile as an adult, allocution would be available pursuant to MCR 6.425(D). See MCR 3.955(C).

C. Crime Victim's Statement at Sentencing Hearing[21]

A crime victim has a constitutional right "to make a statement to the court at sentencing."[22] Const 1963, art 1, § 24. The Crime Victim's

[19] For more information about allocution, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 6.

[20] If the court decides to sentence a juvenile as an adult, the procedures in MCR 6.425 apply. MCR 3.955(C).

[21] For detailed information about victim impact statements, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 7.

Rights Act gives a victim, or the victim's designee, the opportunity to make a statement at the defendant's sentencing or disposition hearing about the impact of the offense. MCL 780.765(1) (felony convictions); MCL 780.793(1) (juvenile offenses); MCL 780.825(1) (serious misdemeanor convictions); *People v Cobbs*, 443 Mich 276, 285 (1993); *People v Williams*, 244 Mich App 249, 253-254 (2001).See also MCR 6.425(D)(1)(c)(*iv*) ("At sentencing, the court must, on the record before imposing sentence address any victim of the crime who is present at sentencing or any person the victim has designated to speak on the victim's behalf and permit the victim or the victim's designee to make an impact statement ").

D. Restitution[23]

A crime victim's right to restitution is preserved in Michigan's Constitution. Const 1963, art 1, § 24. Restitution is specifically authorized or addressed under a number of statutes and court rules. See, e.g., MCL 780.766 and MCL 780.767 (felony article of the CVRA); MCL 780.794 and MCL 780.795 (juvenile article of the CVRA); MCL 780.826 (misdemeanor article of the CVRA); MCR 6.427(11) (restitution included in judgment of sentence). MCL 769.1a is the general restitution statute.

E. Additional Sentencing Requirements for Student Offenders

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

> (a) Attending the same school building that is attended by the victim of the violation.
>
> (b) Utilizing a school bus for transportation to and from any school if the individual or juvenile will have contact

---

[22] See MCL 780.763(3) (felony convictions), MCL 780.791(3) (juvenile offenses), and MCL 780.823(3) (serious misdemeanor convictions) for information about what may be included in a crime victim's statement. But note that the content of a victim's impact statement is not limited to the information found in the statutes that govern a victim's impact statement. See MCL 780.763(3)(a)-(d); MCL 780.791(3)(a)-(d); MCL 780.823(3)(a)-(d).

[23] A detailed discussion of restitution is outside the scope of this benchbook. For further information about restitution, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8. See also the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 8, for information about restitution and sentencing.

with the victim during use of the school bus." MCL 750.520o(1).

8.8 Statutory Sentencing Guidelines

A detailed discussion of the statutory sentencing guidelines is beyond the scope of this benchbook. This section of the benchbook makes brief reference to the sentencing guidelines and provides some basic information. For a comprehensive discussion of felony sentencing and the sentencing guidelines, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*.

The statutory sentencing guidelines apply to felony offenses listed in MCL 777.11 to MCL 777.19 that were committed on or after January 1, 1999.[24] MCL 769.34(2). All prior record variables (PRVs) are to be scored for each offense subject to the guidelines. MCL 777.21(1)(b). Only certain offense variables (OVs) are scored for convictions subject to the guidelines. MCL 777.21(1)(a); MCL 777.22. A sentencing court is obligated to score the PRVs and applicable OVs for the particular conviction before the court, determine the minimum sentence range recommended by the properly scored guidelines, and, aware that the range indicated by the guidelines is *advisory* only, impose a sentence that is appropriate to both the offense and the offender. MCL 777.21(1)(c); *People v Lockridge*, 498 Mich 358, 364-365, 391, 399 (2015),[25] rev'g in part 304 Mich App 278 (2014), and overruling *People v Herron*, 303 Mich App 392 (2013).[26]

A. Offense Variable (OV) 11—Criminal Sexual Penetration

Under the statutory sentencing guidelines, OV 11 must be scored for a defendant when criminal sexual penetration is involved in the sentencing offense. MCL 777.41. Although other OVs are also scored under the statutory sentencing guidelines for sexual assault offenses, OV 11 is one of only two variables that directly address CSC offenses.[27]

---

[24]Until 2015, courts were mandated to impose on a defendant a minimum sentence falling within a range established by scoring the statutory sentencing guidelines. See MCL 769.34(2), as it appeared in 2002 PA 666, effective March 1, 2003. The guidelines became *advisory* when *People v Lockridge*, 498 Mich 358, 391 (2015), was decided. MCL 769.34(2) was amended by 2020 PA 295 to reflect the Michigan Supreme Court's holding, effective March 24, 2020.

[25]See also *Alleyne v United States*, 570 US 99 (2013), and *Apprendi v New Jersey*, 530 US 466 (2000).

[26]See also *People v Steanhouse*, 500 Mich 453, 466 (2017).

[27] For detailed information on the other OVs scored when sexual assault is involved, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 2.

B. Offense Variable (OV) 13—Continuing Pattern of Criminal Behavior[28]

Fifty points are appropriately assigned to OV 13 when a defendant's sentencing offense is part of a continuing pattern of felonious activity involving three or more sexual penetrations against an individual under the age of 13. MCL 777.43(1)(a).[29] Points are also assessed under OV 13 when the sentencing offense is part of a pattern of felonious criminal activity[30] involving three or more crimes against a person[31] without regard to whether the previous felonious conduct involved criminal sexual conduct. MCL 777.43(1)(c); MCL 777.21(4)(b).

8.9 Other Sentencing Factors

A. Second or Subsequent CSC Convictions

MCL 750.520f provides the penalty for offenders convicted of a second or subsequent violation of specific criminal sexual conduct statutes. MCL 750.520f requires a sentencing court to sentence a defendant to a mandatory minimum term of no less than five years' imprisonment[32] when he or she is convicted of a second or subsequent violation of MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), or MCL 750.520d (CSC-III). MCL 750.520f(1). For purposes of MCL 750.520f, an offense is considered a second or subsequent offense if, before conviction of the second or subsequent offense, the offender had been convicted under MCL 750.520b, MCL 750.520c, MCL 750.520d, "or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense." MCL 750.520f(2).

---

[28] The information about OV 13 appearing in this section is limited to the information relevant to criminal sexual conduct. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 2, for a complete discussion of the circumstances involved in scoring OV 13.

[29] MCL 777.43, the statute defining OV 13, contains other point values for other circumstances of an offense, but those point values and corresponding circumstances are not relevant to the discussion in this benchbook. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 2, for additional information about OV 13.

[30] Misdemeanor offenses punishable by more than one year of imprisonment may be included when scoring OV 13 according to MCL 777.43(1)(c) (pattern of felonious activity involving three or more crimes against a person). *People v Carlson*, 332 Mich App 663, 670-671 (2020). See MCL 777.43(1)(c).

[31] "Crimes against a person" is one of the crime groups identified in the sentencing guidelines. MCL 777.5.

[32] "Although MCL 750.520f(1) authorizes a minimum sentence in excess of 5 years, it does not mandate it." *People v Wilcox*, 486 Mich 60, 69 (2010).

Because the general habitual offender statutes address a defendant's maximum possible sentence and the subsequent offense provisions of MCL 750.520f address a defendant's minimum 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).

Unlike the general habitual offender statutes, MCL 750.520f does not require the prosecution to file notice of its intent to proceed under MCL 750.520f(1). *People v Eason*, 435 Mich 228, 249 n 35 (1990), citing *People v Bailey*, 103 Mich App 619, 627-628 (1981).

B. 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).[33]

1. Consecutive Sentence Permitted for CSC-I Conviction

"The court may order a term of imprisonment imposed under [MCL 750.520b] to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.520b(3). MCL 750.520b(3) authorizes consecutive sentencing only in "cases in which the multiple offenses arose from the 'same transaction[.]'" *People v Bailey*, 310 Mich App 703, 723 (2015). "[A]n ongoing course of sexually abusive conduct involving episodes of assault does not in and of itself render the crimes part of the same transaction. For multiple penetrations to be considered as part of the same transaction, they must be part of a 'continuous time sequence,' not merely part of a continuous course of conduct." *Id*. at 725, citing *People v Brown*, 495 Mich 962, 963 (2014), and *People v Ryan*, 295 Mich App 388, 402-403 (2012).

2. Consecutive Sentence Permitted for False Statement in Petition for Postconviction DNA Testing

"An individual who intentionally makes a material false statement in a petition filed under . . . MCL 770.16, is guilty of a felony[.]" MCL 750.422a(1). "The court may order a term of

[33] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7, for more information about concurrent and consecutive sentencing.

imprisonment imposed under [MCL 750.422a(1)] to be served consecutively to any other term of imprisonment being served by the individual." MCL 750.422a(2).

C. Conditional Sentences

When an offender is convicted of an offense punishable by a fine or imprisonment, or both, the court has the discretion to impose a conditional sentence and order the offender to pay a fine (with or without the costs of prosecution) and restitution as indicated in MCL 769.1a or the Crime Victim's Rights Act (MCL 780.751 to MCL 780.834), within a limited time stated in the sentence.[34] MCL 769.3(1).[35] If the offender defaults on payment, the court may impose a sentence otherwise authorized by law. MCL 769.3(1).

With the exception of an offender convicted of CSC-I or CSC-III, "the court may also place the offender on probation with the condition that the offender pay a fine, costs, damages, restitution, or any combination in installments with any limited time and may, upon default in any of those payments, impose sentence as provided by law." MCL 769.3(2).

If an offender is . . . subject to a conditional sentence under MCL 769.3, "any restitution ordered under [MCL 769.1a] shall be a condition of that . . . sentence."[36] MCL 769.1a(11).

Part III—Probation and Alternatives to Incarceration

8.10 Probation and Sex Offenders[37]

A. Mandatory Conditions of Probation

Except for the nonprobationable offenses in MCL 771.1[38] and as otherwise provided by law, a court may place an individual

[34]**Note:** Restitution may not be ordered under Article 3 of the CVRA, MCL 780.826(2), for an ordinary misdemeanor. See *People v Castillo*, 337 Mich App 298, 308-309 (2021).

[35]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for more information about conditional sentences.

[36]See the other provisions in MCL 769.1a for more information on restitution in various circumstances.

[37] For a comprehensive discussion of probation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

[38]The nonprobationable offenses are murder, treason, CSC-I, CSC-III, armed robbery, or major controlled substance offenses. MCL 771.1(1).

convicted of a listed offense[39] on probation for any term of years but not less than five years and with certain conditions. MCL 771.2a(7). Mandatory and discretionary conditions appear in MCL 771.2a(8)-(13). Except as provided in MCL 771.2a(9)-(13), the court must order an individual placed on probation under MCL 771.2a(7) not to reside, work, or loiter within a student safety zone. MCL 771.2a(8).

B. Exceptions to School Safety Zone Prohibitions

There are exceptions to the mandatory probation conditions concerning student safety zones. Under the circumstances described below, the prohibitions required by MCL 771.2a(8) do not apply to individuals convicted of a listed offense.

1. Residing Within a Student Safety Zone

The court must not prohibit an individual on probation after conviction of a listed offense from residing within a student safety zone, MCL 771.2a(8)(a), under any of the following circumstances described in MCL 771.2a(9):

> "(a) The individual is not more than 19 years of age and attends secondary school or postsecondary school, and resides with his or her parent or guardian. However, an individual described in this subdivision must be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual must be permitted to initiate or maintain contact with a minor with whom he or she attends secondary school or postsecondary school in conjunction with that school attendance.
>
> (b) The individual is not more than 26 years of age, attends a special education program, and resides with his or her parent or guardian or in a group home or assisted living facility. However, an individual described in this subdivision must be ordered not to initiate or maintain contact with a minor within that student safety zone. The individual must be permitted to initiate or maintain contact with a minor with whom he or she attends a special education program in conjunction with that attendance.

[39] See Chapter 9 for a comprehensive discussion of listed offenses and the SORA.

> (c) The individual was residing within that student safety zone on January 1, 2006. However, if the individual was residing within the student safety zone on January 1, 2006, the court shall order the individual not to initiate or maintain contact with any minors within that student safety zone. This subdivision does not prohibit the court from allowing contact with any minors named in the probation order for good cause shown and as specified in the probation order."

In addition to the above exceptions, the prohibition against residing in a student safety zone, MCL 771.2a(8)(a), does not prohibit a person on probation after conviction of a listed offense from "being a patient in a hospital or hospice that is located within a student safety zone." MCL 771.2a(10). The hospital "exception does not apply to an individual who initiates or maintains contact with a minor within that student safety zone." *Id*.

2. Working Within a Student Safety Zone

If an individual on probation under MCL 771.2a(7) was working within a student safety zone on January 1, 2006, he or she cannot be prohibited from working in that student safety zone as indicated in MCL 771.2a(8)(b). MCL 771.2a(11). If a person was working within a student safety zone on January 1, 2006, "the court shall order the individual not to initiate or maintain contact with any minors in the course of his or her employment within that student safety zone." *Id*. However, for good cause shown and as specified in the probation order, a court is authorized to allow the probationer to have contact with any minors named in the probation order. MCL 771.2a(11).

If an individual on probation under MCL 771.2a(7) only intermittently or sporadically enters a student safety zone for work purposes, the court must not impose the condition in MCL 771.2a(8)(b) that would prohibit the person from working in a student safety zone. MCL 771.2a(12). Even when a person "intermittently or sporadically" works within a student safety zone, he or she must be ordered "not to initiate or maintain contact with any minors in the course of his or her employment within that safety zone." *Id*. For good cause shown and as specified in the probation order, the court may allow the probationer contact with any minors named in the probation order. *Id*.

C. Stalking Offenses and Probation

1. Stalking

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). MCL 750.411h(3) permits a court to order a defendant sentenced to probation for stalking to:

- refrain from stalking any person during the term of probation;
- refrain from any contact with the victim of the offense for which the defendant was placed on probation;
- be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; if the court determines counseling is appropriate, the defendant must receive the indicated counseling at the defendant's own expense. MCL 750.411h(3)(a)-(c).

2. Aggravated Stalking

An individual who is sentenced to probation for a violation of MCL 750.411i (aggravated stalking) may be sentenced to probation for any term of years, but the court must sentence the individual to a term of probation of not less than five years. MCL 771.2a(2); MCL 750.411i(4). A probationary period imposed for an aggravated stalking conviction is subject to the terms and conditions of probation contained in MCL 750.411i(4) and MCL 771.3. MCL 771.2a(2). MCL 750.411i(4) authorizes a court to order a defendant who is sentenced to probation to:

- refrain from stalking any person during the term of probation;
- refrain from any contact with the victim of the offense for which the defendant is placed on probation;
- be evaluated to determine whether the defendant needs psychiatric, psychological, or social counseling; if the court determines it is appropriate, the defendant must receive the indicated counseling at the defendant's own expense. MCL 750.411i(4)(a)-(c).

D. Sex Offenders Exempted from Probation

Even if a person was convicted of a listed offense, MCL 771.2a(13) permits the court to exempt that person from being placed on probation under MCL 771.2a(7) if either of the following circumstances apply:

> "(a) The individual has successfully completed his or her probationary period under [the youthful trainee act, MCL 762.11–MCL 762.15,] for committing a listed offense and has been discharged from youthful trainee status.[40]
>
> (b) The individual was convicted of committing or attempting to commit a violation solely described in [MCL 750.520e(1)(a)], and at the time of the violation was 17 years of age or older but less than 21 years of age and is not more than 5 years older than the victim." MCL 771.2a(13).

E. Reducing a Term of Probation[41]

"Except as provided in [MCL 771.2(10)], [MCL 771.2a], and [MCL 768.36], after the defendant has completed 1/2 of the original felony or misdemeanor probation period, he or she may be eligible for early discharge as provided in this section."[42] MCL 771.2(2).

MCL 771.2(10) disqualifies certain defendants from receiving reduced probation. "A defendant who was convicted of 1 or more of the following crimes is not eligible for reduced probation under this section:

> (a) A domestic violence related violation of . . . MCL 750.81 [assault and/or battery], or MCL 750.81a [aggravated assault], or an offense involving domestic violence as that term is defined in . . . MCL 400.1501.
>
> (b) A violation of . . . MCL 750.84 [assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation].

---

[40] See Section 8.12 for information on youthful trainee status. For a comprehensive discussion of youthful trainee status see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

[41] The court must consider the restitution ordered, if any, before granting early release. See MCL 771.2(5) and MCL 771.2(7). In some cases the victim must be informed of hearings and other court procedures. See MCL 771.2(7) and MCL 771.2(8). See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 5, for more information.

[42] For more information about early discharge from probation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

(c) A violation of . . . MCL 750.411h [stalking].

(d) A violation of . . . MCL 750.411i [aggravated stalking].

(e) A violation of . . . MCL 750.520c [CSC-II].

(f) A violation of . . . MCL 750.520e [CSC-IV].

(g) A listed offense.

(h) An offense for which a defense was asserted under [MCL 768.36 (insanity)].

(i) A violation of . . . MCL 750.462a to [MCL] 750.462h [human trafficking], or former [MCL 750.462i or MCL 750.462j]." MCL 771.2(10).

8.11 Delayed Sentencing of Sex Offender[43]

A court may delay imposing sentence for up to one year on a defendant who is eligible for a sentence of probation. MCL 771.1(2). The delay allows the defendant to demonstrate that probation, or other leniency compatible with the ends of justice, and the defendant's rehabilitation, is an appropriate sentence for his or her conviction. *Id*. During the period of delay, the court may require the defendant to comply with any applicable terms and conditions associated with a sentence of probation. *Id*.

8.12 Youthful Trainee Status

"The [Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*,[44]] provides a mechanism for individuals who commit certain crimes . . . to be excused from having a criminal record." *People v Rahilly*, 247 Mich App 108, 113 (2001). Assignment of an individual to youthful trainee status under MCL 762.11 is discretionary. *People v Gow*, 203 Mich App 94, 96 (1994). MCL 762.11 is remedial "and should be construed liberally for the advancement of the remedy."*People v Bobek*, 217 Mich App 524, 529 (1996).

[43] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for more information about delayed sentencing.

[44]For a detailed discussion of HYTA and youthful trainee status, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

A. Assignment to Youthful Trainee Status

Until October 1, 2021. An individual who pleads guilty to a criminal offense that he or she committed on or after the individual's seventeenth birthday but before his or her twenty-fourth birthday, may consent to be assigned the status of youthful trainee by the court having jurisdiction of the offense, without entering a judgment of conviction. MCL 762.11(1). If the individual committed the offense on or after his or her twenty-first birthday but before the individual's twenty-fourth birthday, assignment to youthful trainee status cannot occur without the prosecuting attorney's consent. *Id*.

Beginning on October 1, 2021. With the exception of the offenses and circumstances found in MCL 762.11(3) and MCL 762.11(4), an individual who pleads guilty to an offense committed on or after his or her eighteenth birthday but before the individual's twenty-sixth birthday may consent to be assigned the status of youthful trainee by the court having jurisdiction over the offense, without entering a judgment of conviction. MCL 762.11(2). If the individual committed the offense on or after his or her twenty-first birthday but before his or her twenty-sixth birthday, assignment to youthful trainee status cannot occur without the prosecuting attorney's consent. *Id*.

B. Offenses to Which HYTA Does Not Apply

An individual convicted of any of the following offenses is not eligible for assignment to youthful trainee status:

- a felony for which the maximum penalty is life imprisonment, MCL 762.11(3)(a),
- a major controlled substance offense, MCL 762.11(3)(b),
- a traffic offense, MCL 762.11(3)(c),
- a violation, an attempted violation, or a conspiracy to violate the criminal sexual conduct statutes (CSC-I, CSC-II, CSC-III, or CSC-IV), *except for commission of the offenses* set forth in:
    - MCL 750.520d(1)(a) (victim at least age 13 and less than age 16), and
    - MCL 750.520e(1)(a) (victim at least age 13 and less than age 16 and defendant is five or more years older than victim). MCL 762.11(3)(d).
- assault, attempted assault, or conspiracy to commit assault with the intent to commit CSC-I, CSC-II, certain CSC-III

offenses, or certain CSC-IV offenses under MCL 750.520g. The CSC-III and CSC-IV offenses excluded from this provision are:

- MCL 750.520d(1)(a) (victim at least age 13 and less than age 16), and
- MCL 750.520e(1)(a) (victim at least age 13 and less than age 16 and defendant is five or more years older than victim). MCL 762.11(3)(e).

In addition, according to MCL 762.11(4)(c), a court must not assign an individual to youthful trainee status if any of the following apply:

- "[t]he individual was previously convicted of or adjudicated for a listed offense for which registration is required under the sex offenders registration act [SORA, MCL 28.721 to MCL 28.736]." MCL 762.11(4)(a).
- "[i]f the individual is charged with a listed offense for which registration is required under the [SORA], the individual fails to carry the burden of proving by clear and convincing evidence that he or she is not likely to engage in further listed offenses." MCL 762.11(4)(b).
- the court determines that the offense involved a factor set out in:
  - MCL 750.520b(1)(a) to MCL 750.520b(1)(h), CSC-I.
  - MCL 750.520c(1)(a) to MCL 750.520c(1)(*l*), CSC-II.
  - MCL 750.520d(1)(b) to MCL 750.520d(1)(f), CSC-III.
  - MCL 750.520e(1)(b) to MCL 750.520e(1)(g), CSC-IV.

C. Employment and Education Under HYTA

An individual assigned youthful trainee status may be required to seek or maintain employment or education during the time the individual is a youthful trainee. MCL 762.11(5).

D. Electronic Monitoring Under HYTA

An individual assigned to the status of youthful trainee on or after his or her twenty-first birthday may be subject to electronic monitoring during the individual's probationary term. MCL 762.11(6).

8.13 Parole and Electronic Monitoring of Sex Offenders[45]

Except for a prisoner granted parole under MCL 791.235(10), which permits medical parole[46] for a medically frail prisoner, "a person convicted and sentenced for the commission of [certain] crimes other than a prisoner subject to disciplinary time is not eligible for parole until the person has served the minimum term imposed by the court less an allowance for disciplinary credits as provided in [MCL 800.33(5)], and is not eligible for special parole[.]" MCL 791.233b. Crimes listed in MCL 791.233b that are relevant to this benchbook include MCL 750.13 (taking away or enticing a minor),[47] MCL 750.158 (sodomy/bestiality),[48] MCL 750.338 (gross indecency between males),[49] MCL 750.338a (gross indecency between females),[50] and MCL 750.338b (gross indecency between a male and female),[51] MCL 750.520b (CSC-I),[52] MCL 750.520c (CSC-II),[53] MCL 750.520d (CSC-III),[54] and MCL 750.520g (assault with intent to commit CSC-I, CSC-II, or CSC-III).[55]

MCL 791.242 governs the period of parole and prevents a person convicted of actual forcible rape from being granted parole "for a period less than 2 years . . . unless the maximum time remaining to be served on the sentence is less than 2 years." MCL 791.242(2). If a person sentenced under MCL 750.520b(2)(b)[56] is granted parole, he or she must be on parole for life. MCL 791.242(3).

An offender convicted of CSC-I under MCL 750.520b,[57] or an offender 17 years of age or older convicted of CSC-II under MCL 750.520c against a victim who is less than 13 years old,[58] remains subject to mandatory lifetime electronic monitoring pursuant to MCL 750.520n, even if the

---

[45]For more information about electronic monitoring, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7.

[46] Medical parole is not available to a prisoner convicted of CSC-I. See MCL 791.235(10).

[47]See Section 3.24 for more information about taking away or enticing a minor, MCL 750.13.

[48]See Section 3.14 for more information about sodomy/bestiality. MCL 750.158.

[49]See Section 3.10 for more information about gross indecency between males, MCL 750.338.

[50]See Section 3.11 for more information about gross indecency between females, MCL 750.338a.

[51]See Section 3.12 for more information about gross indecency between a male and a female, MCL 750.338b.

[52]See Section 2.2 for more information about CSC-I, MCL 750.520b.

[53]See Section 2.3 for more information about CSC-II, MCL 750.520c.

[54]See Section 2.4 for more information about CSC-III, MCL 750.520d.

[55]SeeSection 2.6 and 2.7 for more information about assault with intent to commit CSC-I, CSC-II, or CSC-III, MCL 750.520g.

[56] MCL 750.520b(2)(b) is CSC-I "committed by an individual 17 years of age or older against an individual less than 13 years of age[.]" See Section 2.2 for more information.

offender is granted parole for life under MCL 791.242(3). MCL 750.520b(2)(d); MCL 750.520c(2)(b); MCL 750.520n(1).[59]

Parole is not available to an offender aged 18 or older convicted of CSC-I against an individual under the age of 13 when the offender has a previous conviction involving a victim under the age of 13 for CSC-I, CSC-II, CSC-III, CSC-IV, or assault with intent to commit CSC[60] against a victim under the age of 13. MCL 791.234(6)(e); MCL 750.520b(2)(c).

Where an offender is not already subject to lifetime electronic monitoring pursuant to MCL 750.520n (victim under the age of 13), the parole board may require electronic monitoring when granting parole to an offender convicted of violating or conspiring to violate MCL 750.520b (CSC-I) or MCL 750.520c (CSC-II). MCL 791.236(15). When an offender is subject to electronic monitoring under such circumstances, the monitoring is limited to the duration of the offender's parole. MCL 791.236(15)(a).

8.14 Day Parole From Jail Limited for Most Sex Offenders

Except as provided in MCL 801.251(3), and according to MCL 801.251a, the day parole statute, MCL 801.251, generally permits the release of a person from jail during "necessary and reasonable hours" to work or to seek employment, to attend school, to conduct self-employment activities, including housekeeping and attending to his or her family's needs, or to participate in medical, mental health, psychological, and substance abuse treatment.[61] MCL 801.251(1).

MCL 801.251(3) imposes limitations on release privileges for persons sentenced or committed to jail for specific CSC or CSC-related crimes. A

---

[57] See *People v Johnson*, 298 Mich App 128, 136 (2012) (holding that "a person convicted under [MCL 750.520b], regardless of the ages involved, is to be sentenced to lifetime electronic monitoring, and a person convicted under [MCL 750.520c] is to be sentenced to lifetime monitoring only if the defendant was 17 or older at the time of the crime and the victim was less than 13"). For additional discussion of lifetime electronic monitoring and CSC-I convictions, see Section 8.13. See also the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7.

[58] For additional discussion of lifetime electronic monitoring in CSC-II convictions, see Section 8.13. See also the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7.

[59] Before accepting a plea of guilty or nolo contendere, the trial court must advise the defendant of, and determine that he or she understands, "any . . . requirement for mandatory lifetime electronic monitoring under MCL 750.520b or [MCL] 750.520c[.]" MCR 6.302(B)(2). Advising the defendant of a requirement for mandatory lifetime electronic monitoring is required because "mandatory lifetime electronic monitoring is part of the sentence itself." *People v Cole*, 491 Mich 325, 327 (2012). "Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring." *Id.* at 337. For more information, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7.

[60] Or a violation of federal law, or the law of another state or political subdivision, that substantially corresponds to a violation listed in MCL 750.520b(2)(c).

defendant who is in jail and serving any part of a sentence of imprisonment for any of the offenses listed in MCL 801.251(3) must not be granted day parole except for the limited circumstances involving medical, mental health, psychological, or substance abuse treatment. The offenses (including attempts) for which day parole is prohibited are:

- Child sexually abusive activity, MCL 750.145c.
- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- Assault with intent to commit criminal sexual conduct (CSC-I, CSC-II, and CSC-III), MCL 750.520g.
- Murder in connection with sexual misconduct.

8.15 Sex Offenders Ineligible for Custodial Incarceration Outside Prison and Jail

MCL 769.2a(1) excludes certain sex offenders from residence in community placements or work camp programs. See *Jansson v Dep't of Corrections*, 147 Mich App 774, 776-780 (1985). Under MCL 769.2a(1)(a)-(d), a person sentenced to imprisonment (or serving a sentence of imprisonment) for committing any of the following offenses, or an attempt to commit any of the offenses,[62] is not eligible for custodial incarceration outside a state correctional facility or county jail:

- CSC-I, MCL 750.520b.
- CSC-II, MCL 750.520c.
- CSC-III, MCL 750.520d.
- CSC-IV, MCL 750.520e.
- Assault with intent to commit CSC-I, CSC-II or CSC-III, MCL 750.520g.

---

[61] An individual may petition the court for the privilege of leaving jail as provided in MCL 801.251(1) when he or she is sentenced or committed; the court has discretion to renew the individual's petition. MCL 801.251(2). The court may withdraw the privilege at any time without notice by entering an order to that effect. *Id.*

[62] MCL 750.520, a felony involving carnal knowledge, is one of the offenses listed in MCL 769.2a. However, MCL 750.520 was repealed by 1974 PA 266, effective November 1, 1974.

- Murder in connection with sexual misconduct.

8.16 Treatment Programs for Sex Offenders

A detailed discussion of sex offender treatment programs is beyond the scope of this benchbook. See the following resources for information about sex offender treatment:

- Michigan Department of Corrections, *Michigan Sex Offender Program*[63]
- National Center for Biotechnology Information, U.S. National Library of Medicine, *Sex Offender Treatment Programs Delivered In-Person or Virtually for Adults Convicted of Sexual Offences in Various Settings: A Review of Clinical Effectiveness and Guidelines*
- *Sex Offender Resource*
- Federal Bureau of Prisons, *Sex Offenders*

Part IV—Expungement

8.17 Setting Aside (Expunging) a Sex Offender's Conviction

This section addresses the requirements and procedures for setting aside or expunging convictions under the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq*. Setting aside and expunging juvenile adjudications and records is governed by MCL 712A.18e and MCR 3.925(E). For more information on these matters, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3, and the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21. See also the Michigan Judicial Institute's Quick Reference Materials:

- Setting Aside a Conviction Flowchart
- Setting Aside a Conviction Checklist
- Setting Aside a Human Trafficking Conviction Flowchart
- Setting Aside a Conviction for Human Trafficking Victim Checklist

[63] *Note:* This resource, and the resources cited in the bullets following it, are linked to the information cited using Perma.cc, which directs the reader to an archived record of the sources cited.

Having one or more convictions set aside under the SACA "is a privilege and conditional and is not a right." MCL 780.621d(14).

Except as provided in MCL 780.621,[64] MCL 780.621e,[65] and MCL 780.621g,[66] a person may have no more than one conviction set aside under the SACA. MCL 780.624.

A. Application to Set Aside Convictions

Except as otherwise provided in the SACA, MCL 780.621 *et seq.*, a person may file an application[67] to have one or more convictions set aside under the SACA according to specific guidelines set forth in MCL 780.621–MCL 780.624. MCL 780.621(1). According to MCL 780.621(1), an individual applying to have a conviction[68] set aside must satisfy the following requirements:

> "(a) Except as provided in subdivisions (b) and (c), a person convicted of 1 or more criminal offenses, but not more than a total of 3 felony offenses, in this state, may apply to have all of the applicant's convictions from this state set aside.
>
> (b) An applicant may not have more than a total of 2 convictions for an assaultive crime set aside under this act during the applicant's lifetime.
>
> (c) An applicant may not have more than 1 felony conviction for the same offense set aside under this section if the offense is punishable by more than 10 years imprisonment.
>
> (d) A person who is convicted of a violation or an attempted violation of . . . MCL 750.520e,[69] before January 12, 2015 may petition the convicting court to set aside the conviction if the individual has not been

[64]The number of convictions that may be set aside varies depending on the type and circumstances of each offense. See MCL 780.621.

[65]Multiple misdemeanor marijuana convictions may be set aside by application according to MCL 780.621e.

[66]More than one conviction may be automatically set aside under MCL 780.621g(5).

[67] See SCAO Form MC 227, *Application to Set Aside Conviction(s)*.

[68]A misdemeanor or felony conviction for an offense listed in MCL 780.621(2)(a)-(f) that was deferred and dismissed, is considered a misdemeanor conviction for purposes of determining eligibility under the SACA. MCL 780.621(2).

[69] For a discussion of MCL 750.520e (CSC-IV), see Section 2.5. "[O]nce a conviction is set aside pursuant to MCL 780.621(1)(a), that conviction shall not bar a court from setting aside a CSC-IV conviction pursuant to MCL 780.621(1)(d) in a subsequent ruling." *People v Koert*, ___ Mich App ___, ___ (2024).

> convicted of another offense other than not more than 2 minor offenses. As used in this subdivision, 'minor offense' means a misdemeanor or ordinance violation to which all of the following apply:
>
> > (*i*) The maximum permissible term of imprisonment does not exceed 90 days.
> >
> > (*ii*) The maximum permissible fine is not more than $1,000.00.
> >
> > (*iii*) The person who committed the offense is not more than 21 years old." MCL 780.621(1).

Except as indicated in MCL 780.621b(1)(a)-(d), when a petition is filed under MCL 780.621 or MCL 780.621e[70] to have a conviction set aside, more than one felony offense or more than one misdemeanor offense must be treated as a single felony offense or a single misdemeanor offense "if the felony or misdemeanor convictions were contemporaneous such that all of the felony or misdemeanor offenses occurred within 24 hours and arose from the same transaction[.]" MCL 780.621b(1). MCL 780.621b(1)(a)-(d) lists the offenses to which MCL 780.621b(1) does not apply:

- Assaultive crimes. MCL 780.621b(1)(a).
- Crimes involving the use or possession of a dangerous weapon. MCL 780.621b(1)(b).
- Crimes for which the maximum sentence is 10 or more years of imprisonment. MCL 780.621b(1)(c).
- Conviction of a crime that would constitute an assaultive crime had the conviction been obtained in Michigan. MCL 780.621b(1)(d).

1. Timing and Content of Application

The time for filing an application to set aside a conviction and the content requirements of an application are set forth in MCL 780.621d. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3, for detailed information.

[70] MCL 780.621e allows an individual to apply to have set aside one or more misdemeanor marijuana convictions. MCL 780.621e(1).

2. Submission of Application to State Police

Although the original application must be filed with the convicting court, the applicant must also submit a copy of the application and one set of fingerprints to the state police.[71] MCL 780.621d(8). The state police must forward a copy of the fingerprints to the Federal Bureau of Investigation (FBI). *Id*. The department of state police must report to the court any information in the department's records regarding pending charges against the applicant, the applicant's conviction record, whether the applicant has had any convictions set aside, and similar information that the department obtains from the FBI. *Id*. "The court shall not act upon the application until the department of state police reports the information required by [MCL 780.621d(8)] to the court." *Id*.

3. Submission of Application to Attorney General and Prosecuting Attorney

A copy of the application must be served on the attorney general and the office of each prosecuting attorney that prosecuted the offense(s) the applicant seeks to set aside. MCL 780.621d(10). The attorney general and prosecuting attorney must have the opportunity to contest the application. *Id*. If any of the convictions was for an assaultive crime or a serious misdemeanor, the prosecutor must, by first-class mail to the victim's last known address, notify the victim of the assaultive crime or serious misdemeanor of the defendant's application to set aside a conviction under MCL 780.772a and MCL 780.827a.[72] MCL 780.621d(10). The victim has the right to make a written or oral statement at any proceeding under the SACA regarding the conviction. *Id*.[73]

B. Convictions That May Not Be Set Aside

MCL 780.621c(1) provides that a person must not apply to have set aside, and a judge must not set aside, any of the following convictions:

---

[71]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3, for more information.

[72]See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Section 7.8, for more information.

[73]See *People v Butka*, ___ Mich ___, ___ n 6 (2024) (noting that although the trial court is not statutorily required to consider victim impact statements when deciding an application to set aside a conviction, it is not an abuse of discretion to do so "when weighing whether setting aside an applicant's conviction is consistent with the public welfare") (quotation marks and citation omitted). See also Section 8.17(C).

- A felony or attempted felony for which the maximum punishment is life imprisonment. MCL 780.621c(1)(a).

- An offense or attempted offense involving child sexually abusive activity or material, an offense or attempted offense involving prohibited use of the internet or a computer, CSC-II or attempted CSC-II, CSC-III or attempted CSC-III, or an assault or attempted assault with intent to commit criminal sexual conduct involving penetration or to commit CSC-II. MCL 780.621c(1)(b).[74] See Section 8.17(B).

- CSC-IV or an attempt to commit CSC-IV, if the conviction occurred on or after January 12, 2015.[75] MCL 780.621c(1)(c).

- Felony conviction for domestic violence if there is a previous conviction for misdemeanor domestic violence. MCL 780.621c(1)(e).

- Human trafficking crimes (involving forced labor; holding victim as debt bondage; recruiting or benefiting from violations involving debt bondage or forced labor; human trafficking involving a minor; human trafficking involving terrorism). MCL 780.621c(1)(f). See Part IV for detailed information about human trafficking violations.

C. Court's Decision on Application

After a hearing on the application to set aside a conviction under MCL 780.621(1), the court may require that affidavits be filed and proofs be taken, as it considers appropriate. MCL 780.621d(11).

If the court finds the circumstances and the applicant's behavior satisfactory from the date of the applicant's conviction(s) until the date of his or her application to set aside the conviction(s), and if the court finds that setting aside the applicant's conviction(s) "is consistent with the public welfare," the court may order that the conviction(s) be set aside. MCL 780.621d(13).

"Each element [of MCL 780.621d(13)[76]] is separate and distinct, and a trial court's discretionary analysis must account for each element." *People v Butka*, ___ Mich ___, ___(2024). The word "'public' within the term 'public welfare' . . . refers to a community at large, as

[74]Additional offenses not relevant to this benchbook are listed in MCL 780.621c(1)(b).

[75]Additional offenses not relevant to this benchbook appear in MCL 780.621c(d).

[76]Formerly MCL 780.621(14). See 2020 PAs 190 and 191, effective April 11, 2021.

distinguished from an individual or a limited class of people." *Id*. at ___. Accordingly, "the public welfare must consist of more than the subjective opinions of the two victims [who opposed defendant's application]." *Id*. at ___. "[T]o set aside a conviction, courts must look beyond the crime itself to circumstances that occur after a defendant's conviction, both in terms of the defendant's individual circumstances and the forward-looking impact of setting aside a conviction on the public as a whole." *Id*. at ___. Thus, "the Court of Appeals erred by holding that the statements of two individuals comprise the public welfare," and "the trial court abused its discretion when it denied defendant's application to set aside his conviction" based on "only the individual feelings and sensitivities of the two victims . . . ." *Id*. at ___, ___ n 5. "[N]o record evidence supported a finding that either the 'circumstances and behavior' of defendant or the 'public welfare' weighed in favor of denying defendant's application." *Id*. at ___ (reversing the Court of Appeals and remanding to the trial court for entry of an order setting aside defendant's 2003 conviction for third-degree child abuse").

"[O]nce a conviction is set aside pursuant to MCL 780.621(1)(a), that conviction shall not bar a court from setting aside a CSC-IV conviction pursuant to MCL 780.621(1)(d) in a subsequent ruling." *People v Koert*, ___ Mich App ___, ___ (2024). In *Koert*, the defendant was previously convicted of CSC-IV, as well as two counts of delivery of less than five kilograms of marijuana; when he filed an application to set aside each of these convictions, "the trial court concluded that defendant's subsequent felony convictions precluded it from setting aside his CSC-IV conviction" and "granted defendant's application with respect to the marijuana convictions but denied it with respect to the CSC-IV charge." *Id*. at ___. However, on appeal, the *Koert* Court concluded that "the trial court was permitted to set aside defendant's marijuana convictions and his CSC-IV conviction in the same proceeding after the court ruled on the record effective immediately that the marijuana convictions were expunged." *Id*. at ___ (noting "that the Legislature did not intend that defendant be barred from having all three of his convictions set aside in concurrent proceedings," and that "the trial court's decision to set aside the marijuana convictions enabled it to subsequently set aside the CSC-IV conviction during the same proceeding").

8.18 Expunging a Conviction Without an Application (Clean Slate Legislation)

MCL 780.621g is part of the package of laws known as the Clean Slate legislation. MCL 780.621g provides for automatically setting aside a conviction listed in MCL 780.621g after a certain amount of time has

passed since the date of conviction if all applicable requirements in MCL 780.621g are satisfied. MCL 780.621g. Only information from the Clean Slate legislation that is directly relevant to the content of this benchbook is included here. For a detailed discussion of the provisions of the legislation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3.

A. Limitations on Automatically Setting Aside a Conviction

As relevant to this benchbook, convictions for the commission, or unless otherwise noted, the attempted commission of the following crimes are not convictions for which automatic set-aside is possible:

- An offense involving child sexually abusive activity or material. MCL 780.621c(1)(b).
- Use of the internet or a computer, computer program, network, or system to make a prohibited communication. MCL 780.621c(1)(b).
- CSC-II. MCL 780.621c(1)(b).
- CSC-III. MCL 780.621c(1)(b).
- Assault with intent to commit criminal sexual conduct involving sexual penetration or to commit CSC-II. MCL 780.621c(1)(b).
- CSC-IV, if the conviction occurred on or after January 12, 2015. MCL 780.621c(1)(c).
- Felonious domestic violence, if the person has a previous misdemeanor domestic violence conviction. MCL 780.621c(1)(e) (note that an attempt is not contemplated).
- Assaultive crimes. MCL 780.621g(10)(a).
- Serious misdemeanors. MCL 780.621g(10)(b).
- Any other offense punishable by 10 or more years of imprisonment that is not otherwise listed. MCL 780.621g(10)(d).
- Violation of MCL 777.1–MCL 777.69[77] involving a minor, a vulnerable adult, injury or serious impairment, or death. MCL 780.621g(10)(e).

[77] MCL 777.1–MCL 777.69 list offenses to which the sentencing guidelines apply.

- Any violation related to human trafficking.[78] MCL 780.621g(10)(f). See also MCL 780.621c(1)(f) (note, however, that MCL 780.621c(1)(f) does not contemplate attempted human trafficking offenses).

Automatic set-aside "does not apply to an individual who has more than 1 conviction for an assaultive crime or an attempt to commit an assaultive crime that is recorded and maintained in the department of state police database." MCL 780.621g(7). Limitations exist on the total number of convictions that may be automatically set aside, as well. See MCL 780.621g(5).

B. Expunged Convictions for Listed Offenses

Offenders who have a conviction for a listed offense automatically set aside under MCL 780.621g are considered convicted of the listed offense for purposes of the SORA. MCL 780.622(3).

8.19 Effects of Expunging a Conviction With or Without Filing an Application

If the court sets aside a conviction under MCL 780.621 or MCL 780.621e, or a conviction is automatically set aside under MCL 780.621g, the individual is considered, for purposes of the law, not to have been previously convicted, except as provided in MCL 780.622 and MCL 780.623. MCL 780.622(1).

- "The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside."[79] MCL 780.622(2).

- If an applicant's conviction for a listed offense, as defined in MCL 28.722 of the SORA, is set aside under MCL 780.621(1), MCL 780.621e, or MCL 780.621g, "the applicant is considered to have been convicted of that offense for purposes of [the SORA]." MCL 780.622(3).

- Setting aside a conviction does not affect the right of the applicant to rely on the conviction to bar subsequent proceedings for the same offense. MCL 780.622(4).

---

[78] See MCL 780.621(4)(e).

[79] But see *Nelson v Colorado*, 581 US ___ (2017) (holding that a Colorado statute requiring a petitioner to "prove [his or] her innocence by clear and convincing evidence to obtain [a] refund of costs, fees, and restitution paid pursuant to an invalid conviction[] . . . does not comport with [the Fourteenth Amendment's guarantee of] due process[]"). It is unclear whether the *Nelson* holding applies to the setting aside of a conviction under MCL 780.622(2). See SCAO Memorandum, *Refunding of Assessments if Conviction Invalidated*, for additional discussion.

- Setting aside a conviction does not affect the right of a victim of the crime to prosecute or defend a civil action for damages. MCL 780.622(5).

- Setting aside a conviction does not create a right to initiate an action for damages for incarceration under the sentence the applicant served before the conviction was set aside. MCL 780.622(6).

- Having a conviction set aside "does not relieve any obligation to pay restitution owed to the victim of a crime nor does it affect the jurisdiction of the convicting court or the authority of any court order with regard to enforcing an order for restitution." MCL 780.622(7).

- A conviction that is set aside, and any records related to the conviction or a collateral action, "cannot be used as evidence in an action for negligent hiring, admission, or licensure against any person." MCL 780.622(8).

- A conviction set aside under MCL 780.621, MCL 780.621e, or MCL 780.621g, may be considered a prior conviction for purposes of charging a crime as a second or subsequent offense or for sentencing under the habitual offender statutes. MCL 780.622(9).

- Unless otherwise permitted under MCL 780.621, MCL 780.621e, or MCL 780.621g, a person may have only one conviction set aside.[80] MCL 780.624.

The state police must maintain a nonpublic record of any order setting aside a conviction, or other notification about a conviction that was automatically set aside under MCL 780.621g, the record of the arrest, fingerprints, conviction, and sentence of the person to whom the order or other notification applies. MCL 780.623(2).[81] The record is nonpublic but is available to the entities or individuals specified in MCL 780.623(2), and only for the specific purposes detailed there. *Id*.

[80] Victims of human trafficking may apply to have set aside more than one conviction of certain prostitution offenses if the victim can prove by a preponderance of the evidence that those offenses were the direct result of being a victim of human trafficking. See MCL 780.621d(6) and MCL 780.621d(12). See Section 8.17 for more information.

[81] The information about nonpublic records under the SACA is very limited. For more information about the nonpublic record maintained after a conviction, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3.

8.20 Setting Aside the Convictions of Human Trafficking Victims

A person convicted of a prostitution offense under MCL 750.448 (soliciting), MCL 750.449 (admitting a person to a place for purposes of prostitution), MCL 750.450 (aiding or abetting a violation of MCL 750.448 or MCL 750.449), or a substantially corresponding local ordinance who committed the offense "as a direct result of the person being a victim of a human trafficking violation" may apply to have that conviction set aside. MCL 780.621(3).

A person may file an application to have a conviction set aside under MCL 780.621(3) at any time following the date of conviction and may apply to set aside more than one conviction. MCL 780.621d(6).

In addition to other content required by MCL 780.621d(7),[82] an individual who seeks to have one or more convictions set aside under MCL 780.621(3) must include with his or her application a statement indicating that he or she meets the criteria found in MCL 780.621(3), as well as a statement of facts in support of the individual's assertion. MCL 780.621d(7)(g).

If the court finds the circumstances and the applicant's behavior satisfactory from the date of the applicant's conviction(s) until he or she applied under MCL 780.621d(3) to have his or her conviction(s) set aside, and if the court finds that setting aside the applicant's conviction(s) "is consistent with the public welfare," the court may set the conviction(s) aside if the court also finds that the applicant has proved to the court by a preponderance of the evidence that his or her conviction was a direct result from having been a victim of human trafficking. MCL 780.621d(12).

[82] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3, for a discussion of the required content of an application to set aside a conviction.

Chapter 9: Sex Offenders Registration Act (SORA)

Part I—Introduction

9.1 Sex Offenders Registration Act (SORA)[1]

A. Purpose

The purpose of the SORA is stated in MCL 28.721a:

> "The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by [the SORA] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of [the SORA] are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger."[2]

[1]The content of Michigan's Sex Offenders Registration Act (SORA) closely mirrors, but does not exactly duplicate, the federal Sex Offender Registration and Notification Act (SORNA). "[SORNA] establishes national standards for sex offender registration and notification in the United States. SORNA has a dual character, imposing registration obligations on sex offenders as a matter of Federal law that are federally enforceable under circumstances supporting Federal jurisdiction, see 18 U.S.C. 2250, and providing minimum national standards that non-Federal jurisdictions are expected to incorporate in their sex offender registration and notification programs . . . ." *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed Reg 69856 (December 8, 2021). The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[2] Effective July 1, 2011, PAs 17 and 18 made significant changes to the SORA in an effort to further comply with SORNA. However, "the fact that the 2011 Legislature did not amend SORA to create an identical statutory scheme to SORNA and instead included several additional provisions indicates that the Legislature was, at the very least, not motivated solely by a desire to conform to SORNA." *People v Betts*, 507 Mich 527, 570-571 (2021). Federal guidelines discussing in detail the application and scope of SORNA requirements were published in the Federal Register for December 8, 2021 and became effective on January 7, 2022. See *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed Reg 69856 (December 8, 2021). The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. Some provisions included in the 2022 federal guidelines for SORNA differ from similar such provisions in the SORA, and it is unknown how those guidelines might affect the content or application of the SORA.

B. Constitutionality

1. Retroactive Application of 2011 Registration Requirements Violates Prohibition Against Ex Post Facto Laws[1]

"[T]he retroactive application of Michigan's Sex Offenders Registration Act . . . , as amended by 2011 PA 17 and 18 (the 2011 SORA), violates state and federal constitutional prohibitions on ex post facto laws." *People v Betts*, 507 Mich 527, 533 (2021).[2] See US Const art I, § 10; Const 1963, art 1, § 10. Specifically, "the 2011 SORA may not be retroactively applied to registrants whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments." *Betts*, 507 Mich at 573-574.[3]

The defendant in *Betts* pleaded guilty to CSC-II in 1993, two years before the SORA took effect. *Id*. at 527, 536. Amendments to the SORA, effective in 2011, increased a defendant's duties related to SORA registration and expanded the scope of information a defendant was required to provide to the proper law enforcement agency. *Id*. at 537. After completing his parole, the defendant failed to comply with the registration requirements of the SORA made applicable to him as a result of his 1993 conviction. *Id*. at 536. The *Betts* Court explained that "the 2011 SORA's aggregate punitive effects negate the state's intention to deem it a civil regulation." *Id*. at 562. The Court concluded: "[T]he retroactive imposition of the 2011 SORA increases registrants' punishment for their committed offenses

---

[1]Effective July 1, 2011, PAs 17 and 18 made significant changes to Michigan's Sex Offenders Registration Act (SORA) in an effort to further comply with the federal Sex Offender Registration and Notification Act (SORNA). Federal guidelines discussing in detail the application and scope of SORNA requirements were published in the federal register for December 8, 2021 and became effective on January 7, 2022. See *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed Reg 69856 (December 8, 2021). The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. Some provisions included in the 2022 guidelines for SORNA differ from similar such provisions in the SORA, and it is unknown how those federal guidelines might affect the content or application of the SORA.

[2]Effective July 1, 2011, PAs 17 and 18 made significant changes to the SORA in an effort to further comply with SORNA. However, "the fact that the 2011 Legislature did not amend SORA to create an identical statutory scheme to SORNA and instead included several additional provisions indicates that the Legislature was, at the very least, not motivated solely by a desire to conform to SORNA." *People v Betts*, 507 Mich 527, 570-571 (2021). Federal guidelines discussing in detail the application and scope of SORNA requirements were published in the Federal Register for December 8, 2021 and became effective on January 7, 2022. See *Registration Requirements Under the Sex Offender Registration and Notification Act*, 86 Fed Reg 69856 (December 8, 2021). The link to this resource was created using Perma.cc and directs the reader to an archived record of the page. Some provisions included in the 2022 federal guidelines for SORNA differ from similar such provisions in the SORA, and it is unknown how those guidelines might affect the content or application of the SORA.

in violation of federal and state constitutional prohibitions on ex post facto laws." *Id*.

2. Retroactive Application of 2021 Requirements to CSC Offenders Does Not Constitute Punishment or Violate Ex Post Facto Clauses of Federal or Michigan Constitutions

The 2021 amendments to SORA do not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions (US Const, art I, § 10, and Const 1963, art 1, § 10, respectively) when applied to first-degree criminal sexual conduct (CSC-I) offenders *People v Kiczenski*, ___ Mich App ___, ___ (2024). Defendant was convicted of two counts of CSC-I for a sexual assault committed in 1980 and sentenced as a habitual offender to two concurrent terms of 35 to 100 years. *Id*. at ___. Defendant filed a motion based on *Betts* to preclude him from having to register under the 2011 SORA registration requirements. The trial court denied defendant's motion. *Kiczenski*, ___ Mich App at ___. According to the court, although the 2011 SORA did not apply to defendant, the 2021 SORA amendments enacted in light of *Betts* to cure the constitutional defects of the 2011 SORA did apply to defendant. *Id*. at ___. Defendant appealed, claiming that the 2021 SORA still violated the Ex Post Facto Clauses of the United States and Michigan Constitutions by increasing the punishment for a crime already adjudicated. *Id*. at ___.

"'[T]he Legislature intended the 2021 SORA as a civil regulation.'" *Id*. at ___, quoting *People v Lymon*, ___ Mich ___, ___ (2024). "Therefore, the 2021 SORA can only be considered punishment if the statutory scheme is so punitive either in

[3]The eastern division of the federal district court and the Sixth Circuit Court of Appeals were faced with challenges to the retroactive application of Michigan's SORA before *Betts* was decided. *People v Betts*, 507 Mich 527 (2021). See *Does #1-5 v Snyder* (*Does I*), 834 F3d 696 (CA 6, 2016), and *Does v Snyder* (*Does II*), 449 F Supp 3d 719 (ED Mich, 2020). Federal challenges have also followed the *Betts* decision, the 2021 amendments enacted in 2020 PA 295, and the *People v Lymon*, ___ Mich ___ (2024) decision regarding the SORA's application to non-sex offenses. See *Does v Whitmer* (*Does III*), opinion and order of the United States District Court for the Eastern District of Michigan, issued September 27, 2024 (Case No. 22-cv-10209), where the federal district court granted summary disposition to the *Does III* plaintiffs on their ex post facto claims (based on the *Betts* decision), their non-sex offense claims (based on the *Lymon* decision), their challenges to the SORA's application to people with out-of-state convictions, and their First Amendment challenge to the 2021 internet-identifier reporting requirements. The federal district court rejected the plaintiffs' assertion that all sex offenders are entitled to an individualized hearing under all circumstances. The *Does III* court directed the parties to meet and confer on issues it noted in its opinion and to "file a joint statement . . . setting forth their points of agreement and disagreement regarding each one." *Does III*, ___ F Supp 3d ___ (2024). Note, however, that decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. See *People v Bosca*, 310 Mich App 1, 76 n 25 (2015); *People v Gillam*, 479 Mich 253, 261 (2007); *Abela v Gen Motors Corp*, 469 Mich 603, 606-607 (2004).

purpose or effect as to negate the State's intention to deem it civil." *Kiczenski*, ___ Mich App at ___ (cleaned up). "[W]hether the 2021 SORA constitutes punishment for sexual offenders [depends] on an analysis specific to them, using the factors outlined in [*Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963)[1]." *Kiczenski*, ___ Mich App at ___. The fourth—and most important—of the five most relevant *Mendoza-Martinez* factors identified by the Michigan Supreme Court is "whether the statute has a rational connection to a nonpunitive purpose[.]" *Kiczenski*, ___ Mich App at ___ (quotation marks and citation omitted).

"[T]he *Lymon* Court described the Legislature's purpose in enacting SORA as preventing future criminal sexual acts and ensuring public safety from particularly dangerous individuals." *Id*. at ___. The *Lymon* Court found that including "certain non-sexual offenses did rationally address this purpose" such that factor four weighed against finding that the 2021 SORA was punishment. *Kiczenski*, ___ Mich App at ___. "Because the rational connection to the nonpunitive purpose is more apparent than in *Lymon*, factor 4 weighs strongly against the 2021 SORA being considered punishment for sexual offenders." *Kiczenski*, ___ Mich App ___.[2] "[T]herefore, . . . there is no ex post facto violation." *Id*. at ___ (affirmed).

3. Application of Sex Offenders Registration Act (SORA) to Non-Sexual Offenders Constitutes Cruel or Unusual Punishment

"Although the 2021 SORA[3] bears a rational relation to its nonpunitive purpose and the Legislature has continued to

---

[1]All of the factors are set forth in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963). The factors are used to determine whether a statute constitutes a punishment. "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Id*. (Quotation marks omitted.)

[2]The *Kiczenski* Court distinguished its holding that the 2021 SORA is not punishment from the contrary holding in *Does III*. Both courts agreed that "there is no unanimity in the literature on the efficacy of sex-offender registries on recidivism, and that SORA is rationally connected to a non-punitive purpose." *Kiczenski*, ___ Mich App at ___ (citations omitted). However, the *Kiczenski* Court asserted that the *Does III* Court did not give "the weight factor 4 is required to receive, . . ." *Kiczenski*, ___ Mich App at ___. "[A] finding of a rational connection to a non-punitive purpose goes a long way . . . towards finding a regulation not being punishment, nor excessive." *Id*. at ___.

express its intention that SORA constitute a civil regulation, SORA resembles traditional methods of punishment, promotes the traditional aims of punishment, and imposes affirmative restraints that are excessive as applied to non-sexual offender registrants." *People v Lymon*, ___ Mich ___, ___ n 6 (2024). "Accordingly, we conclude that the 2021 SORA constitutes punishment as applied to non-sexual offenders." Id. at ___. Further, "the punishment of SORA registration for non-sexual offenders like defendant is grossly disproportionate and accordingly constitutes cruel or unusual punishment under the Michigan Constitution." *Id*. at ___.

The defendant in *Lymon* was subject to SORA due to two convictions for unlawful imprisonment (MCL 750.349b)[1] involving minors —a tier I offense under MCL 28.722(r)(*iii*). Unlawful imprisonment "is one of only three offenses for which a conviction does not necessarily require commission of a sexual act that results in placement on the sex-offender registry."*Lymon*, ___ Mich at ___. The other offenses are accosting, enticing or soliciting a minor under MCL 750.145a (MCL 28.722(t)(*i*)), and kidnapping a minor under MCL 750.349 (MCL 28.722(v)(*ii*)). *Lymon*, ___ Mich at ___. For more information on these offenses, see Section 3.15, Section 3.21, and Section 3.25.

4. Registration Has a Legitimate Purpose

> **Note:** Some cases holding that the SORA was not punitive were decided before the effective date of 2011 PAs 17 and 18, which enacted the provisions of the SORA considered by *People v Betts*, 507 Mich 527 (2021), and determined to be punitive. In *People v Lymon*, ___ Mich ___, ___ (2024), the Court held that the 2021 amendments to SORA constituted cruel or unusual punishment when applied to non-sexual offenders.

The 2021 amendments to SORA are rationally connected to a nonpunitive purpose." *People v Kiczenski*, ___ Mich App ___, ___ (2024) (affirming the trial court's denial of defendant's motion to find unconstitutional under *Betts* the retroactive application of the 2021 SORA). "[T]he *Lymon* Court described

[3]2020 PA 295 amended the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., effective March 4, 2021, while the Michigan Supreme Court was considering the ex post facto challenge in *People v Betts*, 507 Mich 527 (2021); however, the 2021 amendments were not at issue in *Betts*. *People v Lymon* , ___ Mich ___, ___ n 3 (2024).

[1]For more information on unlawful imprisonment, see Section 3.25.

the Legislature's purpose in enacting SORA as preventing future criminal sexual acts and ensuring public safety from particularly dangerous individuals." *Id*. at ___. "[P]ublic safety is a quintessentially legitimate justification, and these [sex offender] registries are no doubt connected to that goal." *Id*. at ___ (cleaned up).

The judicial fact-finding that occurs before a court orders a defendant to register under the SORA does not violate the *Apprendi-Blakely*[1] rule:

> "First, SORA does not impose a penalty in the form in which criminal statutes generally express maximum penalties. That is, SORA does not affect a person's liberty by imposing additional confinement beyond the statutorily authorized maximum penalty. Nor does SORA improperly deprive a person convicted of a listed offense of property by imposing an additional fine beyond the statutorily authorized maximum penalty. Second, the prior decisions of this Court, which we must follow, and the federal courts' analyses that this Court has adopted have concluded that SORA does not impose a penalty or punishment as a sanction for a criminal violation . . . . Rather, SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public; it was not designed to punish sex offenders. Consequently, we conclude that judicial fact-finding in applying SORA does not violate [a] defendant's constitutional rights to a jury trial and due process of law[.]" *People v Golba*, 273 Mich App 603, 620 (2007) (citations omitted).[2]

5. Due Process

The SORA does not violate a defendant's due process rights. *People v Golba*, 273 Mich App 603, 619-620 (2007).[3] According to the *Golba* Court:

> "A defendant does not have a legitimate privacy interest in preventing the compilation and

[1] The *Apprendi-Blakely* rule requires a court to submit to a jury to determine beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum[.]" *Apprendi v New Jersey*, 530 US 466, 490 (2000); *Blakely v Washington*, 542 US 296, 301 (2004).

[2] See Note in Section 9.1(B)(4).

[3] See Note in Section 9.1(B)(4).

> dissemination of truthful information that is already a matter of public record. Further, SORA does not violate a defendant's substantive due process rights. SORA 'advances a legitimate government interest in protecting the community by promoting awareness of the presence of convicted sex offenders from whom certain members of the community may face a danger.'" *Golba*, 273 Mich App at 619-620, quoting *Akella v Mich Dep't of State Police*, 67 F Supp 2d 716, 733 (ED Mich, 1999) (citations omitted).

See also *In re Tiemann*, 297 Mich App 250, 268 (2012) ("Because the effects of SORA do not implicate a liberty or property interest, the Due Process Clause does not provide [a defendant] with procedural safeguards[;] any safeguards would be those afforded by the statute.").

But see *People v Temelkoski*, 501 Mich 960, 961 (2018). The Supreme Court stated: "Because defendant pleaded guilty on the basis of the inducement provided in HYTA[1] as effective in 1994 (i.e., before SORA's effective date), was assigned to HYTA training by the trial judge, and successfully completed his HYTA training, retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process. US Const, Am XIV; Const 1963, art 1, § 17." *Temelkoski*, 501 Mich at 961. Rather, the defendant would have a conviction on his record, would have been required to register under the SORA, and would be obligated to satisfy the duties mandated of SORA registrants, a consequence of the SORA's amendment and its application to the defendant. *Id*. According to the Court, that outcome was unjust considering that assignment to HYTA status prompted the defendant to plead guilty; the defendant pleaded under circumstances giving him the opportunity to benefit from HYTA and avoid such consequences as having a conviction on his record and being made to comply with SORA. *Id*.

6. Cruel or Unusual Punishment

a. SORA Is Not a Punishment

> "At the end of the *Mendoza-Martinez*[2] inquiry, [a court] must answer whether [a] defendant has demonstrated by the clearest proof that the 2021 SORA is so punitive either

[1] HYTA is the Holmes Youthful Trainee Act, MCL 762.11 *et seq*.

in purpose or effect as to negate the State's intention to deem it civil." *People v Kiczenski*, ___ Mich App ___, ___ (2024) (quotation marks and citations omitted). "Limiting the class of offender to those with CSC-I convictions, defendant has failed to carry that high burden." *Id*. at ___.[1]

"SORA does not impose a penalty or punishment as a sanction for a criminal violation." *People v Golba*, 273 Mich App 603, 620 (2007). "Rather, SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public[.]" *Id*. at 620.[2]

b. SORA Is a Punishment (Cruel or Unusual Not Considered)

"Considering the *Mendoza-Martinez* factors cumulatively, the 2011 SORA's aggregate punitive effects negate the state's intention to deem it a civil regulation." *People v Betts*, 507 Mich 527, 562 (2021) (citation omitted.)[3] The *Betts* Court concluded: "[T]he retroactive imposition of the 2011 SORA increases registrants' punishment for their committed offenses in violation of federal and state constitutional prohibitions on ex post facto laws." *Id*.[4]

---

[2]These are the factors set forth in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963), for determining whether a civil regulation constitutes a punishment. "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Id*. (Citations omitted.)

[1]For more information on the constitutionality of the retroactive application of the 2021 SORA to CSC-1 offenders, see Section 9.1(B)(2).

Kiczenski challenged SORA under an ex-post-facto argument (see Section 9.1(B)(2)), rather than the cruel-and-unusual-punishment argument made in *People v Lymon*, ___ Mich ___ (2024) (see Section 9.1(B)(6)). However, "in determining whether a statute imposes a criminal punishment, which is all either prohibits, the standard is the same." *Kiczenski*, ___ Mich App at ___ n 4.

[2]See Note in Section 9.1(B)(4).

[3]Although the 2021 amendments to the SORA enacted by 2020 PA 295 were in effect when *Betts* was decided, only the 2011 amendments to the SORA by PAs 17 and 18 were at issue in *Betts*; the *Betts* Court "did not offer any analysis as to the 2021 SORA." *People v Lymon*, ___ Mich ___, ___ n 2 (2024).

[4]See Note in Section 9.1(B)(4).

c. SORA Is Punishment But Not Cruel or Unusual

"To determine if a punishment is cruel or unusual, a court must consider whether it is 'grossly disproportionate.'" *People v Lymon*, ___ Mich ___, ___ (2024), citing *People v Bullock*, 440 Mich 15, 34 n 17 (1992). "To evaluate whether a punishment is 'grossly disproportionate,' a reviewing court must consider four factors: (1) the harshness of the penalty compared to the gravity of the offense; (2) the penalty imposed for the offense compared to the penalties imposed for other offenses in Michigan; (3) the penalty imposed for the offense in Michigan as compared to the penalty imposed for the same offense in other states; and (4) whether the penalty imposed advances the goal of rehabilitation."*Lymon*, ___ Mich at ___ (2024), citing *Bullock*, 440 Mich at 33-34.

- *Lifetime Registration for a Convicted CSC-I Offender*

"SORA's lifetime-registration requirement is not unjustifiably disproportionate" where defendant was convicted of two counts of first-degree criminal sexual conduct and one count of unlawful imprisonment based on the use of nonphysical force to support the element of restraint.[1] *People v Jarrell*, 344 Mich App 464, 467, 487 (2022). "[Defendant did] not establish[] plain constitutional error in his as-applied challenge that the requirements of SORA violate[d] the Michigan Constitution's prohibition on cruel or unusual punishment." *Id*. at 487.

- *Lifetime Registration for a Convicted CSC-I Juvenile Offender*

Relying on *Jarrell*, the Court of Appeals concluded that three of the four *Bullock* factors "strongly support" that SORA's mandatory lifetime registration requirement is "neither cruel nor unusual" on its face when imposed on a juvenile convicted by plea of second-degree criminal sexual conduct. *People v Malone*, ___ Mich App ___, ___ (2023). To succeed, a facial challenge to a statute's constitutionality requires a showing that there are no circumstances under which the statute would be valid. *Id*. Mandatory punishments under Michigan law are not rare

[1] "[T]he restraint element can be satisfied by evidence of nonphysical force that involves a credible threat of harm . . . ."

and are not invalid simply because the defendant is a juvenile at the time the mandatory sentence is imposed. *Malone*, ___ Mich App at ___.

d. SORA is Cruel or Unusual Punishment When Imposed on Non-Sexual Offenders

"[T]he punishment of SORA registration for non-sexual offenders like defendant [who was convicted of unlawful imprisonment involving a minor] is grossly disproportionate and accordingly constitutes cruel or unusual punishment under the Michigan Constitution."[1] *People v Lymon*, ___ Mich ___, ___ (2024)**.** "[D]efendant and other offenders whose crimes lacked a sexual component[2] are entitled to removal from the sex-offender registry." *Lymon*, ___ Mich at ___.

7. No Right of Confrontation

"[B]ecause SORA is a regulatory statute and not a criminal statute, a 'criminal prosecution' is not at issue and neither [the state nor the federal] Confrontation Clause applies." *In re Tiemann*, 297 Mich App 250, 256-257, 266, 269-270 (2012) (rejecting the 15-year-old respondent's contention that his "Sixth Amendment right of confrontation was violated when [he] was not allowed to cross-examine [the 14-year-old victim]" during a hearing to determine whether the victim consented to the sexual contact, and thus whether the respondent was excused from SORA registration requirements).

---

[1]The *Lymon* Court evaluated the constitutionality of the 2021 amendments to the SORA enacted by 2020 PA 295, effective March 24, 2021, and it referred to the statute as "the 2021 SORA." *Lymon*, ___ Mich at ___. The 2021 SORA was in effect when *People v Betts*, 507 Mich 527 (2021) was decided, however, only the 2011 amendments to the SORA by PAs 17 and 18 were at issue in *Betts*; the *Betts* Court "did not offer any analysis as to the 2021 SORA." *Lymon*, ___ Mich at ___ n 2.

[2]The *Lymon* Court identified three offenses subject to the SORA that do "not necessarily require commission of a sexual act that results in placement on the sex-offender registry": accosting, enticing or soliciting a minor under MCL 750.145a, MCL 28.722(t)(*i*); kidnapping involving a minor under MCL 750.349, MCL 28.722(v)(*ii*); and unlawful imprisonment involving a minor under MCL 750.349b, MCL 28.722(r)(*iii*). *Lymon,* ___ Mich at ___. For more information on these offenses, see Section 3.15, Section 3.21, and Section 3.25, respectively.

C. Rule in *Betts*[1] That Retroactive Application of 2011 Registration Requirements Violated Prohibition Against Ex Post Facto Laws Does Not Apply Retroactively

1. Federal Law Does Not Mandate Retroactive Application of *Betts*[2]

"The first step in the federal analysis of retroactivity is whether the decision created a new rule." *People v Shaver*, ___ Mich App ___, ___ (2024) (quotation marks and citations omitted). "*Betts* announced a new rule because Michigan courts before *Betts* consistently rejected ex post facto challenges to SORA on the ground that the registration requirements of the act were not considered punishment, but a civil remedy." *Id*. at ___. "Given the state of the law at the time defendant's conviction became final, no state court considering the claim could have felt compelled by existing precedent to grant [defendant's motion for relief from judgment]." *Id*.

New rules are generally not applied retroactively, unless the rule is either a "substantive rule of constitutional law," or a "'watershed rule' of criminal procedure." *Id*. at ___ (citations omitted). First, "*Betts*'s categorization of the 2011 SORA as punitive does not make it a substantive rule of constitutional law," because it is not "'a rule forbidding certain primary conduct or a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Id*. at ___ (citation omitted). Second, "application of the 2011 SORA to [defendant] did not create an impermissibly large risk of an inaccurate conviction or alter the fairness of the proceedings concerning his failure-to-register conviction," nor did *Betts* "establish a procedural rule because its application has no bearing on the process through which criminal convictions are obtained." *Id*. at ___.

Therefore, "[f]ederal law does not mandate retroactive application because *Betts* create[d] a new rule, *Betts* d[id] not prohibit a certain class of primary conduct, and *Betts* d[id] not establish a watershed rule of criminal procedure." *Id*. at ___.

---

[1] *People v Betts*, 507 Mich 527 (2021). For more information on the rule established in *Betts*, see Section 9.1(B)(1).

[2] *People v Betts*, 507 Mich 527 (2021). For more information on the rule established in *Betts*, see Section 9.1(B)(1).

2. State Law Does Not Mandate Retroactive Application of *Betts*[1]

Retroactivity under state law must also be considered because "[a] state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords."*People v Shaver*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted; alteration in original). Michigan's "state-law test" for retroactive application of new rules established by caselaw requires courts to "consider: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice." *Id*. at ___ (quotation marks and citations omitted).

"Under the purpose prong, a law may be applied retroactively when it concerns the ascertainment of guilt or innocence; however, a new rule of procedure which does not affect the integrity of the fact-finding process should be given prospective effect." *Id*. at ___ (quotation marks and citation omitted). The purpose prong is the "most important factor," and its analysis is similar to that of the "watershed exception" under federal law. *Id*. (quotation marks and citation omitted). Because application of the new rule in *Betts* "is not going to impact the chances of a wrongful conviction," the purpose prong "weighs in favor of prospective application." *Id*. at ___-___.

The second prong (extent of reliance on old rule) and third prong (new rule's effect on administration of justice) are often considered together "[b]ecause the amount of past reliance will often have a profound effect on the administration of justice." *Id*. at ___. "While . . . there was broad reliance on the prior rule, . . . the toll that retroactive application of *Betts* would have on the administration of justice[is unknown]." *Id*. at ___. Retroactive application of the new *Betts* rule "would apply to an entire class of criminal convictions that were committed and finalized between 2011 and 2021, so it is clear that this would cause some strain on the administration of justice," due to the "valid reliance upon the 2011 SORA." *Id*. at ___. "[G]iven the information available, . . . the second and third factors weigh[] slightly against retroactive application." *Id*. at ___. Therefore, "Michigan's standard for retroactive application of judicial decisions weighs against retroactive application of *Betts*."

[1]*People v Betts*, 507 Mich 527 (2021). For more information on the rule established in *Betts*, see Section 9.1(B)(1).

9.2 Listed Offenses[1]

Offenses under the SORA are grouped into three tiers based on the seriousness of the offense; the most serious offenses are found in tier III. See *People v Tucker*, 312 Mich App 645, 658 (2015). A listed offense for purposes of the SORA is any tier I, tier II, or tier III offense.[2] MCL 28.722(i). See MCL 28.722(r) (tier I offenses); MCL 28.722(t) (tier II offenses); MCL 28.722(v) (tier III offenses).

Part II—Who Must Register Under the SORA

9.3 Determining Whether Registration is Required

A. Individuals Who are Domiciled or Temporarily Reside in Michigan[3] or Who Work in Michigan With or Without Compensation or Who are Students in Michigan

Subject to MCL 28.723(2), the following individuals must register under the SORA:

- Individual who is convicted of a listed offense after October 1, 1995.[4] MCL 28.723(1)(a).
- Individual who was convicted of a listed offense on or before October 1, 1995, if on or after October 1, 1995, that individual was on probation or parole, in jail, under the jurisdiction of the DOC or the family division of circuit (or probate) court, or committed to the department of health and human services (DHHS) for that offense. MCL 28.723(1)(b).

---

[1] Conviction of an offense formerly identified as a listed offense and found in MCL 28.722(e), required the offender to register as a sex offender under the SORA provided other conditions were met. MCL 28.723. In 2011, the *listed offenses* were divided and grouped into three tiers—tier I, tier II, and tier III. See 2011 PA 17, effective July 1, 2011. In addition to restructuring the listed offenses formerly found in MCL 28.722(e), the 2011 amendment eliminated a number of offenses from the list. See MCL 750.167 (disorderly persons), MCL 750.335a(2)(a) (open or indecent exposure), or a corresponding and substantially similar ordinance of a municipality. See the Table for a complete record of listed offenses throughout the SORA's history.

[2] The offenses in tier I, tier II, and tier III are discussed in detail in Chapters 2 and 3.

[3] Effective July 1, 2011, 2011 PA 17 eliminated the former time requirements of 14 or more consecutive days or 30 or more total days in a calendar year for domicile or residence or employment or student status.

[4] See the Table for the listed offenses effective on October 1, 1995.

- Individual who was convicted on or before October 1, 1995, of an offense described in MCL 28.722(d)(*vi*) as added by 1994 PA 295:[1]

  - if the individual, on October 1, 1995, was on probation or parole for that offense and whose probation or parole for that offense was transferred to Michigan, MCL 28.723(1)(c), or

  - if that individual's probation or parole for that offense was transferred to Michigan after October 1, 1995. *Id*.

- Individual from another state who is required to register or otherwise be identified as a sex offender, a child offender, or a predator under a comparable statute of that other state. MCL 28.723(1)(d).

- Individual who was previously convicted of a listed offense and was not required to register under the SORA at the time, but who was convicted of any other felony on or after July 1, 2011. MCL 28.723(1)(e).[2]

B. Convicted of Offense Added to the Definition of Listed Offense on September 1, 1999

An individual convicted of an offense added to the group of listed offenses on September 1, 1999, is not required to register solely because of that conviction unless one of the following applies:

- Individual was convicted of the offense on or after September 1, 1999. MCL 28.723(2)(a).

- On or after September 1, 1999, individual was on probation or parole, in jail, under the jurisdiction of the DOC or the family division of circuit court, or committed to the DHHS for the offense. MCL 28.723(2)(b).

- On September 1, 1999, individual was on probation or parole that had been transferred to Michigan for that offense, or individual's probation or parole was transferred to Michigan after September 1, 1999. MCL 28.723(2)(c).

---

[1]Effective October 1, 1995, MCL 28.722(d)(*vi*) stated, "An offense substantially similar to an offense described in subparagraphs (*i*) to (*v*) under a law of the United States, any state, or any country." See 1994 PA 295. These offenses then included violations, attempted violations, and conspiracy to commit violations of MCL 750.145a, MCL 750.145b, MCL 750.145c, MCL 750.455, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g; or a third or subsequent violation of any combination of MCL 750.167(1)(f), MCL 750.335a, or a local ordinance substantially corresponding to MCL 750.167(1)(f) or MCL 750.335a. See former MCL 28.722(d).

- On September 1, 1999, individual was in another state or country and was on probation or parole, in jail, committed to the jurisdiction of the DOC or a similar type of state agency, under the jurisdiction of a court that handles matters that are similar to matters handled by Michigan's family division of circuit court, or committed to an agency with the same authority as the DHHS for the offense. MCL 28.723(2)(d).

C. Nonresident Individual Convicted in Michigan

A nonresident individual not identified in MCL 28.723(1), who is convicted in Michigan of a listed offense on or after July 1, 2011, must register under the SORA. MCL 28.723(3). However, that person is not required to comply with the continued reporting requirements of the SORA, as long as he or she is not a resident of Michigan and is not otherwise required to report. *Id.*

A nonresident individual must have a photograph taken pursuant to MCL 28.725a. MCL 28.723(3).

D. Procedural Requirements When Registration Under SORA Is Mandatory

Subject to any applicable conditions outlined in this section in subsections (A)-(C), SORA registration is required when a defendant is convicted of a listed offense, and MCL 28.724 prescribes the specific procedure to be followed when a defendant is convicted of a listed offense. *People v Nunez*, 342 Mich App 322, 327, 328 (2022).

When registration under the SORA is mandatory, a defendant must be registered before he or she is sentenced; in addition, MCR

---

[2] "[T]he recapture provision found in MCL 28.723(1)(e) does not violate the Ex Post Facto Clauses of the state and federal constitutions." *People v Tucker*, 312 Mich App 645, 653 (2015). In *Tucker*, the Court noted that "'there is no retroactive application of the law where a prior conviction is used to enhance the penalty for a new offense committed after the effective date of the statute.'" *Id.* at 652-653, quoting *People v Callon*, 256 Mich App 312, 321 (2003). "MCL 28.723(1)(e) is not a traditional recidivist statute[.]" *Tucker*, 312 Mich App at 653. The defendant's prior conviction could be used to enhance the later conviction but the defendant was not required to register under the SORA unless and until the defendant was convicted of another felony. See MCL 28.723(1)(e); *Tucker*, 312 Mich App at 653. Because the defendant was required to register after he was convicted of "another felony," his registration was "inextricably tied" to his prior conviction. *Tucker*, 312 Mich App at 653. See also *People v Klinesmith (On Remand)*, 342 Mich App 39, 41-42 (2022), where the recapture provision added by SORA amendments made in 2011, required the defendant to register under the SORA after he was convicted of operating while intoxicated, third offense. MCL 28.723(1)(e) requires SORA registration when a defendant who was previously convicted of a listed offense, but was not required to register under the SORA at that time, is later convicted of a felony. *Klinesmith*, 342 Mich App at 42. Requiring SORA registration after the defendant's drunk-driving conviction was not an Ex Post Facto violation because "the recapture provision of SORA attached legal consequences to the subsequent conviction, not to [the] original conviction." *Id.* at 44.

6.427(9) provides that when SORA registration is mandatory for the conviction, that fact must be made part of the judgment of sentence. *Nunez*, 342 Mich App at 330.

The notice a defendant must be given after conviction of a listed offense must also be given before a court accepts a defendant's guilty plea to a listed offense. *Nunez*, 342 Mich App at 334. "Because SORA is a punitive collateral consequence for the conviction of certain crimes, a defendant must be informed of its imposition before entering a guilty plea. For the same reason, the registration requirement must be included in the judgment of sentence." *Id*. at 334. In *Nunez*, the defendant was not required to register under the SORA after he was convicted of a listed offense because the court failed to adhere to the instructions prescribed in MCL 28.724(5) and MCR 6.427(9), and the period during which a trial court could sua sponte correct an invalid sentence had expired. See MCR 6.429(A). *Nunez*, 342 Mich App at 334, 335.

9.4 Exceptions to Registering Under the SORA

A. *Romeo & Juliet* Exceptions to Select Tier II Offenses

1. Sodomy[1]

Under specific circumstances, an individual who violated MCL 750.158 (sodomy) against a minor may claim an exception to registering under the SORA. See MCL 28.722(t)(*v*). To successfully claim a registration exception under MCL 28.722(t)(*v*) for a violation of MCL 750.158 involving a minor, the individual must satisfy the conditions of one of the exceptions below:

- **All of the following—**
  - Victim consented to the conduct that constituted the violation. MCL 28.722(t)(*v*)(A)(I).
  - Victim was at least age 13 but was less than age 16 at the time of the violation. MCL 28.722(t)(*v*)(A)(II).
  - Individual was not more than four years older than the victim. MCL 28.722(t)(*v*)(A)(III).

or

[1] See Section 3.14 for a more detailed discussion of sodomy.

- **All of the following—**
  - Victim consented to the conduct that constituted the violation. MCL 28.722(t)(*v*)(B)(I).
  - Victim was age 16 or 17 at the time of the violation. MCL 28.722(t)(*v*)(B)(II).
  - Victim was not under the custodial authority of the individual at the time of the violation. MCL 28.722(t)(*v*)(B)(III).

2. Gross Indecency

Under specific circumstances an individual may claim an exception to registering under the SORA for a violation of MCL 750.338 (gross indecency between males), MCL 750.338a (gross indecency between females), or MCL 750.338b (gross indecency between males and females).[1] MCL 28.722(t)(*vi*)(A). To successfully claim an exception, the individual must satisfy the requirements of either of two conditions:

- **All of the following—**
  - Victim consented to the conduct constituting the violation. MCL 28.722(t)(*vi*)(A)(I).
  - Victim was a minor at least age 13 but was less than age 16 at the time of the violation. MCL 28.722(t)(*vi*)(A)(II).
  - Individual was not more than four years older than the victim. MCL 28.722(t)(*vi*)(A)(III).

or

- **All of the following—**
  - Victim consented to the conduct constituting the violation. MCL 28.722(t)(*vi*)(B)(I).
  - Victim was age 16 or age 17 at the time of the violation. MCL 28.722(t)(*vi*)(B)(II).
  - Victim was not under the custodial authority of the individual at the time of the violation. MCL 28.722(t)(*vi*)(B)(III).

[1] See Sections 3.10, 3.11, and 3.12 for information about gross indecency.

B. *Romeo & Juliet* Exceptions to Select Tier III Offenses

An individual may claim an exception to registration under the SORA for a violation of MCL 750.520b (CSC-I), MCL 750.520d (CSC-III), or MCL 750.520g(1) (assault with intent to commit criminal sexual conduct involving penetration) if all of the following are true:

- Victim consented to conduct constituting the offense,
- Victim was at least age 13 but under age 16 at the time of the offense, and
- Individual was not more than four years older than the victim. MCL 28.722(v)(*iv*).

C. Determining Whether an Individual Qualifies for an Exception

An individual who pleaded guilty or was found guilty of a listed offense or a juvenile who was adjudicated as responsible for a listed offense may claim that he or she is not required to register after his or her conviction because one of the *Romeo & Juliet* exceptions specified in MCL 28.722(t)(*v*), MCL 28.722(t)(*vi*), and MCL 28.722(v)(*iv*) applies. MCL 28.723a(1). If an individual or juvenile claims that he or she is not obligated to register under the SORA, and the prosecuting attorney disputes that individual's or juvenile's claim, the court must hold a hearing to determine whether the individual is required to register. *Id*.

1. Hearing Process

The process to determine whether an individual qualifies for an exception to the registration requirement under MCL 28.722(t)(*v*), MCL 28.722(t)(*vi*), and MCL 28.722(v)(*iv*) is as follows:

- Individual or juvenile claims that one of the exceptions described in MCL 28.722(t)(*v*), MCL 28.722(t)(*vi*), and MCL 28.722(v)(*iv*) applies in the proceedings involving the individual or juvenile and that the individual or juvenile is not required to register under the SORA. See MCL 28.723a(1).
- If the prosecuting attorney disputes the individual's claim that one of the enumerated exceptions apply, a hearing must be held and the question of registration determined before sentencing or disposition. MCL 28.723a(1).

- Court's decision about whether the individual or juvenile is required to register under the SORA is a final order of the court, and it may be appealed as a matter of right by the prosecutor or the individual, and the court must determine at the hearing whether the exception applies and whether the individual is required to register under the SORA. MCL 28.723a(6).

2. Burden of Proof

The individual claiming he or she is not required to register under the SORA must prove by a preponderance of the evidence that his or her conduct satisfies one of the exceptions described in MCL 28.722(t)(*v*), MCL 28.722(t)(*vi*), or MCL 28.722(v)(*iv*). MCL 28.723a(2).

3. Rules of Evidence

With the exception of privileges, the rules of evidence do not apply to the hearings held under MCL 28.723a to determine whether an individual must register under the SORA. MCL 28.723a(3). However, the protections under the rape-shield statute, MCL 750.520j, are applicable. MCL 28.723a(3).

4. Victim's Rights

The prosecutor must notify the victim of the date, time, and place of the hearing. MCL 28.723a(4). The victim may exercise the following rights at the hearing:

- Victim may submit a written statement to the court. MCL 28.723a(5)(a).
- Victim may attend the hearing and make a written or oral statement to the court. MCL 28.723a(5)(b).
- Victim may refuse to attend the hearing. MCL 28.723a(5)(c).
- Victim may attend the hearing and refuse to testify or make a statement. MCL 28.723a(5)(d).

5. Cases Pending on or After July 1, 2011

The hearing in MCL 28.723a must be held for both criminal and juvenile cases pending on July 1, 2011, and for criminal and juvenile cases begun on or after July 1, 2011. MCL 28.723a(7).

Part III — Registration Process

9.5 Registration Must Occur By the Proper Authority

An individual must register or be registered as a sex offender as provided in MCL 28.724. MCL 28.724(1).

For prosecutions or juvenile proceedings under MCL 28.724 that were pending on July 1, 2011, "whether the defendant in a criminal case or the minor in a juvenile proceeding is required to register under [the SORA] must be determined on the basis of the law in effect on July 1, 2011." MCL 28.724(7).

A. Convicted and Sentenced for Listed Offense On or Before October 1, 1995

An individual convicted of a listed offense on or before October 1, 1995, who on or before October 1, 1995, was sentenced, had a disposition entered, or was assigned to youthful trainee status for the offense, must have been registered by December 31, 1995, by the appropriate authority, MCL 28.724(2):

- Probation agent assigned to the individual if the individual was placed on probation. MCL 28.724(2)(a).
- Sheriff or his or her designee if the individual was sentenced to jail. MCL 28.724(2)(b).
- Department of corrections (DOC) if the individual was placed under the DOC's jurisdiction. MCL 28.724(2)(c).
- Parole agent assigned to the individual if the individual was on parole. MCL 28.724(2)(d).
- Family division of circuit court or department of health and human services (DHHS) if an order of disposition placed a juvenile offender under the jurisdiction of the family division of circuit court or the DHHS. MCL 28.724(2)(e).

B. Convicted of Listed Offense On or Before October 1, 1995 and Sentenced or Transferred After October 1, 1995

Except as indicated in MCL 28.724(4),[1] an individual convicted of a listed offense on or before October 1, 1995 must be registered by the designated authority, MCL 28.724(3):

- Probation agent assigned to the individual before the individual is sentenced or assigned to the status of youthful trainee if the individual was to be sentenced or assigned after October 1, 1995. MCL 28.724(3)(a).

- Probation or parole agent assigned to an individual whose probation or parole was transferred to Michigan after October 1, 1995. Registration must occur not more than seven days after the transfer. MCL 28.724(3)(b).

- Family division of circuit court if the individual is within the jurisdiction of the family division or committed to the DHHS pursuant to an order of disposition entered after October 1, 1995. Registration must occur before the order of disposition is entered. MCL 28.724(3)(c).

C. Convicted On or Before September 1, 1999 of Listed Offense Added On September 1, 1999

An individual convicted on or before September 1, 1999, of an offense added on September 1, 1999, to the group of listed offenses must be registered by the designated authority, MCL 28.724(4):

- Probation or parole agent assigned to the individual, not later than September 12, 1999, if the individual was on probation or parole on September 1, 1999, for the listed offense. MCL 28.724(4)(a).

- Sheriff or his or her designee not later than September 12, 1999, if the individual was in jail on September 1, 1999, for the listed offense. MCL 28.724(4)(b).

- DOC, not later than November 30, 1999, if the individual was under the jurisdiction of the DOC on September 1, 1999, for the listed offense. MCL 28.724(4)(c).

- Family division of circuit court, the DHHS, or the county juvenile agency not later than November 30, 1999, if the individual was by an order of disposition within the jurisdiction of the family division of circuit court, the DHHS, or the county juvenile agency on September 1, 1999. MCL 28.724(4)(d).

- Probation agent assigned to the individual before sentencing or assignment to youthful trainee status if the individual was sentenced and assigned to youthful trainee

[1] MCL 28.724(4) specifies who must register an offender convicted on or before September 1, 1999, for an offense added on September 1, 1999, to the definition of listed offense. See the Table for the listed offenses effective on September 1, 1999.

status for the offense after September 1, 1999. MCL 28.724(4)(e).

- Probation or parole agent assigned to the individual if the individual's probation or parole for the listed offense is transferred to Michigan after September 1, 1999. Registration must occur within 14 days of the transfer. MCL 28.724(4)(f).

- Family division of circuit court before an order of disposition is entered if the individual is placed within the jurisdiction of the family division of circuit court or committed to the DHHS for the listed offense after September 1, 1999. MCL 28.724(4)(g).

D. Individual Convicted of Listed Offense After October 1, 1995

Subject to MCL 28.723, an individual convicted of a listed offense in Michigan after October 1, 1995, must register under the SORA before sentencing, entry of an order of disposition, or assignment to youthful trainee status. MCL 28.724(5). His or her assigned probation agent or the family division of circuit court must provide the individual with the SORA registration form after the individual is convicted and inform the individual of the duty to register. *Id*.

E. Individual With Previous Conviction of Listed Offense Not Requiring Registration Who was Convicted of Any Other Felony On or After July 1, 2011

Subject to MCL 28.723, an individual who is convicted of *any felony* on or after July 1, 2011, and who was previously convicted of a listed offense for which the individual was *not* required to register at that time must register under the SORA before sentencing, entry of an order of disposition, or assignment to youthful trainee status. MCL 28.724(5). The probation agent or the family division of circuit court must provide the individual with the SORA registration form after the individual is convicted and inform the individual of the duty to register. *Id*.

F. Out-of-State Convictions and Registrations

Under MCL 28.724(6), the following individuals who are convicted or registered in another state or country must register as a sex offender in Michigan "not more than 3 business days after becoming domiciled or temporarily residing, working, or being a student in this state:

(a) Subject to [MCL 28.723(1)],[1] an individual convicted in another state or country on or after October 1, 1995 of a listed offense as defined before September 1, 1999.[2]

(b) Subject to [MCL 28.723(2)],[3] an individual convicted in another state or country of an offense added on September 1, 1999 to the definition of listed offenses.

(c) Subject to [MCL 28.723(1)],[4] an individual convicted in another state or country of a listed offense before October 1, 1995 and, subject to [MCL 28.723(2)],[5] an individual convicted in another state or country of an offense added on September 1, 1999 to the definition of listed offenses, who is convicted of any other felony on or after July 1, 2011.

(d) An individual required to be registered as a sex offender in another state or country regardless of when the conviction was entered." MCL 28.724(6).

G. Providing Copies of Registration and Forwarding Registration Information to Appropriate Agencies

"The officer, court, or agency registering an individual or receiving or accepting a registration under [MCL 28.724] . . . shall provide the individual with a copy of the registration . . . at the time of registration[.]" MCL 28.726(1).

If the officer, court, or agency receives a registration, they must immediately forward the information to the department in a manner developed by the department. MCL 28.726(2). "The department shall promptly provide registration . . . information to the [FBI] and to local law enforcement agencies, sheriff's

---

[1] MCL 28.723(1) addresses registration requirements for offenders living or temporarily residing, working, or going to school in Michigan who were convicted of a listed offense during the times specified in the statute.

[2] See the Table following this chapter for the listed offenses effective before September 1, 1999.

[3] Under MCL 28.723(2), an offender who is convicted of an offense added to the list of offenses on September 1, 1999 is not required to register solely because of that conviction, except under certain conditions.

[4] MCL 28.723(1) addresses registration requirements for offenders living or temporarily residing, working, or going to school in Michigan who were convicted of a listed offense during the times specified in the statute.

[5] Under MCL 28.723(2), an offender who is convicted of an offense added to the list of offenses on September 1, 1999 is not required to register solely because of that conviction, except under certain conditions.

departments, department posts, and other registering jurisdictions, as provided by law." MCL 28.727(8).

9.6 Notifying Offender of SORA Duties

The department must mail notice of a registered individual's duties under the SORA to registered individuals who are not in a state correctional facility. MCL 28.725a(1). In addition, the department must prescribe the form for the notices required under MCL 28.725a. MCL 28.725a(10).[1]

The notification form explaining a registrant's duties under the SORA "must contain a written statement that explains the duty of the individual being registered to provide notice of changes in his or her registration information, the procedures for providing that notice, and the verification procedures under [MCL 28.725a]." MCL 28.727(3).

When a registered individual is released from a state correctional facility, the DOC must give him or her written notice explaining the individual's duties under the SORA. MCL 28.725a(2). The DOC must also give the individual written notice of "the procedure for registration, notification, and verification and payment of the registration fee prescribed under [MCL 28.725a(6)] or [MCL 28.727(1)]." MCL 28.725a(2). The individual must sign and date the notice. *Id*. The DOC is required to maintain a copy of the signed and dated notice in the individual's file and must forward to the department the original copy of the notice within seven days, without regard to whether the individual signed the notice. *Id*.

9.7 Content of Registration

Registration information obtained under the SORA must be forwarded to the department in the format prescribed by the department. MCL 28.727(1). Unless an offender is indigent and qualifies for the 90-day waiver under MCL 28.725b(3), an offender must pay a $50 registration fee with each original registration. MCL 28.727(1).

A. Information Required for Registration

For a registration to be complete, the following information about the registrant must be obtained or otherwise provided:

- **Name.** The registrant's legal name and any aliases, nicknames, ethnic or tribal names, or other names by which

[1] MCL 28.725a(10) also indicates that the department must prescribe the form for verification procedures required under MCL 28.725a. See Section 9.11 for information on verification procedures.

the registrant is known or has been known. MCL 28.727(1)(a).

> **Note:** When registering under the SORA, a registrant in a witness identification and relocation program is required to provide only the name and identifying information associated with the registrant's new identity. Information identifying the registrant's former identity or location must not be contained in the registration or compilation databases. MCL 28.727(1)(a).

- **Social security number(s).** The registrant's social security number and any social security numbers or alleged social security numbers the registrant previously used. MCL 28.727(1)(b).

- **Birthdate(s).** The registrant's birthdate and any other birthdates the registrant previously used. MCL 28.727(1)(c).

- **Residential address.** The address at which the registrant resides or will reside. MCL 28.727(1)(d). If the registrant does not have a residential address, the registration must identify the location or area that is used or will be used by the registrant in lieu of a residence. If the registrant is homeless, the registration must identify the village, city, or township where the registrant spends or will spend the most of his or her time. *Id*.

- **Temporary lodging.** If the registrant is away or expected to be away from his or her residence for more than seven days, the registrant must provide the name and address of the registrant's place of temporary lodging, including the dates the lodging is used or is to be used. MCL 28.727(1)(e).

- **Employers' names and addresses.** The name and address of each of the registrant's employers. MCL 28.727(1)(f). If the registrant does not have a fixed employment location, the registration must identify the general area in which the registrant works and the normal travel routes he or she takes in the course of that employment. *Id*.

- **Name and location of current or future school.** The name and address of any school the registrant attends and any school at which the registrant has been accepted and plans to attend. MCL 28.727(1)(g).

- **Telephone numbers used.** All telephone numbers registered to or used by the registrant, "including, but not limited to, residential, work, and mobile telephone numbers." MCL 28.727(1)(h). See *People v Patton*, 325 Mich App 425, 447 (2018) (concluding that the use of "'registered

to'" in MCL 28.727(1)(h) is not unconstitutionally vague because the statute "provide[s] fair notice of the conduct proscribed, do[es] not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and [its] scope is not so overly broad as to infringe constitutional rights").

- **E-mail and internet identifiers used.** All of the electronic mail addresses and internet identifiers registered to or used by the registrant. MCL 28.727(1)(i). The requirements of MCL 28.727(1)(i) apply only to registrants required to register under the SORA after July 1, 2011. See *People v Patton*, 325 Mich App 425, 447 (2018) (concluding that use of "'registered to'" in MCL 28.727(1)(i) is not unconstitutionally vague because the statute "provide[s] fair notice of the conduct proscribed, do[es] not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, and [its] scope is not so overly broad as to infringe constitutional rights").

- **Vehicles and license plate numbers.** A description of any vehicle owned or operated by the registrant and the license plate number of each vehicle. MCL 28.727(1)(j).

- **Driver's license number or other identification number.** The registrant's driver license number or state personal identification card number. MCL 28.727(1)(k).

- **Passport and immigration documents.** A digital copy of the registrant's passport and other immigration documents. MCL 28.727(1)(*l*).

- **Occupational license(s).** The registrant's occupational and professional licensing information and any licenses that authorize the registrant to engage in any occupation, profession, trade, or business. MCL 28.727(1)(m).

- **Previous conviction(s) for listed offenses.** A brief summary of the registrant's convictions for listed offenses without regard to the time at which the convictions occurred. MCL 28.727(1)(n). The summary must include where the offense occurred and the original charged offense, if the registrant was convicted of a lesser offense. *Id*.

- **Physical appearance.** A complete description of the registrant's physical appearance. MCL 28.727(1)(o).

- **Photograph.** A photograph of the registrant as required by MCL 28.725a. MCL 28.727(1)(p).

- **Finger and palm prints.** The registrant's fingerprints (if not already on file with the department) and the registrant's palm prints. MCL 28.727(1)(q). An individual who must register under the SORA must have had his or her fingerprints, palm prints, or both taken no later than September 12, 2011, if the individual's fingerprints or palm prints were not already on file with the department at that time. *Id*. If the individual's fingerprints and palm prints are not already on file with the Federal Bureau of Investigation (FBI), the department must forward the FBI a copy of those prints. *Id*.

  Note: "SORA requires fingerprinting only once." *People v Tucker*, 312 Mich App 645, 670 n 13 (2015).

- **Information in MCL 28.724a.** Information that must be reported under MCL 28.724a (non-resident registrant's status as a student at an institution of higher education and his or her location if, as part of the registrant's course of studies, he or she is present at another location in the United States or discontinues the studies at that location). MCL 28.727(1)(r). This information must be reported *in person*. MCL 28.724a(1).

B. Additional Information Required for Registration

A registration must contain all of the following:

- **Electronic copy of identification.** An electronic copy of his or her Michigan driver's license or Michigan personal identification card, including the photograph required under the SORA. MCL 28.727(2)(a).

- **Definition of offense.** The text in the statute that defines the criminal law requiring the registrant's registration. MCL 28.727(2)(b).

- **Warrant information.** Any information about an outstanding arrest warrant. MCL 28.727(2)(c).

- **Tier number.** The registrant's classification as a tier I, tier II, or tier III offender. MCL 28.727(2)(d).

- DNA **sample.** An indication of whether a sample of the registrant's DNA has been obtained, and if a DNA profile results, an indication of whether the registrant's DNA profile has been entered into the federal combined DNA index system (CODIS).[1] MCL 28.727(2)(e).

- **Criminal history.** A registrant's complete criminal history, including the dates of each arrest and conviction. MCL 28.727(2)(f).

- **DOC number and status.** A registrant's DOC number and whether the registrant is on parole, probation, or supervised release. MCL 28.727(2)(g).

- **FBI number.** A registrant's FBI number. MCL 28.727(2)(h).

C. Required Signatures[1] and Duty to Be Truthful [2]

An individual registering under the SORA must sign the registration and notice. MCL 28.727(4). However, even if the registration is unsigned or the registration fee is unpaid, the registration and notice must be forwarded to the department. *Id*.

"The officer, court, or an employee of the agency registering the individual or receiving or accepting a registration under [MCL 28.724] shall sign the registration form." MCL 28.727(5).

An individual registering under the SORA "shall not knowingly provide false or misleading information concerning a registration, notice, or verification." MCL 28.727(6).

D. Registration Fee[3]

An individual must submit a $50 registration fee along with his or her original registration. MCL 28.727(1). An individual claiming to be indigent has the burden of proving his or her indigence to the satisfaction of the agency where the individual is reporting. MCL 28.725b(3). The individual may have his or her registration fee waived for up to 90 days. *Id*.

> "Except as otherwise provided in [MCL 28.725b], an individual who reports as prescribed under [MCL

---

[1] The CODIS unit manages the Combined DNA Index System and the National DNA Index System (NDIS). For detailed information about these databases, see Frequently Asked Questions on CODIS and NDIS. *Note:* The link to the FAQs on CODIS and NDIS was created using Perma.cc and directs the reader to an archived record of the page.

[1] See M Crim JI 20.39f, *Sex Offenders Registration Act Violations – Failure to Sign Registration and Notice*.

[2] See M Crim JI 20.39c, *Sex Offenders Registration Act Violations – Providing False or Misleading Information*.

[3] See M Crim JI 20.39g, *Sex Offenders Registration Act Violations – Failure to Pay Registration Fee*.

28.725a(3)][1] shall pay a $50.00 registration fee as follows:

> (a) Upon initial registration.
>
> (b) Annually following the year of initial registration. The payment of the registration fee under this subdivision must be made at the time the individual reports in the first reporting month for that individual as set forth in [MCL 28.725a(3)] of each year in which the fee applies, unless an individual elects to prepay an annual registration fee for any future year for which an annual registration fee is required. Prepaying any annual registration fee must not change or alter the requirement of an individual to report as set forth in [MCL 28.725a(3)]. The payment of the registration fee under this subdivision is not required to be made for any registration year that has expired before January 1, 2014 or to be made by any individual initially required to register under this act after January 1, 2027. The registration fee required to be paid under this subdivision must not be prorated on grounds that the individual will complete his or her registration period after the month in which the fee is due.
>
> (c) The sum of the amounts required to be paid under subdivisions (a) and (b) must not exceed $550.00." MCL 28.725a(6).

"Payment of the registration fee prescribed under [the SORA] must be made in the form and by means prescribed by the department. Upon payment of the registration fee prescribed under [the SORA], the officer or employee shall forward verification of the payment to the department in the manner the department prescribes. The department shall revise the law enforcement database and public internet website . . . as necessary and indicate verification of payment in the law enforcement database[.]" MCL 28.725b(4).

Allocation of fees. The $50 registration fee is allocated according to the distribution in MCL 28.725b(1). The $50 registration fee is collected by the court, local law enforcement agency, sheriff's department or department post for each registration. *Id*. Of each $50 collected, $30 must be forwarded to the department, and the

[1] MCL 28.725a(3) prescribes the schedule for when each individual registered under the SORA who is not incarcerated must report in-person to the appropriate reporting authority and verify his or her residence or domicile. MCL 28.725a(3).

department must deposit the money into the sex offenders registration fund, a separate fund in the department of treasury. MCL 28.725b(1). The remaining $20 is to be retained by the court, local law enforcement agency, sheriff's department, or department of state police post. *Id*. The department of corrections does not collect any portion of the registration fee. MCL 28.725c.

9.8 Length of Registration Period

Individuals registered under the SORA are required to comply with the procedures prescribed in MCL 28.724a (verification of a student's status) and MCL 28.725a (proof of residence or domicile). MCL 28.725(10).

Any term of incarceration imposed for committing a crime or any term of civil commitment is excluded from the length of a registration period under MCL 28.725. MCL 28.725(14).

> "For an individual who was previously convicted of a listed offense for which he or she was not required to register under [the SORA] but who is convicted of any felony on or after July 1, 2011, any period of time that he or she was not incarcerated for that listed offense or that other felony and was not civilly committed counts toward satisfying the registration period for that listed offense as described in this section. If those periods equal or exceed the registration period described in this section, the individual has satisfied his or her registration period for the listed offense and is not required to register under [the SORA]. If those periods are less than the registration period described in this section for that listed offense, the individual shall comply with this section for the period of time remaining." MCL 28.725(15).

A. Tier I Offenders

Except as otherwise provided in MCL 28.725 and MCL 28.728c,[1] a tier I offender must comply with the SORA registration requirements for 15 years. MCL 28.725(11).

[1] MCL 28.728c addresses the process and evaluation involved in an offender's petition to discontinue registration.

B. Tier II Offenders

Except as otherwise provided in MCL 28.725 and MCL 28.728c,[1] a tier II offender must comply with the SORA registration requirements for 25 years. MCL 28.725(12).

C. Tier III Offenders

Except as otherwise provided in MCL 28.725 and MCL 28.728c,[2] a tier III offender must comply with the SORA registration requirements for life. MCL 28.725(13).

9.9 Failure to Register or Comply with the SORA[3]

A. Duties of the Registering Authority

MCL 28.728a states:

> "(1) If an individual fails to register or to update his or her registration information as required under [the SORA], the local law enforcement agency, sheriff's office, or department post responsible for registering the individual or for verifying and updating his or her registration information shall do all of the following immediately after the date the individual was required to register or to update his or her registration information:
>
> (a) Determine whether the individual has absconded or is otherwise unlocatable.
>
> (b) If the registering authority was notified by a registration jurisdiction that the individual was to appear in order to register or update his or her registration information in the jurisdiction of the registering authority, notify the department in a manner prescribed by the department that the individual failed to appear as required.

---

[1] MCL 28.728c addresses the process and evaluation involved in an offender's petition to discontinue registration.

[2] MCL 28.728c addresses the process and evaluation involved in an offender's petition to discontinue registration.

[3] See M Crim JI 20.39, *Sex Offenders Registration Act Violations – Failure to Register*; M Crim JI 20.39j, *Sex Offenders Registration Act Violations – Venue;* M Crim JI 20.39k, *Sex Offenders Registration Act Violations – Registration / Notification / Verification In-person Requirement*; and M Crim JI 20.39*l*, *Sex Offenders Registration Act Violations – Definitions –* Residence */ Domicile.*

(c) Revise the information in the registry to reflect that the individual has absconded or is otherwise unlocatable.

(d) Seek a warrant for the individual's arrest if the legal requirements for obtaining a warrant are satisfied.

(e) Enter the individual into the national crime information center[1] wanted person file if the requirements for entering information into that file are met."

B. Duties of the Department of State Police

MCL 28.728a(2) states:

"If an individual fails to register or to update his or her registration information as required under [the SORA], the department shall do all of the following immediately after being notified by the registering authority that the individual failed to appear as required:

(a) Notify that other registration jurisdiction that the individual failed to appear as required.

(b) Notify the United States marshal's service in the manner required by the United States marshal's service of the individual's failure to appear as required.

(c) Update the national sex offender registry[2] to reflect the individual's status as an absconder or as unlocatable."

C. Penalties for Failure to Comply with SORA Requirements

1. In General

MCL 28.729(1) states:

---

[1] *Note:* The link to the National Crime Information Center (NCIC) was created using Perma.cc and directs the reader to an archived record of the page.

[2] *Note:* The link to the national sex offender registry was created using Perma.cc and directs the reader to an archived record of the page. See also the Michigan Public Sex Offender Registry, also linked using Perma.cc.

> "Except as provided in [MCL 28.729(2), MCL 28.729(3), and MCL 28.729(4)], an individual required to be registered under [the SORA] who willfully violates [the SORA] is guilty of a felony punishable as follows:
>
> > (a) If the individual has no prior convictions for a violation of [the SORA], by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.
> >
> > (b) If the individual has 1 prior conviction for a violation of [the SORA], by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both.
> >
> > (c) If the individual has 2 or more prior convictions for violations of [the SORA], by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both."

MCL 28.729(2) states:

> "An individual who willfully fails to comply with [MCL 28.725a], other than payment of the fee required under [MCL 28.725a(6)], is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both."

MCL 28.729(3) states:

> "An individual who willfully fails to sign a registration and notice as provided in [MCL 28.727(4)] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both."

MCL 28.729(4) states:

> "An individual who willfully refuses or fails to pay the registration fee prescribed in [MCL 28.725a(6) or MCL 28.727(1)] within 90 days of the date the individual reports under [MCL 28.724a or MCL 28.725a] is guilty of a misdemeanor punishable by imprisonment for not more than 90 days."

2. Sentence Enhancement

MCL 28.729(1) is a statutory recidivism scheme that created three *separate and distinct* felonies in MCL 28.729(1)(a)-(c)—SORA-1, SORA-2, and SORA-3, respectively—based on the number of convictions an offender accrues for violating the SORA; the penalties for each of the felonies stated in MCL 28.729(1)(a)-(c) elevate as the number of an offender's SORA convictions increase. *People v Allen*, 499 Mich 307, 321-322, 326-327 (2016) (ruling that the Court of Appeals erred when it interpreted MCL 28.729(1) and MCL 769.10 as being in direct conflict). Rather than a *single* offense imposing harsher penalties for repeat felonies, SORA-1, SORA-2, and SORA-3 are distinguished by the crime class and the definition assigned to each of them by the Legislature under MCL 777.11b. *Allen*, 499 Mich at 321-322. "[T]he Legislature intended in enacting SORA-2 and SORA-3 to elevate each offense, not merely the punishment." *Id*. at 326. The statutory structure of the offenses defined in MCL 28.729(1) and the enhanced penalties for habitual offenders in MCL 769.10–MCL 769.12 are not in conflict; both statutory provisions may be applied to a second conviction of SORA-2. *Allen*, 499 Mich at 326-327. Under MCL 28.729(1)(b), an offender who is convicted of violating the SORA for a second time has committed a separate felony under the SORA, and that second conviction qualifies the offender as a habitual offender subject to the sentence enhancement under MCL 769.10. *Allen*, 499 Mich at 321-322.

"Nothing in SORA or the HOA [Habitual Offender Act] precludes a sentencing court from enhancing the maximum sentence provided for SORA-2 by the applicable habitual-offender statute." *Allen*, 499 Mich at 311. "[A] trial court can sentence [a] defendant under SORA-2 as a second-offense habitual offender using his SORA-1 conviction." *Id*. at 326.

3. Mandatory Revocation of Probation, Parole, and Youthful Trainee Status

A court must revoke the probation of an individual on probation who willfully violates the SORA. MCL 28.729(5).

Youthful trainee status must be revoked for a youthful trainee who willfully violates the SORA. MCL 28.729(6).

The parole board must rescind an individual's parole if the individual willfully violates the SORA after being paroled. MCL 28.729(7).

4. Venue for Enforcement

An individual who fails to register as required by the SORA or who violates MCL 28.725 may be prosecuted in the following judicial districts:

- The offender's last residence or registered address.
- The offender's actual residence or address.
- Where the individual was arrested for the violation. MCL 28.729(8).

9.10 Petition to Discontinue Registration

A. Who May Petition the Court

1. Tier I Offenders

A tier I offender who satisfies the requirements of MCL 28.728c(12)[1] may petition the court for an order permitting him or her to discontinue registration under the SORA. MCL 28.728c(1).

2. Tier III Offenders

A tier III offender who satisfies the requirements of MCL 28.728c(13)[2] may petition the court for an order permitting him or her to discontinue registration under the SORA. MCL 28.728c(2).

3. Tier I, Tier II, and Tier III Offenders

A tier I, tier II, or tier III offender who satisfies the requirements of MCL 28.728c(14) or MCL 28.728c(15)[3] may petition the court for an order permitting him or her to discontinue registration under the SORA. MCL 28.728c(3).

B. Filing the Petition

MCL 28.728c is the only means by which an offender may obtain judicial review of his or her registration requirements under the

[1] See Section 9.10(F).

[2] See Section 9.10(F).

[3] See Section 9.10(F).

SORA. MCL 28.728c(4). MCL 28.728c(4) does not prohibit an offender from appealing his or her conviction or sentence as otherwise permitted by law or court rule. *Id*.

With the exception of convictions that occur in another state or country, a petition filed under MCL 28.728c must be filed in the court in which the offender was convicted of the listed offense. MCL 28.728c(4). If an individual was convicted in another state or country and the individual is a Michigan resident, the individual may file the petition to discontinue his or her registration under the SORA only in the circuit court of the county in which he or she resides. *Id*.

An individual may not file a petition if he or she previously filed a petition under MCL 28.728c, and after a hearing, the court denied the petition. MCL 28.728c(4).

At least 30 days before a hearing is held on the petition, a copy of the petition must be filed with the prosecutor's office that prosecuted the case against the offender. MCL 28.728c(7). If the conviction occurred in another state or country, then the petition must be filed with the prosecutor's office in the county where the offender resides. *Id*. The prosecutor may participate in all proceedings involving the petition, and the prosecutor may appeal any decision made on the petition. *Id*.

C. Contents of the Petition

The petition must be made under oath and include all of the following information:

- Petitioner's name and address. MCL 28.728c(5)(a).
- Identification of the offense for which the petitioner is requesting to discontinue his or her registration. MCL 28.728c(5)(b).
- Statement indicating whether the petitioner has a previous conviction for a listed offense requiring him or her to register under the SORA. MCL 28.728c(5)(c).

An individual is guilty of perjury, MCL 750.423(1), if he or she knowingly makes a false statement in a petition under MCL 28.728c. MCL 28.728c(6).

D. Victim Notification

If the prosecutor knows the name of the victim involved in the offense, the prosecutor must give the victim written notice that a petition was filed and must provide the victim with a copy of the

petition. MCL 28.728c(8). The prosecutor must send the notice by first-class mail to the victim's last known address. *Id*. The notice must include information about the victim's rights as described in MCL 28.728c(10). MCL 28.728c(8).

By right the victim may attend any proceeding held on the petition and to present a written or oral statement to the court before the court decides on the petition. MCL 28.728c(10). A victim must not be required to attend any hearing on the petition against his or her will. *Id*.

E. Hearing on the Petition

If the petition is properly filed with the court, the court must conduct a hearing. MCL 28.728c(9).

To decide whether a petition merits the discontinuation of SORA registration, MCL 28.728c(12) (tier I offenders) or MCL 28.728c(13) (tier III offenders), requires the court to consider all of the following:

> "(a) The individual's age and level of maturity at the time of the offense.
>
> (b) The victim's age and level of maturity at the time of the offense.
>
> (c) The nature of the offense.
>
> (d) The severity of the offense.
>
> (e) The individual's prior juvenile or criminal history.
>
> (f) The individual's likelihood to commit further listed offenses.
>
> (g) Any impact statement submitted by the victim under the William Van Regenmorter crime victim's rights act, . . . MCL 780.751 to [MCL] 780.834, or under [MCL 28.728c].
>
> (h) Any other information considered relevant by the court." MCL 28.728c(11).

Notwithstanding the court's consideration of the factors listed, the court must not grant an offender's petition if the court determines that the petitioner presents a continuing threat to the public. MCL 28.728c(11).

F. Determining Whether to Grant the Petition

1. Tier I Offenders

Note: A tier I offender may also be able to discontinue registration if he or she meets the requirements in MCL 28.728c(14) or MCL 28.728c(15). Those provisions are discussed in Section 9.10(F).

MCL 28.728c(12) states that a properly filed petition under MCL 28.728c(1) (tier I offenders) *may be granted* if all of the following apply:

> "(a) Ten or more years have elapsed since the date of his or her conviction for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.
>
> (b) The petitioner has not been convicted of any felony since the date described in subdivision (a).
>
> (c) The petitioner has not been convicted of any listed offense since the date described in subdivision (a).
>
> (d) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.
>
> (e) The petitioner successfully completed a sex offender treatment program certified by the United States attorney general under 42 USC 16915(b)(1),[1] or another appropriate sex offender treatment program. The court may waive the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner's confinement, release, probation, or parole." MCL 28.728c(12)(a)-(e).

2. Tier III Offenders

Note: A tier III offender may also be able to discontinue registration if he or she meets the requirements in MCL

[1] This federal provision was transferred and renumbered as 34 US 20915.

28.728c(14) or MCL 28.728c(15). Those provisions are discussed in Section 9.10(F).

MCL 28.728c(13) states that a properly filed petition under MCL 28.728c(2) (tier III offenders) *may be granted* if all of the following apply:

> "(a) The petitioner is required to register based on an order of disposition entered under [MCL 712A.18], that is open to the general public under [MCL 712A.28].
>
> (b) Twenty-five or more years have elapsed since the date of his or her adjudication for the listed offense or from his or her release from any period of confinement for that offense, whichever occurred last.
>
> (c) The petitioner has not been convicted of any felony since the date described in subdivision (b).
>
> (d) The petitioner has not been convicted of any listed offense since the date described in subdivision (b).
>
> (e) The petitioner successfully completed his or her assigned periods of supervised release, probation, or parole without revocation at any time of that supervised release, probation, or parole.
>
> (f) The court determines that the petitioner successfully completed a sex offender treatment program certified by the United States attorney general under 42 USC 16915(b)(1),[1] or another appropriate sex offender treatment program. The court may waive the requirements of this subdivision if successfully completing a sex offender treatment program was not a condition of the petitioner's confinement, release, probation, or parole." MCL 28.728c(13)(a)-(f).

3. Tier I, Tier II, or Tier III Offenders

According to MCL 28.728c(14), a court *must grant* a properly filed petition under MCL 28.728c(3) (tier I, tier II, or tier III offenders) "if the court determines that the conviction for the

[1] This federal provision was transferred and renumbered as 34 US 20915.

listed offense was the result of a consensual sexual act between the petitioner and the victim and any of the following apply:

(a) All of the following:

(*i*) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.

(*ii*) The petitioner is not more than 4 years older than the victim.[1]

(b) All of the following:

(*i*) The individual was convicted of a violation of [MCL] 750.158, [MCL] 750.338, [MCL] 750.338a, [or MCL] 750.338b.

(*ii*) The victim was 13 years of age or older but less than 16 years of age at the time of the violation.

(*iii*) The individual is not more than 4 years older than the victim.

(c) All of the following:

(*i*) The individual was convicted of a violation of [MCL] 750.158, [MCL] 750.338, [MCL] 750.338a, [MCL] 750.338b, [or MCL] 750.520c.

(*ii*) The victim was 16 years of age or older at the time of the violation.

(*iii*) The victim was not under the custodial authority of the individual at the time of the violation."

Under MCL 28.728c(15), a court *must grant* a properly filed petition under MCL 28.728c(3) (tier I, tier II, or tier III offenders) if either of the following applies:

"(a) Both of the following:

[1] "[O]ne who is even one day past the 4-year or 48-month eligibility limit described in MCL 28.728c(14)(a)(*ii*) is ineligible to obtain relief under that statute." *People v Costner*, 309 Mich App 220, 232 (2015). "[W]hen [MCL 28.728c(14)(a)(*ii*)] inquires into whether the petitioner 'is not more than 4 years older than the victim,' it is using the commonly understood definition of a 'year' as a measure of time, and a 'year' is commonly understood as being 12 months in duration." *Costner*, 309 Mich App at 231 (holding that MCL 8.3j, which defines "year" as a "calendar year," does not apply to a unit or measure of time, and concluding that the defendant was not eligible to be removed from the registry because the defendant was four years and 23 days older than the victim) (citation and emphasis omitted).

> (*i*) The petitioner was adjudicated as a juvenile.
>
> (*ii*) The petitioner was less than 14 years of age at the time of the offense.
>
> (b) The individual was registered under [the SORA] before July 1, 2011 for an offense that required registration but for which registration is not required on or after July 1, 2011."

G. Petition Is Granted

If a court grants a defendant's petition to discontinue registration, MCL 28.728c, the court must promptly provide the department and the petitioner with a copy of the order. MCL 28.728d. The department must promptly remove the petitioner's registration from the database maintained according to MCL 28.728(1). MCL 28.728d.

Part IV—Reporting Requirements

9.11 Verification of Domicile or Residence[1]

An offender who is not incarcerated and who is required to register under the SORA must verify his or her domicile or residence by reporting *in person* to the registering authority with jurisdiction over the location of the offender's domicile or residence. MCL 28.725a(3).

> "A report under [MCL 28.725a(3)] must be made no earlier than the first day or later than the last day of the month in which the individual is required to report. However, if the registration period for that individual expires during the month in which he or she is required to report under this section, the individual shall report during that month on or before the date his or her registration period expires." MCL 28.725a(4).

[1] See M Crim JI 20.39e, *Sex Offenders Registration Act Violations – Failure to Verify*, M Crim JI 20.39j, *Sex Offenders Registration Act Violations – Venue*, M Crim JI 20.39k, *Sex Offenders Registration Act Violations – Registration / Notification / Verification In-person Requirement*, and M Crim JI 20.39*l*, *Sex Offenders Registration Act Violations – Definitions – Residence / Domicile*.

A. Yearly Verification (Tier I Offenders)

Subject to MCL 28.725a(4) (setting out routine times for an offender's annual report), MCL 28.725a(3)(a) requires tier I offenders to report "once each year during the individual's month of birth."

B. Semi-Annual Verification (Tier II Offenders)

Subject to MCL 28.725a(4) (setting out routine times for an offender's biannual report), MCL 28.725a(3)(b) requires tier II offenders to report two times each year according to the following schedule:

Birth Month	Reporting Months
January	January and July
February	February and August
March	March and September
April	April and October
May	May and November
June	June and December
July	January and July
August	February and August
September	March and September
October	April and October
November	May and November
December	June and December

C. Quarterly Verification (Tier III Offenders)

Subject to MCL 28.725a(4) (setting out routine times for an offender's quarterly report), MCL 28.725a(3)(c) requires tier III

offenders to report four times each year as the following table indicate:

Birth Month	Reporting Months
January	January, April, July, and October
February	February, May, August, and November
March	March, June, September, and December
April	April, July, October, and January
May	May, August, November, and February
June	June, September, December, and March
July	July, October, January, and April
August	August, November, February, and May
September	September, December, March, and June
October	October, January, April, and July
November	November, February, May, and August
December	December, March, June, and September

D. Registrant's Duty to Review Information for Accuracy

A registrant who reports as required by MCL 28.725a(3) must review all of his or her registration information for accuracy. MCL 28.725a(4). According to MCL 28.725a(5):

> "When an individual reports under [MCL 28.725a(3)], an officer or authorized employee of the registering authority shall verify the individual's residence or domicile and any information required to be reported under [MCL 28.724a].[1] The officer or authorized employee shall also determine whether the individual's

> photograph required under [the SORA] matches the appearance of the individual sufficiently to properly identify him or her from that photograph. If not, the officer or authorized employee shall require the individual to obtain a current photograph within 7 days under this section. When all of the verification information has been provided, the officer or authorized employee shall review that information with the individual and make any corrections, additions, or deletions the officer or authorized employee determines are necessary based on the review. The officer or authorized employee shall sign and date a verification receipt. The officer or authorized employee shall give a copy of the signed receipt showing the date of verification to the individual. The officer or authorized employee shall forward verification information to the department in the manner the department prescribes. The department shall revise the law enforcement database and public internet website maintained under [MCL 28.728] as necessary and shall indicate verification in the public internet website maintained under [MCL 28.728(2)]."[1]

E. Registration Fee

Unless a registrant is indigent and qualifies under MCL 28.725b for a 90-day waiver of the registration fee, "an individual who reports as prescribed under [MCL 28.725a(3), requiring regular verification of an individual's domicile or residence] shall pay a $50.00 registration fee as follows:

> (a) Upon initial registration.
>
> (b) Annually following the year of initial registration. The payment of the registration fee under this subdivision must be made at the time the individual reports in the first reporting month for that individual as set forth in [MCL 28.725a(3)] of each year in which the fee applies, unless an individual elects to prepay an annual registration fee for any future year for which an annual registration fee is required. Prepaying any annual registration fee must not change or alter the requirement of an individual to report as set forth in

[1] See Section 9.12 for information about resident and nonresident student requirements under MCL 28.724a.

[1] For information about the computerized law enforcement database and the public internet website, see Section 9.16 and Section 9.17, respectively.

[MCL 28.725a(3)]. The payment of the registration fee under this subdivision is not required to be made for any registration year that has expired before January 1, 2014 or to be made by any individual initially required to register under this act after January 1, 2027. The registration fee required to be paid under this subdivision must not be prorated on grounds that the individual will complete his or her registration period after the month in which the fee is due.

(c) The sum of the amounts required to be paid under subdivisions (a) and (b) must not exceed $550.00." MCL 28.725a(6).

F. Required Identification[1]

1. Residents

Except as otherwise noted in this subsection, an individual required to register under the SORA must maintain either a valid Michigan driver's or chauffeur's license, or an official Michigan personal identification card with the individual's current address. MCL 28.725a(7). An individual may use the license or card as proof of domicile or residence. *Id*. The officer or authorized employee may also require the individual to produce an additional document showing the individual's name and address, including, but not limited to, an individual's voter registration card, a utility bill, or another bill. *Id*. Other satisfactory proof of domicile or residence may be specified by the department of state police. *Id*. An individual who is required to register under the SORA is not required to maintain a valid operator's or chauffeur's license or an official state personal identification card if that individual is homeless. *Id*.

2. Released Prisoners

Not more than seven days after an incarcerated individual required to register under the SORA is released, he or she must report to the secretary of state to have his or her digitalized photograph taken. MCL 28.725a(8). If the individual had a digitized photograph taken for a driver's license, a chauffeur's license, or an official state personal identification card before January 1, 2000, or within two years before he or she was released, that individual is not required to report under this

[1] See M Crim JI 20.39d, *Sex Offenders Registration Act Violations – Identification Requirements*.

subsection, unless the individual's appearance has changed since the photograph was taken. *Id*. The photograph must be used on the individual's driver's license, chauffeur's license or state identification card, unless he or she is a nonresident. *Id*. When an individual renews his or her license or identification card as required by law, or as otherwise provided under the SORA, the individual must have a new photograph taken. *Id*. The digitized photograph must be made available to the department by the secretary of state for registration under the SORA. *Id*.

G. Failure to Report

If an individual fails to report as required under MCL 28.725a or under MCL 28.724a, the department must notify all registering authorities as indicated in MCL 28.728a and initiate enforcement action according to MCL 28.728a.[1] MCL 28.725a(9).

9.12 Reporting Requirements Specific to Student Offenders

A. Nonresidents

MCL 28.724a(1) provides that a nonresident required to be registered under the SORA must report his or her status *in person* to the registering authority with jurisdiction over the campus of an institution of higher education if:

- The individual is a student or enrolls as a student at that institution of higher education, or if the individual withdraws from his or her enrollment at the institution; or
- The individual, as part of his or her studies at that institution of higher education, is present at another location in Michigan, another state, or a United States territory or possession, or the individual withdraws from his or her studies at that location. MCL 28.724a(1)(a)-(b).

B. Residents

An individual resident of Michigan required to register under the SORA, must report *in person* to the registering authority with jurisdiction of the area in which his or her new residence or

[1] See Section 9.9.

domicile is located, if any of the events described in MCL 28.724a(1) occur. MCL 28.724a(2).

C. General Reporting Requirements

The report required under MCL 28.724a(1) (nonresident students) and MCL 28.724a(2) (resident students) must comply with the following:

- An individual who registered under the SORA before October 1, 2002, was required to make his or her first report under MCL 28.724a(1) or MCL 28.724a(2) not later than January 15, 2003. MCL 28.724a(3)(a).

- An individual must report not more than three business days following his or her enrollment or discontinuance as a student on that campus or his or her study in Michigan or in another state or in a United States territory or possession, or in another country. MCL 28.724a(3)(b).

Additional registration reports required under MCL 28.724a must be made according to the time periods in MCL 28.725a(3)(a)-(c) which also govern reports made under MCL 28.725a(3).[1] MCL 28.724a(4).

MCL 28.724a(5) states:

> "The local law enforcement agency, sheriff's department, or department post to which an individual reports under [MCL 28.724a] shall require the individual to pay the registration fee required under [MCL 28.725a] or [MCL 28.727(1)] and to present written documentation of employment status, contractual relationship, volunteer status, or student status. Written documentation under this subsection may include, but need not be limited to, any of the following:
>
> (a) A W-2 form, pay stub, or written statement by an employer.
>
> (b) A contract.

[1] Subject to MCL 28.725a(4) (explaining that an offender can register no earlier than the first day or later than the last day of the month in which he or she is obligated to report), MCL 28.725a(3) sets out the number of times each year a tier I, tier II, and tier III offender must report and prescribes the month in which the verification and report must be made. See Section 9.11. **Note:** MCL 28.725a(2)(a)-(c), cited in MCL 28.724a(4), must refer to MCL 28.725a(3) because MCL 28.725a(2) has no subsections and is limited to individuals released from incarceration. Therefore, the benchbook refers to MCL 28.725a(3), rather than to MCL 28.725a(2), as the statutory language in MCL 28.724a(4) indicates.

(c) A student identification card or student transcript."

MCL 28.724a does not apply to a student "whose enrollment and participation at an institution of higher education is solely through the mail or the internet from a remote location." MCL 28.724a(6).

9.13 In-Person Notification of Post-Registration Changes of Status

A. In-State Changes[1]

1. In-Person Notification

According to MCL 28.725(1)(a)-(e), a resident of Michigan who is required to register under the SORA must report *in person*, or in another manner prescribed by the department and notify the registering authority with jurisdiction over the area where the individual's residence or domicile is located not more than three business days after any of the following:

> "(a) The individual changes or vacates his or her residence or domicile.
>
> (b) The individual changes his or her place of employment, or employment is discontinued.
>
> (c) The individual enrolls as a student with an institution of higher education, or enrollment is discontinued.
>
> (d) The individual changes his or her name.
>
> (e) Any change required to be reported under [MCL 28.724a]."[2]

A registrant must not knowingly provide false or misleading information in a notification. MCL 28.727(6).

"Although the reporting requirements [under MCL 28.725(1)] are undeniably burdensome, their restraining effect is not absolute. Registrants are not precluded from many activities,

---

[1] See M Crim JI 20.39a, *Sex Offenders Registration Act Violations – Failure to Notify*; M Crim JI 20.39j, *Sex Offenders Registration Act Violations – Venue;* M Crim JI 20.39k, *Sex Offenders Registration Act Violations – Registration / Notification / Verification In-person Requirement*; and M Crim JI 20.39*l*, *Sex Offenders Registration Act Violations – Definitions – Residence / Domicile.*

[2] See Section 9.12 for information about resident and nonresident student requirements under MCL 28.724a.

such as changing residences or jobs, but are merely required to report them." *People v Tucker*, 312 Mich App 645, 682 (2015).

See *People v Allen*, 310 Mich App 328, 338 (2015), rev'd on other grounds 499 Mich 307 (2016),[1] (finding that "there was substantial evidence to support the allegation that defendant changed or vacated his registered residence, or intended to reside at a place other than his residence for more than seven days, and that he failed to appear in person before the registering authority to report his new address [as is required under MCL 28.725(1)(a) and MCL 28.725(1)(e)[2]]" where "defendant's registered address appeared uninhabitable" for nine straight days, the defendant admitted to staying at another location "for the previous two weeks," and there was witness testimony supporting the defendant having only slept at the registered residence twice in a five-month period).

2. Providing Copies of Registration and Forwarding Notification Information to Appropriate Agencies

The officer, court, or agency that receives a notification under MCL 28.725(1) must provide the registrant with a copy of the notification at the time of notice. MCL 28.726(1).

Immediately after receiving notice of a registrant's address change under MCL 28.725(1), the officer, court, or agency that received the notification must forward it to the department using the method prescribed by the department. MCL 28.726(2).

The department must promptly provide the Federal Bureau of Investigation with any information received in a notification. MCL 28.727(8). The department must also provide the information to local law enforcement agencies, sheriff's departments, department posts, and other registering jurisdictions as required by law. *Id*.

3. Nonresident Employees

A nonresident who is required to be registered under the SORA and whose place of employment is in Michigan must report *in person* and notify the registering authority with jurisdiction over the area in which his or her place of

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

[2] The information that appeared in MCL 28.725(1)(e) now appears in MCL 28.725(2)(b). See 2020 PA 295, effective March 24, 2021.

employment is located, or the department post in the location of the individual's place of employment, not more than three business days after the individual's place of employment changes or is discontinued. MCL 28.725(3).

B. Out-of-State Changes[1]

1. Change to Another State

A resident of Michigan who is required to be registered under the SORA must report *in person* and notify the registering authority with jurisdiction over the area where his or her residence or domicile is located not more than three business days before changing his or her residence or domicile to another state. MCL 28.725(7). The individual must identify the state to which the individual is moving, and if known, the new address in that state. *Id*. "The department shall update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state." *Id*.

2. Change to Another Country

A Michigan resident who is required to be registered under the SORA must report *in person* and notify the registering authority with jurisdiction over the area where his or her residence or domicile is located no later than 21 days before changing his or her residence or domicile to another country, or before traveling to another country for more than 7 days. MCL 28.725(8). The individual must indicate the new country of residence or travel and the address of his or her new residence or domicile or place of stay, if known. *Id*. "The department shall update the registration and compilation databases and promptly notify the appropriate law enforcement agency and any applicable sex or child offender registration authority." *Id*.

---

[1] See M Crim JI 20.39b, *Sex Offenders Registration Act Violations – Failure to Report Before Moving to Another State or Moving to or Visiting Another Country for More Than Seven Days*; M Crim JI 20.39j, *Sex Offenders Registration Act Violations – Venue;* M Crim JI 20.39k, *Sex Offenders Registration Act Violations – Registration / Notification / Verification In-person Requirement*; and M Crim JI 20.39*l*, *Sex Offenders Registration Act Violations – Definitions – Residence / Domicile.*

C. In-Person Reporting Requirements Are Constitutional

SORA's in-person reporting requirements "do not constitute punishment [and t]herefore they necessarily cannot constitute cruel or unusual punishment." *People v Tucker*, 312 Mich App 645, 683 (2015). Applying the seven factors set forth in *Kennedy v Mendoza-Martinez*, 372 US 144 (1963),[1] "[t]he requirements impose affirmative restraints and arguably resemble conditions of supervised probation or parole[; h]owever, the reporting requirements do not necessarily promote deterrence or retribution, they are rationally connected to the nonpunitive purpose of protecting the public by ensuring that the registry is accurate, and they are not excessive." *Tucker*, 312 Mich App at 682. Accordingly, the Court concluded "that there is not the clearest proof that the in-person reporting requirements are so punitive in purpose or effect as to negate the Legislature's intent to deem them civil." *Id*. at 683.

9.14 Reporting Change in Contact or Vehicle Information, or Temporary Residence

Some changes in circumstances require reporting, but the method of reporting is left to the department. See MCL 28.725(2). According to the Michigan State Police's Sex Offender Registry FAQ, Question 17,[2] these circumstances may be reported in-person, by United States Postal Service, or by drop-off.

A. Change in Contact or Vehicle Information

An individual who is a Michigan resident required to be registered under the SORA must, in the manner prescribed by the department, report to the registering authority with jurisdiction over the location of the individual's residence or domicile not more than three business days after the following occurs:

> "Except as otherwise provided in this subdivision, any change in vehicle information, electronic mail addresses, internet identifiers, or telephone numbers registered to or used by the individual. The requirement to report any change in electronic mail addresses and internet identifiers applies only to an individual required to be registered under [the SORA] after July 1, 2011." MCL 28.725(2)(a).

[1] For a list of the seven *Mendoza-Martinez* factors, see Section 9.1(B).

[2] *Note:* The link to the Sex Offender Registry FAQs was created using Perma.cc and directs the reader to an archived record of the page.

B. Temporary Change of Residence

An individual who is a Michigan resident and who is required to be registered under the SORA must, in the manner prescribed by the department, report to the registering authority with jurisdiction over the location of the individual's residence or domicile not more than three business days after the following occurs:

> "The individual intends to temporarily reside at any place other than his or her residence for more than 7 days." MCL 28.725(2)(b).

9.15 Notice of Registrant's Release or Change in Incarceration

A. Individuals in Prison

"If an individual who is incarcerated in a state correctional facility and is required to be registered under [the SORA] is granted parole or is due to be released upon completion of his or her maximum sentence, the department of corrections [DOC], before releasing the individual, shall provide notice of the location of the individual's proposed place of residence or domicile to the department of state police." MCL 28.725(4).

B. Individuals in County Jail

"If an individual who is incarcerated in a county jail and is required to be registered under [the SORA] is due to be released from custody, the sheriff's department, before releasing the individual, shall provide notice of the location of the individual's proposed place of residence or domicile to the department of state police." MCL 28.725(5).

C. Correctional Facility Transfers

MCL 28.725(6) states:

> "Not more than 7 days after either of the following occurs, the [DOC] shall notify the local law enforcement agency or sheriff's department having jurisdiction over the area to which the individual is transferred or the deparment post of the transferred residence or domicile of an individual required to be registered under [the SORA]:

(a) The individual is transferred to a community residential program.

(b) The individual is transferred into a level 1 correctional facility of any kind, including a correctional camp or work camp."

D. Transfer of Probation or Parole

"If the probation or parole of an individual required to be registered under [the SORA] is transferred to another state or an individual required to be registered under [the SORA] is transferred from a state correctional facility to any correctional facility or probation or parole in another state, the [DOC] shall promptly notify the department and the appropriate law enforcement agency and any applicable sex or child offender registration authority in the new state. The department shall update the registration and compilation databases." MCL 28.725(9).

Part V—Collection and Availability of SORA Information

9.16 Computerized Law Enforcement Database

A. Required Information

MCL 28.728(1) requires the department to maintain a computerized law enforcement database of the registrations and notices that are required under the SORA. MCL 28.728(1). The database must contain all of the following information for each individual who registers under the SORA:

- Legal name and any other names by which the individual is known or has been known, including aliases, nicknames, and ethnic or tribal names. MCL 28.728(1)(a).
- Social Security number and any Social Security numbers or alleged numbers the individual previously used. MCL 28.728(1)(b).
- Date of birth and any other alleged dates of birth the individual previously used. MCL 28.728(1)(c).

- Address where the individual resides or will reside. MCL 28.728(1)(d). If the individual does not have a residential address, the registration must identify the location or area that will be used by the individual instead of a residence, or, if the individual is homeless, the registration must identify the village, city, or township where the individual will spend the majority of his or her time. *Id*.

- Name and address of any temporary lodging to be used if the individual is away or expected to be away from his or her residence for more than seven days; dates the lodging is used or expected to be used. MCL 28.728(1)(e).

- Name and address of each of the individual's employers. MCL 28.728(1)(f).

- Name and address of any school the individual attends and any school that has accepted the individual as a student and that the individual plans to attend. MCL 28.728(1)(g).

- All telephone numbers used by or registered to the individual, including the individual's mobile telephone number and the telephone numbers associated with the individual's residence and work. MCL 28.728(1)(h).

- Except as otherwise provided, all electronic mail addresses and internet identifiers registered to or used by the individual.[1] MCL 28.728(1)(i).

- License plate number and description of any vehicle owned or operated by the individual. MCL 28.728(1)(j).

- individual's driver's license number or state personal identification card number. MCL 28.728(1)(k).

- Digital copy of the individual's passport and any immigration documents. MCL 28.728(1)(*l*).

- Licensing information that authorizes the individual to engage in an occupation or a profession, trade, or business, and any other occupational and professional licensing information. MCL 28.728(1)(m).

- Brief summary of the individual's convictions for listed offenses without regard to when the convictions occurred. MCL 28.728(1)(n). The summary should indicate where the offense occurred and the original charge if the individual was convicted of a lesser offense. *Id*.

---

[1]This subdivision applies only to individuals whose registration was required under the SORA after July 1, 2011. MCL 28.728(1)(i).

- Complete description of the individual's physical appearance. MCL 28.728(1)(o).
- Photograph of the individual as required under MCL 28.725a. MCL 28.728(1)(p).
- Fingerprints and palm prints of the individual. MCL 28.728(1)(q).
- Electronic copy of the individual's Michigan driver's license or Michigan personal identification card, including the photograph required under the SORA. MCL 28.728(1)(r).
- Language of the statutory provision defining the offense for which the offender must be registered. MCL 28.728(1)(s).
- Outstanding arrest warrant information, if any. MCL 28.728(1)(t).
- Individual's registration status and classification as a tier I, tier II, or tier III offender. MCL 28.728(1)(u).
- Whether a sample of the individual's DNA has been obtained, and whether the individual's DNA profile has been entered into the federal combined DNA index system (CODIS).[1] MCL 28.728(1)(v).
- Individual's complete criminal history, including the dates of each arrest and conviction. MCL 28.728(1)(w).
- Individual's department of corrections (DOC) number and whether the individual is on parole, probation, or release. MCL 28.728(1)(x).
- Individual's Federal Bureau of Investigation (FBI) number. MCL 28.728(1)(y).

B. Distribution of the Law Enforcement Database

"The department shall make the law enforcement database available to each department post, local law enforcement agency, and sheriff's department by the law enforcement information network. Upon request by a department post, local law enforcement agency, or sheriff's department, the department shall provide to that post, agency, or sheriff's department the information from the law enforcement database in printed form for the designated areas

[1] The CODIS unit manages the Combined DNA Index System and the National DNA Index System (NDIS).

located in whole or in part within the post's, agency's, or sheriff's department's jurisdiction." MCL 28.728(6).

"The department shall make the law enforcement database available to a department post, local law enforcement agency, or sheriff's department by electronic, computerized, or other similar means accessible to the post, agency, or sheriff's department." MCL 28.728(7). The database must be searchable "by name, village, city, township, and county designation, zip code, and geographical area" as well as by the name and campus location of an institution of higher education. MCL 28.728(6)-(7).

C. Organization of Law Enforcement Database

"The compilation of individuals must be indexed alphabetically by village, city, township, and county, numerically by zip code area, and geographically as determined appropriate by the department." MCL 28.728(5).

D. Removing Individuals from the Database

"If the department determines that an individual has completed his or her registration period, including a registration period reduced by law under 2011 PA 18, or that he or she otherwise is no longer required to register under [the SORA], the department shall remove the individual's registration information from . . . the law enforcement database . . . within 7 days after making that determination." MCL 28.728(9).

E. Violations Set Aside or Expunged

"If an individual required to be registered under [the SORA] presents an order to the department or the appropriate registering authority that the conviction or adjudication for which the individual is required to be registered under [the SORA] has been set aside under . . . MCL 780.621 to [MCL] 780.624, or has been otherwise expunged, his or her registration under [the SORA] must be discontinued. If this subsection applies, the department shall remove the individual from the law enforcement database . . . maintained under [MCL 28.728]."[1] MCL 28.725(16).

[1] See Chapter 8, Part IV for more information on setting aside or expunging convictions.

9.17 Public Internet Website

Separate from the law enforcement database in MCL 28.728(1), the department of state police must also maintain a public internet website to implement MCL 28.730(2) and MCL 28.730(3).[1] MCL 28.728(2). "The department shall make the public internet website available to the public by electronic, computerized, or other similar means accessible to the public." MCL 28.728(7).

A. Information Required on the Public Internet Website

With the exception of the individuals described in MCL 28.728(4),[2] all of the following information for each individual registered under the SORA must be contained in the public website:

- Legal name and any other names by which the individual is or has been known, including any aliases, nicknames, and ethnic or tribal names. MCL 28.728(2)(a).
- Date of birth. MCL 28.728(2)(b).
- Address of the individual's residence. MCL 28.728(2)(c). If the individual does not have a residential address, the public internet website must identify the village, city, or township the individual uses in lieu of a residence. *Id*.
- Address of each of the individual's employers. MCL 28.728(2)(d). If the individual works at a location or address that is different from the employer's address, the public internet website must contain that address or location. *Id*.
- Address of the school the individual attends and address of any school the individual plans to attend at which he or she has been accepted as a student. MCL 28.728(2)(e).
- Description and license plate number of any vehicle owned or operated by the individual. MCL 28.728(2)(f).
- Brief summary of the individual's conviction(s) for listed offenses without regard to when the conviction(s) occurred. MCL 28.728(2)(g).

---

[1] MCL 28.730(2) requires a state police post, a local law enforcement agency, or a sheriff's department to make the information on the public internet website available for public inspection during regular business hours.

[2] MCL 28.728(4) lists individuals whose information must not be included on the public internet website. See Section 9.17(C) for a description of these individuals.

- Complete description of the individual's physical appearance. MCL 28.728(2)(h).

- Photograph of the individual as required by MCL 28.725a. MCL 28.728(2)(i). The department of state police must use a individual's arrest photograph or department of corrections (DOC) photograph until the photograph required under MCL 28.725a is acquired and becomes available. *Id*.

- Language of the statutory provision that defines the offense requiring the individual's registration. MCL 28.728(2)(j).

- Status of the individual's registration. MCL 28.728(2)(k).

B. Information That Must Not Appear on the Public Internet Website

The following information must not be available on the public internet website:

- Identity of any victim(s) of the offense. MCL 28.728(3)(a).

- Individual's Social Security number. MCL 28.728(3)(b).

- Arrest(s) not resulting in a conviction. MCL 28.728(3)(c).

- Numbers of any travel or immigration documents. MCL 28.728(3)(d).

- Individual's classification as a tier I, tier II, or tier III offender. MCL 28.728(3)(e).

- Numbers of the individual's driver's license or state personal identification card. MCL 28.728(3)(f).

C. Individuals That Must Not Be Included on the Public Internet Website

The following individuals must not be included on the public internet website:

- "An individual registered solely because he or she had 1 or more dispositions for a listed offense entered under . . . MCL 712A.18, in a case that was not designated as a case in which the individual was to be tried in the same manner as an adult under . . . MCL 712A.2d." MCL 28.728(4)(a).

- "An individual registered solely because he or she was the subject of an order of disposition or other adjudication in a juvenile matter in another state or country." MCL 28.728(4)(b).

- An individual registered solely for a single tier I offense, with the exception of an individual convicted of any of the following:

  - MCL 750.145c(4) (knowing possession of, search for, or access to, child sexually abusive material). MCL 28.728(4)(c)(*i*).

  - MCL 750.335a(2)(b) (indecent exposure), if a victim is a minor. MCL 28.728(4)(c)(*ii*).

  - MCL 750.349b (unlawful imprisonment), if the victim is a minor. MCL 28.728(4)(c)(*iii*).[1]

  - MCL 750.539j (invasion of privacy), if a victim is a minor.MCL 28.728(4)(c)(*iv*).

  - An offense substantially similar to one listed in MCL 28.728(4)(*i*)-(*iv*) under a law specifically described in 42 USC 16911,[2] or under a law of any state, any country, or under tribal or military law. MCL 28.728(4)(c)(*v*).

D. Organization of Public Internet Website

"The compilation of individuals [on the public internet website] must be indexed alphabetically by village, city, township, and county, numerically by zip code area, and geographically as determined appropriate by the department." MCL 28.728(5).

E. Availability of Information on Public Internet Website

A registering authority must make available for public inspection during regular business hours information from the public internet website listed in MCL 28.728(2) for the designated areas, in whole or in part, within the registering authority's jurisdiction. MCL 28.730(2). The registering authority is not obligated to provide a

[1] In *People v Lymon*, ___ Mich ___, ___ (2024), the Michigan Supreme Court "conclude[d] that the imposition of the [2021 Sexual Offenders Registration Act] on non-sexual offenders like defendant [who was convicted of unlawful imprisonment of a minor] constitutes cruel or unusual punishment under the Michigan Constitution." The *Lymon* Court affirmed the Court of Appeals judgment that "offenders whose crimes lacked a sexual component are entitled to removal from the sex-offender registry." *Id.* at ___. See also Section 3.15, Section 3.21, Section 3.25, and Section 9.1.

[2] This federal provision was transferred and renumbered as 34 US 20911.

member of the public with a copy of the information. *Id*. The registering authority must make the public internet website available to the public by electronic, computerized, or other accessible means. MCL 28.728(7). The website must be searchable "by name, village, city, township, and county designation, zip code, and geographical area" as well as by the name and campus location of an institution of higher education. MCL 28.728(6)-(7).

F. Updating the Public Internet Website

The public internet website must be updated by the department of state police with new registrations, deleted registrations, and changes of address, "at the same time those changes are made to the law enforcement database described in [MCL 28.728(1)]." MCL 28.728(6).

G. Notification of Changes in Specific Registrations to Subscribers Who Receive Such Notifications

Members of the public may subscribe to receive electronic or computerized notification of a change to the registration information of an individual appearing on the public internet website. MCL 28.730(3). The department of state police must notify a subscriber whenever a specific offender appearing on the public internet website initially registers under the SORA, or when the offender changes his or her registration to a location within the area or geographic radius designated by the subscriber. *Id*.

H. Removing Individuals from the Public Internet Website

"If the department determines that an individual has completed his or her registration period, including a registration period reduced by law under 2011 PA 18, or that he or she otherwise is no longer required to register under [the SORA], the department shall remove the individual's registration information from . . . the public internet website within 7 days after making that determination." MCL 28.728(9).

I. Violations Set Aside or Expunged

"If an individual required to be registered under [the SORA] presents an order to the department or the appropriate registering authority that the conviction or adjudication for which the individual is required to be registered under [the SORA] has been set aside under . . . MCL 780.621 to [MCL] 780.624, or has been otherwise expunged, his or her registration under [the SORA] must be discontinued. If this subsection applies, the department shall

remove the individual from . . . the public internet website maintained under [MCL 28.728]."[1] MCL 28.725(16).

J. Constitutional Issues

"If a court determines that the public availability under [MCL 28.730] of any information concerning individuals registered under [the SORA] violates the constitution of the United States or this state, the department shall revise the public internet website described in [MCL 28.728(2)] so that it does not contain that information." MCL 28.728(8).

9.18 General Public Notification and Computerized Database Requirements

A. Confidentiality

"Except as provided in [the SORA], a registration or report is confidential and information from that registration or report shall not be open to inspection except for law enforcement purposes. The registration or report and all included materials and information are exempt from disclosure under . . . the freedom of information act . . . . MCL 15.243." MCL 28.730(1).

B. Unauthorized Disclosure of Information[2]

Unless otherwise permitted under the SORA, any person, with the exception of the registrant, who has knowledge of a registration or report under the SORA, must not disclose the information. MCL 28.730(4). A person "who divulges, uses, or publishes nonpublic information concerning the registration or report in violation of [the SORA] is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both." *Id*.

If an individual's registration or report is revealed in violation of the SORA, that individual may bring a civil cause of action for treble damages against the responsible party. MCL 28.730(5). See *Redmond v Heller*, 332 Mich App 415, 436-437 (2020) (plaintiff was permitted to assert a claim under MCL 28.730(5) after defendant posted nonpublic information about an offender registered under the SORA).

---

[1] See Part IV for more information on setting aside or expunging convictions.

[2] See M Crim JI 20.39h, *Sex Offenders Registration Act Violations – Registering Agent Offenses*.

> "[MCL 28.730(4) and MCL 28.730(5)] do not apply to the public internet website described in [MCL 28.728(2)] or information from that public internet website that is provided or made available under [MCL 28.728(2) or MCL 28.728(3)]."MCL 28.730(6).

[See next page for a table containing a history of listed offenses.]

History of *Listed Offenses*[1]

PA 295 */1/1995* enses in MCL (d)(*i*)-(*vi*).	**1999 PA 85** *eff. 9/1/1999* Listed offenses in MCL 28.722(d)(*i*)-(*xiii*).	**2005 PA 301** *eff. 2/1/2006* Listed offenses in MCL 28.722(e)(*i*)-(*xiv*).	**2011 PA 17** *eff. 7/1/2011* Defining *listed offenses* as tier I, MCL 28.722(s)(*i*)-(*ix*), tier II, MCL 28.722(u)(*i*)-(*xii*), or tier III offenses, MCL 28.722(w)(*i*)-(*viii*). See MCL 28.722(k).	**2014 PA 328** *eff. 1/14/2015* Listed offenses are tier I, MCL 28.722(s)(*i*)-(*x*), tier II, MCL 28.722(u)(*i*)-(*xiii*), or tier I offenses, MCL 28.722(w)(*i*)-(*viii*).
750.145a	MCL 750.145a	MCL 750.145a	MCL 750.145a - tier II.	MCL 750.145a - tier II.
50.145b	MCL 750.145b	MCL 750.145b	MCL 750.145b - tier II.	MCL 750.145b - tier II.
750.145c	MCL 750.145c	MCL 750.145c	MCL 750.145c(4) - tier I. See Section 3.5. MCL 750.145c(2) - tier II. See Section 3.3. MCL 750.145c(3) - tier II. See Section 3.4.	MCL 750.145c(4) - tier I. See Section 3.5. MCL 750.145c(2) - tier II. See Section 3.3. MCL 750.145c(3) - tier II. See Section 3.4.
ent violation of ation of: MCL 67(1)(f), 50.335a, ponding local nance.	3rd/subsequent violation of any combination of: MCL 750.167(1)(f), MCL 750.335a, or a corresponding local ordinance.	3rd/subsequent violation of any combination of: MCL 750.167(1)(f), MCL 750.335a(2)(a), or a corresponding local ordinance.	eliminated MCL 750.167(1)(f) MCL 750.335a(2)(b), if victim is a minor - tier I.	MCL 750.335a(2)(b), if victim is a minor tier I.
750.455	MCL 750.455	MCL 750.455	MCL 750.455 - tier II.	MCL 750.455 - tier II.
50.520b	MCL 750.520b	MCL 750.520b	MCL 750.520b with exceptions - tier III. See Section 2.2 and Section 9.4(B).	MCL 750.520b with exceptions - tier III. See Section 2.2 and Section 9.4(B).
750.520c	MCL 750.520c	MCL 750.520c	MCL 750.520c against a victim age 13 or older but under age 18 - tier II. See Section 2.3. MCL 750.520c against a victim age 18 or older - tier II. See Section 2.3. MCL 750.520c against a victim under age 13 - tier III. See Section 2.3.	MCL 750.520c against a victim age 13 o older but under age 18 - tier II. See Section 2.3. MCL 750.520c against a victim age 18 o older - tier II. See Section 2.3. MCL 750.520c against a victim under age - tier III. See Section 2.3.
50.520d	MCL 750.520d	MCL 750.520d	MCL 750.520d with exceptions - tier III. See Section 2.4and Section 9.4(B).	MCL 750.520d with exceptions - tier III. See Section 2.4 and Section 9.4(B).
750.520e	MCL 750.520e	MCL 750.520e	MCL 750.520e if victim is age 18 or older - tier I. See Section 2.5. MCL 750.520e against victim age 13 or older but under age 18 - tier II. See Section 2.5. MCL 750.520e by actor age 17 or older against a victim under age 13 - tier III. See Section 2.5.	MCL 750.520e if victim is age 18 or older tier I. See Section 2.5. MCL 750.520e against victim age 13 or old but under age 18 - tier II. See Section 2.5. MCL 750.520e by actor age 17 or older against a victim under age 13 - tier III. See Section 2.5.

1994 PA 295 *eff. 10/1/1995* Listed offenses in MCL 28.722(d)(*i*)-(*vi*).	**1999 PA 85** *eff. 9/1/1999* Listed offenses in MCL 28.722(d)(*i*)-(*xiii*).	**2005 PA 301** *eff. 2/1/2006* Listed offenses in MCL 28.722(e)(*i*)-(*xiv*).	**2011 PA 17** *eff. 7/1/2011* Defining *listed offenses* as tier I, MCL 28.722(s)(*i*)-(*ix*), tier II, MCL 28.722(u)(*i*)-(*xii*), or tier III offenses, MCL 28.722(w)(*i*)-(*viii*). See MCL 28.722(k).	**2014 PA 328** *eff. 1/14/2015* Listed offenses are tier I, MCL 2 (*x*), tier II, MCL 28.722(u)(*i*)-(*xii* offenses, MCL 28.722(w)(*i*
MCL 750.520g	MCL 750.520g	MCL 750.520g	MCL 750.520g(2) against a victim age 18 or older - tier I. See Section 2.7. MCL 750.520g(2) against a victim age 13 or older but under age 18 - tier II. See Section 2.7. MCL 750.520g(1) with exceptions - tier III. See Section 2.6 and Section 9.4(B). MCL 750.520g(2) against victim under age 13 - tier III. See Section 2.7.	MCL 750.520g(2) against a victi older - tier I. See Section MCL 750.520g(2) against a victi older but under age 18 - t See Section 2.7. MCL 750.520g(1) with exceptio See Section 2.6 and Section MCL 750.520g(2) against victim 13 - tier III. See Section 2.7.
attempt/conspiracy to commit offense listed.	attempt/conspiracy to commit offense listed.	attempt/conspiracy to commit offense listed.	attempt/conspiracy to commit tier I offense. attempt/conspiracy to commit tier II offense. attempt/conspiracy to commit tier III offense.	attempt/conspiracy to co tier I offense. attempt/conspiracy to co tier II offense. attempt/conspiracy to co tier III offense.
offense substantially similar to offense listed der law of US, any state, or any country.	offense substantially similar to offense listed under law of US, any state, or any country, or under tribal or military law.	offense substantially similar to offense listed under law of US, any state, or any country, or under tribal or military law.	offense substantially similar to tier I/tier II/ tier III offense listed under 42 USC 16911,[1] or law of any state, or any country, or under tribal or military law - tier I, tier II, tier III.	offense substantially similar to t tier III offense listed under 42 U or law of any state, or any count tribal or military law - tier I, tie
	MCL 750.158 if victim under age 18.	MCL 750.158 if victim under age 18.	MCL 750.158 against a minor with exceptions - tier II. See Section 3.14and Section 9.4(A).	MCL 750.158 against a m with exceptions - tier See Section 3.14 and Sectio
	except for juvenile disposition or adjudication, MCL 750.338, MCL 750.338a, MCL 750.338b, if victim under age 18.	except for juvenile disposition or adjudication, MCL 750.338, MCL 750.338a, MCL 750.338b, if victim under age 18.	MCL 750.338, MCL 750.338a, and MCL 750.338b against a victim age 13 or older but less than age 18 with exceptions - tier II. See Sections 3.10, 3.11, 3.12 and Section 9.4(A). MCL 750.338, MCL 750.338a, and MCL 750.338b against a victim under age 13 - tier III. See Sections 3.10, 3.11, 3.12.	MCL 750.338, MCL 750.338a, 750.338b against a victim age 1 but less than age 18 with exceptions See Sections 3.10, 3.11, 3. Section 9.4(A). MCL 750.338, MCL 750.338a, 750.338b against a victim under age 13 See Sections 3.10, 3.11,

[1]Effective October 1, 2002, 2002 PA 542 amended MCL 28.722 by relettering the provision in that statute that contained the listed offenses at that time. After that amendment, the listed offenses appeared in MCL 28.722(e) until the statute was again amended (more substantively) and relettered by 2011 PA 17. Subsequently, effective March 24, 2021, 2020 PA 295 amended MCL 28.722 by relettering the provisions in MCL 28.722 that contain the offenses characterized as tier I, tier II, and tier III offenses. No substantive changes were made to the offenses listed in those provisions. Tier I offenses now appear in MCL 28.722(r), tier II offenses now appear in MCL 28.722(t), and tier III offenses now appear in MCL 28.722(v).

1994 PA 295 *eff. 10/1/1995* Listed offenses in MCL 28.722(d)(*i*)-(*vi*).	**1999 PA 85** *eff. 9/1/1999* Listed offenses in MCL 28.722(d)(*i*)-(*xiii*).	**2005 PA 301** *eff. 2/1/2006* Listed offenses in MCL 28.722(e)(*i*)-(*xiv*).	**2011 PA 17** *eff. 7/1/2011* Defining *listed offenses* as tier I, MCL 28.722(s)(*i*)-(*ix*), tier II, MCL 28.722(u)(*i*)-(*xii*), or tier III offenses, MCL 28.722(w)(*i*)-(*viii*). See MCL 28.722(k).	**2014 PA 328** *eff. 1/14/2015* Listed offenses are tier I, MCL 28.722(s)(*i*)-(*x*), tier II, MCL 28.722(u)(*i*)-(*xiii*), or tier III offenses, MCL 28.722(w)(*i*)-(*viii*).
	MCL 750.349 if victim under age 18.	MCL 750.349 if victim under age 18.	MCL 750.349 if victim is a minor - tier III. See Section 3.21.	MCL 750.349 if victim is a minor - tier III. See Section 3.21.
	MCL 750.350	MCL 750.350	MCL 750.350 - tier III.	MCL 750.350 - tier III.
	MCL 750.448 if victim under age 18.	MCL 750.448 if victim under age 18.	MCL 750.448 if victim is a minor - tier II. See Section 3.7.	MCL 750.448 if victim is a minor - tier II. See Section 3.7.
	other violation of MI law or local ordinance of municipality that by its nature constitutes a sexual offense against a victim under age 18.	other violation of MI law or local ordinance of municipality that by its nature constitutes a sexual offense against a victim under age 18.	other violation of MI law or local ordinance of municipality that by its nature constitutes a sexual offense against a minor and offense is not a tier II or tier III offense - tier I.	other violation of MI law or local ordinance of municipality that by its nature constitutes a sexual offense against a minor and offense is not a tier II or tier III offense - tier I.
	offense committed by a person who was a sexually delinquent person under MCL 750.10a at the time.	offense committed by a person who was a sexually delinquent person under MCL 750.10a at the time.	offense committed by a person who was a sexually delinquent person under MCL 750.10a at the time - tier I.	offense committed by a person who was a sexually delinquent person under MCL 750.10a at the time - tier I.
		MCL 750.335a(2)(b) if prior conviction for MCL 750.335a.	MCL 750.335a(2)(b) if victim is a minor - tier I. See Section 3.11.	MCL 750.335a(2)(b) if victim is a minor - tier I. See Section 3.11.
			MCL 750.349b if victim is a minor - tier I. See Section 3.25.	MCL 750.349b if victim is a minor - tier I. See Section 3.25.
			MCL 750.539j if victim is a minor - tier I. See Section 3.26.	MCL 750.539j if victim is a minor - tier I. See Section 3.26.
			MCL 750.145d(1)(a) unless violation arose from violation of MCL 750.157c - tier II. See Section 3.20.	MCL 750.145d(1)(a) unless violation arose from violation of MCL 750.157c - tier II. See Section 3.20.

1994 PA 295 *eff. 10/1/1995* Listed offenses in MCL 28.722(d)(*i*)-(*vi*).	**1999 PA 85** *eff. 9/1/1999* Listed offenses in MCL 28.722(d)(*i*)-(*xiii*).	**2005 PA 301** *eff. 2/1/2006* Listed offenses in MCL 28.722(e)(*i*)-(*xiv*).	**2011 PA 17** *eff. 7/1/2011* Defining *listed offenses* as tier I, MCL 28.722(s)(*i*)-(*ix*), tier II, MCL 28.722(u)(*i*)-(*xii*), or tier III offenses, MCL 28.722(w)(*i*)-(*viii*). See MCL 28.722(k).	**2014 PA 328** *eff. 1/14/2015* Listed offenses are tier I, MCL 28.722(s)(*i*)-(*x*), tier II, MCL 28.722(u)(*i*)-(*xiii*), or tier III offenses, MCL 28.722(w)(*i*)-(*viii*).
				MCL 750.449a(2) - tier I. See Section 3.6.
				MCL 750.462e(a) - tier II. See Section 3.6.

1. This federal provision was transferred and renumbered as 34 US 20911.
2. This federal provision was transferred and renumbered as 34 US 20911.

Glossary

Note: Caselaw relevant to the definition of a word or phrase may follow the definition of those words and phrases in the glossary. Not every word or phrase defined in the glossary is accompanied by caselaw.

A

Access

- For purposes of the MCL 750.145c, *access* is "to intentionally cause to be viewed by or transmitted to a person." MCL 750.145c(1)(a).

Accredited laboratory

- For purposes of the Sexual Assault Kit Evidence Submission Act, MCL 752.931 *et seq.*, *accredited laboratory* means "a DNA laboratory that has received formal recognition that it meets or exceeds a list of standards, including the FBI director's quality assurance standards, to perform specific tests, established by a nonprofit professional association of persons actively involved in forensic science that is nationally recognized within the forensic community in accordance with the provisions of the federal DNA identification act, 42 USC 14132, or subsequent laws." MCL 752.932(a).

Activities of daily living

- For purposes of MCL 791.235, *activities of daily living* are "basic personal care and everyday activities as described in 42 CFR 441.505, including, but not limited to, tasks such as eating, toileting, grooming, dressing, bathing, and transferring from 1 physical position to another, including, but not limited to, moving from a reclining position to a sitting or standing position." MCL 791.235(22)(a).

Actor

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *actor* is "a person accused of criminal sexual conduct." MCL 750.520a(a).

Adjudication

- For purposes of MCL 600.5805 and MCL 600.5851b, *adjudication* is "an adjudication of 1 or more offenses under . . . MCL 712A.1 to [MCL] 712A.32." MCL 600.5805(16)(a); MCL 600.5851b(5)(a).

Adultery

- For purposes of the Michigan Penal Code, Adultery Chapter (MCL 750.30–MCL 750.32), *adultery* is "the sexual intercourse of 2 persons, either of whom is married to a third person." MCL 750.29.

Affinity

- For purposes of this benchbook, a*ffinity* describes the relationships among individuals that arise from the marriage of specific individuals, e.g., a woman married to a man is related by affinity to her husband's mother and father as a "daughter-in-law." See *People v Moss*, 333 Mich App 515, 524-526 (2020), rev'd on other grounds *People v Moss*, 509 Mich 253, 257 n 1 (2022).

Affirmative defense

- For purposes of this benchbook, an *affirmative defense* is a defense "'that admits the doing of the act charged, but seeks to justify, excuse, [or] mitigate it[.]'" *People v Sorscher*, 151 Mich App 122, 132 (1986), quoting 21 Am Jur 2d, Criminal Law, § 183, p 338.

Aggravated stalking

- For purposes of MCL 750.411i, *aggravated stalking* is a stalking violation that "involves any of the following circumstances:

  (a) At least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order or at least 1 of the actions is in violation of an injunction or preliminary injunction.

  (b) At least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

  (c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's

family, or another individual living in the same household as the victim.

(d) The individual has been previously convicted of a violation of this section or [MCL 750.411h]." MCL 750.411i(2).

Alcoholic liquor

- For purposes of MCL 768.37, *alcoholic liquor* "means that term as defined in . . . MCL 436.1105." MCL 768.37(3)(a).

Appears to include a child

- For purposes of MCL 750.145c, *appears to include a child* is "that the depiction appears to include, or conveys the impression that it includes, a person who is less than 18 years of age, and the depiction meets either of the following conditions:

  (*i*) It was created using a depiction of any part of an actual person under the age of 18.

  (*ii*) It was not created using a depiction of any part of an actual person under the age of 18, but all of the following apply to that depiction:

    (A) The average individual, applying contemporary community standards, would find the depiction, taken as a whole, appeals to the prurient interest.

    (B) The reasonable person would find the depiction, taken as a whole, lacks serious literary, artistic, political, or scientific value.

    (C) The depiction depicts or describes a listed sexual act in a patently offensive way." MCL 750.145c(1)(b).

Assaultive crime

- For purposes of MCL 765.6b(6) and MCL 770.9a, and as relevant to the offenses discussed in this benchbook, *assaultive crime* is an offense against a person for any of the offenses listed in MCL 770.9a(3):

  Stalking an individual under the age of 18 when the defendant is five or more years older than the victim, MCL 750.411h(2)(b).[1]

  Aggravated stalking, MCL 750.411i,

[1] MCL 750.411h(3) is listed in MCL 770.9a(3) as an assaultive crime, but MCL 750.411h(3) describes the penalties for violating MCL 750.411h.

CSC-I, MCL 750.520b,

CSC-II, MCL 750.520c,

CSC-III, MCL 750.520d,

CSC-IV, MCL 750.520e, or

Assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 770.9a(3); MCL 765.6b(6).

- For purposes of the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq.*, *assaultive crime* is any of the following:

  (1) a violation of MCL 770.9a;

  (2) a violation of MCL 750.81 to MCL 750.90g;

  (3) a violation of MCL 750.110a, MCL 750.136b, MCL 750.234a, MCL 750.234b, MCL 750.234c, MCL 750.349b, MCL 750.411h(2)(a), or any other violent felony; or

  (4) a violation of another state's law or of the law of a political subdivision of this state or another state that substantially corresponds to a violation listed in MCL 780.621(4)(a)(*i*)-(*iii*). MCL 780.621(4)(a)(*i*)-(*iv*).

- For purposes of MCL 600.2163a, *assaultive crime* means that term as it is defined in MCL 770.9a. MCL 600.2163a(2)(b)(*ii*).

B

Bodily injury

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq.*), *bodily injury* "means any physical injury." MCL 750.462a(a).

C

Character for truthfulness

- For purposes of this benchbook and MRE 608(a), there is a "distinction between credibility and character for truthfulness[.]" *People v Lukity*, 460 Mich 484, 490 (1999). "*Character for truthfulness* is a specific aspect of *credibility*." *Id.*

(emphasis added). "MRE 608(a) states that 'credibility' may be attacked or supported by opinion or reputation evidence" as long as the evidence admitted is limited to *character for truthfulness* or untruthfulness. *Lukity*, 460 Mich at 490; MRE 608(a). The admission of evidence in support of a witness's credibility is allowed only if a party has attacked the witness's *character for truthfulness* with opinion or reputation evidence. *Lukity*, 460 Mich at 490; MRE 608(a).

Child

- For purposes of MCL 750.145c, *child* is "a person who is less than 18 years of age,[2] subject to the affirmative defense created in [MCL 750.145c(7)] regarding persons emancipated by operation of law." MCL 750.145c(1)(c).

Child care organization

- For purposes of MCL 750.520b–MCL 750.520e, *child care organization* means that term as defined in MCL 722.111. See MCL 750.520b(1)(b)(*vi*); MCL 750.520c(1)(b)(*vi*); MCL 750.520d(1)(g); MCL 750.520e(1)(h). MCL 722.111(1)(b) defines that term as "a governmental or nongovernmental organization having as its principal function receiving minor children for care, maintenance, training, and supervision, notwithstanding that educational instruction may be given. Child care organization includes organizations commonly described as child caring institutions, child placing agencies, children's camps, children's campsites, children's therapeutic group homes, child care centers, day care centers, nursery schools, parent cooperative preschools, foster homes, group homes, or child care homes. Child care organization does not include a governmental or nongovernmental organization that does either of the following:

  (*i*) Provides care exclusively to minors who have been emancipated by court order under [MCL 722.4(3)].

  (*ii*) Provides care exclusively to persons who are 18 years of age or older and to minors who have been emancipated by court order under [MCL 722.4(3)], at the same location."[3]

Child sexually abusive activity

- For purposes of MCL 750.145c, *child sexually abusive activity* is "a child engaging in a listed sexual act." MCL 750.145c(1)(n).

---

[2] For a discussion on the calculation of age, see Section 2.1(D).

[3] For a discussion on the calculation of age, see Section 2.1(D).

Child sexually abusive material

- For purposes of MCL 750.145c, *child sexually abusive material* is "any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy, or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording." MCL 750.145c(1)(o).

Caselaw discussion of *child sexually abusive material*: electronic visual image. "'Electronic visual image' is not defined in [MCL 750.145c(1)]; however, . . . the definition of image includes a 'physical likeness or representation of a person, animal, or thing, photographed, painted, sculptured, or otherwise made visible.'" *People v Riggs*, 237 Mich App 584, 590 (1999). MCL 750.145c(1) "does not require that the children actually be engaging in sexual activity at the time the activity is memorialized on tape. Rather, the statute prohibits the making of a visual image that is a likeness or representation of a child engaging in on of the listed sexual acts." *Riggs*, 237 Mich App at 590-591.

Clergy/member of the clergy

- For purposes of the Child Protection Law, MCL 722.621 *et seq*., *member of the clergy* is "a priest, minister, rabbi, Christian science practitioner, spiritual leader, or other religious practitioner, or similar functionary of a church, temple, spiritual community, or recognized religious body, denomination, or organization." MCL 722.622(z).

Coercion

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq*.), *coercion* includes, but is not limited to any of the following:

  > "(*i*) Threatening to harm or physically restrain any individual or the creation of any scheme, plan, or pattern intended to cause an individual to believe that failure to perform an act would result in psychological, reputational, or financial harm to, or physical restraint of, any individual.

> (*ii*) Abusing or threatening abuse of the legal system, including threats of arrest or deportation without regard to whether the individual being threatened is subject to arrest or deportation under the laws of this state or the United States.
>
> (*iii*) Knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document or any other actual or purported government identification document from any individual without regard to whether the documents are fraudulent or fraudulently obtained.
>
> (*iv*) Facilitating or controlling an individual's access to a controlled substance, as that term is defined in . . . the public health code, 1978 PA 368, MCL 333.7104, other than for a legitimate medical purpose." MCL 750.462a(b)."

Commercial film or photographic print processor

- For purposes of MCL 750.145c, *commercial film* or *photographic print processor* is "a person or his or her employee who, for compensation, develops exposed photographic film into movie films, negatives, slides, or prints; makes prints from negatives or slides; or duplicates movie films or videotapes." MCL 750.145c(1)(d).

Commercial sexual activity

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq.*), *commercial sexual activity* "means 1 or more of the following for which anything of value is given or received by any person:

  > (*i*) An act of sexual penetration or sexual contact as those terms are defined in [MCL 750.]520a.
  >
  > (*ii*) Any conduct prohibited under [MCL 750.145c].[4]
  >
  > (*iii*) Any sexually explicit performance as that term is defined in . . .MCL 722.673." MCL 750.462a(c).

Computer

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit

[4] See Chapter 3 for more information about *child sexually abusive material*.

Matter (MCL 722.671 *et seq.*), *computer* is "any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network." MCL 722.673(a).

- For purposes of MCL 750.145d, *computer* "means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network. Computer includes a computer game device or a cellular telephone, personal digital assistant (PDA), or other handheld device." MCL 750.145d(9)(a).

Computer network

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*) and MCL 750.145d, *computer network* is "the interconnection of hardwire or wireless communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers." MCL 722.673(b); MCL 750.145d(9)(b).

Computer program

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*) and MCL 750.145d, *computer* is "a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network." MCL 722.673(c); MCL 750.145d(9)(c).

Computer system

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*) and MCL 750.145d, *computer*

system is "a set of related, connected or unconnected, computer equipment, device, software, or hardware." MCL 722.673(d); MCL 750.145d(9)(d).

Computer technician

- For purposes of MCL 750.145c, *computer technician* is "a person who installs, maintains, troubleshoots, upgrades, or repairs computer hardware, software, personal computer networks, or peripheral equipment." MCL 750.145c(1)(e).

Confidential communication

- For purposes of MCL 600.2157a, *confidential communication* is "information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim." MCL 600.2157a(1)(a).

Consumed

- For purposes of MCL 768.37, *consumed* "means to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." MCL 768.37(3)(b).

Contemporary community standards

- For purposes of MCL 750.145c, *contemporary community standards* is "the customary limits of candor and decency in this state at or near the time of the alleged violation of this section." MCL 750.145c(1)(f).

Controlled substance

- For purposes of MCL 768.37, *controlled substance* "means that term as defined in . . . MCL 333.7104." MCL 768.37(3)(c). MCL 333.7104(3) defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 [MCL 333.7211 to MCL 333.7220]."

Convicted

- For purposes of MCL 600.2950a, *convicted* "means 1 of the following:

(*i*) The subject of a judgment of conviction or a probation order entered in a court that has jurisdiction over criminal offenses, including a tribal court or a military court.

(*ii*) Assigned to youthful trainee status under . . . MCL 762.11 to [MCL] 762.15, if the individual's status of youthful trainee is revoked and an adjudication of guilt is entered.

(*iii*) The subject of an order of disposition entered under . . . MCL 712A.18, that is open to the general public under . . . MCL 712A.28."

(*iv*) The subject of an order of disposition or other adjudication in a juvenile matter in another state or country." MCL 600.2950a(31)(a).

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, *convicted* is one of the following:

"(*i*) Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses, including, but not limited to, a tribal court or a military court. Convicted does not include a conviction that was subsequently set aside under [MCL 780.621 to MCL 780.624], or otherwise expunged.

(*ii*) Except as otherwise provided in this subparagraph, being assigned to youthful trainee status under [MCL 762.11 to MCL 762.15], before October 1, 2004. An individual who is assigned to and successfully completes a term of supervision under [MCL 762.11 to MCL 762.15], is not convicted for purposes of this act. This subparagraph does not apply if a petition was granted under section 8c at any time allowing the individual to discontinue registration under this act, including a reduced registration period that extends to or past July 1, 2011, regardless of the tier designation that would apply on and after that date.

(*iii*) Having an order of disposition entered under [MCL 712A.18], that is open to the general public under [MCL 712A.28], if both of the following apply:

(A) The individual was 14 years of age or older at the time of the offense.

(B) The order of disposition is for the commission of an offense that would classify the individual as a tier III offender.

(*iv*) Having an order of disposition or other adjudication in a juvenile matter in another state or country if both of the following apply:

(A) The individual is 14 years of age or older at the time of the offense.

(B) The order of disposition or other adjudication is for the commission of an offense that would classify the individual as a tier III offender." MCL 28.722(a).

Courtroom support dog

- For purposes of MCL 600.2163a, *courtroom support dog* is "a dog that has been trained and evaluated as a support dog pursuant to the Assistance Dogs International Standards for guide or service work and that is repurposed and appropriate for providing emotional support to children and adults within the court or legal system or that has performed the duties of a courtroom support dog prior to September 27, 2018." MCL 600.2163a(1)(a).

Credibility

- For purposes of this benchbook and MRE 608(a), *credibility* means "'[w]orthiness of belief; that quality in a witness which renders his evidence worthy of belief.'" *People v Lukity*, 460 Mich 484, 490 (1999) (alteration in original), quoting *Black's Law Dictionary* (6th ed). *Credibility* and *character for truthfulness* "are not synonymous; rather "*character for truthfulness* is a specific aspect of *credibility*." *Lukity*, 460 Mich at 490 (emphasis added). "MRE 608(a) states that 'credibility' may be attacked or supported by opinion or reputation evidence" as long as the evidence admitted is limited to *character for truthfulness* or untruthfulness. *Lukity*, 460 Mich at 490; MRE 608(a). The admission of evidence in support of a witness's credibility is allowed only if a party has attacked the witness's *character for truthfulness* with opinion or reputation evidence. *Lukity*, 460 Mich at 490; MRE 608(a). Specifically, MRE 608(a) states:

"A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked."

Crime

- For purposes of the Crime Victim's Rights Act, Article 1 and MCL 780.811(1)(a)(*xxiii*), *crime* "means a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony." MCL 780.752(1)(b); MCL 780.811(1)(a)(*xxiii*).

Criminal sexual conduct

- For purposes of MCL 600.5805 and MCL 600.5851b, *criminal sexual conduct* is "conduct prohibited under . . . MCL 750.520b, [MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g]." MCL 600.5805(16)(b); MCL 600.5851b(5)(b).

D

Dangerous weapon

- For purposes of MCL 780.621b, *dangerous weapon* is "defined in . . . MCL 750.110a." MCL 780.621b(2). MCL 750.110a, defines *dangerous weapon* as "1 or more of the following:

  (*i*) A loaded or unloaded firearm, whether operable or inoperable.

  (*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

  (*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

  (*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*)." MCL 750.110a(1)(b).

Debt bondage

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq.*), *debt bondage* "includes, but is not limited to, the status or condition of a debt arising from a pledge by the debtor of his or her personal services or those of an individual under his or her control as a security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those

services are not specifically limited and defined." MCL 750.462a(d).

Deliver

- For purposes of MCL 333.7401b, *deliver* is "the actual, constructive, or attempted transfer from 1 person to another of gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone, whether or not there is an agency relationship." MCL 333.7401b(4)(b).

Department

- For purposes of Article 5 of the Public Health Code (MCL 333.5101 *et seq.*), *department* is "the department of health and human services." MCL 333.1104(5).

- For purposes of the Sexual Assault Kit Evidence Submission Act, *department* "means the department of state police, including its forensic science division." MCL 752.932(c).

- For purposes of the Sex Offenders Registration Act (SORA), *department* "means the department of state police." MCL 28.722(c).

Developmental disability

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *developmental disability* is "an impairment of general intellectual functioning or adaptive behavior that meets all of the following criteria:

  (*i*) It originated before the person became 18 years of age.[5]

  (*ii*) It has continued since its origination or can be expected to continue indefinitely.

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

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

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

    (B) Any other condition of a person that produces a similar impairment or requires treatment and services

[5] For a discussion on the calculation of age, see Section 2.1(D).

similar to those required for a person described in this subdivision." MCL 750.520a(b).

- For purposes of MCL 600.2163a, *developmental disability* "means that term as defined in . . . MCL 330.1100a, except that, for the purposes of implementing [MCL 600.2163a], developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment." MCL 600.2163a(1)(c). MCL 330.1100a(27) defines *developmental disability* as either of the following:

  "(a) If applied to an individual older than 5 years of age, a severe, chronic condition that meets all of the following requirements:

    (*i*) Is attributable to a mental or physical impairment or a combination of mental and physical impairments.

    (*ii*) Is manifested before the individual is 22 years old.

    (*iii*) Is likely to continue indefinitely.

    (*iv*) Results in substantial functional limitations in 3 or more of the following areas of major life activity:

      (A) Self-care.

      (B) Receptive and expressive language.

      (C) Learning.

      (D) Mobility.

      (E) Self-direction.

      (F) Capacity for independent living.

      (G) Economic self-sufficiency.

    (*v*) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

  (b) If applied to a minor from birth to 5 years of age, a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined in subdivision (a) if services are not provided." MCL 330.1100a(27).

Disseminate

- For purposes of MCL 750.145e, *disseminate* "means post, distribute, or publish on a computer device, computer network, website, or other electronic device or medium of communication." MCL 750.145e(5)(a).

DNA

- For purposes of MCL 767.24, *DNA* is "human deoxyribonucleic acid." MCL 767.24(5)(a).

DNA identification profile

- For purposes of MCL 750.520m, *DNA identification profile* means that term as defined in MCL 28.172. MCL 750.520m(9)(a). MCL 28.172(c) defines that term as "the results of the DNA identification profiling of a sample, including a paper, electronic, or digital record."

DNA identification profiling

- For purposes of MCL 750.520m, *DNA identification profiling* means that term as defined in MCL 28.172. MCL 750.520m(9)(a). MCL 28.172(d) defines that term as "a validated scientific method of analyzing components of deoxyribonucleic acid molecules in a biological specimen to determine a match or a nonmatch between a reference sample and an evidentiary sample."

Domestic or sexual violence service provider agency

- For purposes of MCL 776.21b, *domestic or sexual violence service provider agency* "means an agency that receives funding from the [Department of Health and Human Services] division of victim services to provide confidential supportive services to victims of domestic or sexual violence, receives a federal grant through the United States Department of Justice to provide confidential supportive services to victims of domestic or sexual violence, or is associated with an Indian tribe and is providing confidential supportive services to victims of domestic or sexual violence. MCL 776.21b(4)(b).

Domestic violence

- For purposes of the Domestic and Sexual Violence Act, MCL 400.1501 *et seq.*, MCL 600.2157a, and MCL 780.621, *domestic violence* "means the occurrence of any of the following acts by an individual that is not an act of self-defense:

"(*i*) Causing or attempting to cause physical or mental harm to a family or household member.

(*ii*) Placing a family or household member in fear of physical or mental harm.

(*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

(*iv*) Engaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 400.1501(d); MCL 600.2157a(1)(b); MCL 780.621(4)(b).

- For purposes of MCL 768.27b and MCL 768.27c, *domestic violence* or *offense involving domestic violence* is "an occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(6)(a); MCL 768.27c(5)(b).

E

Electronic monitoring

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *electronic monitoring* is that term as defined in MCL 791.285. See MCL 750.520a(c). MCL 791.285(3) defines that term as "a device by which, through global positioning system satellite or other means, an individual's movement and location are tracked and recorded."Electronic monitoring device

- For purposes of MCL 765.6b(6), *electronic monitoring device* is "any electronic device or instrument that is used to track the location of an individual or to monitor an individual's blood alcohol content, but does not include any technology that is implanted or violates the corporeal body of the individual." MCL 765.6b(6)(c).

- For purposes of the Holmes Youthful Trainee Act (MCL 762.11 to MCL 762.16), *electronic monitoring device* "includes any electronic device or instrument that is used to track the location of an individual, enforce a curfew, or detect the presence of alcohol in an individual's body." MCL 762.13(8).

Employer

- For purposes of MCL 28.727(1)(f), MCL 28.728(1)(f), and MCL 28.728(2)(d), *employer* "includes a contractor and any individual who has agreed to hire or contract with the individual for his or her services. Information under this subsection must include the address or location of employment if different from the address of the employer." MCL 28.727(1)(f); MCL 28.728(1)(f); MCL 28.728(2)(d). For purposes of MCL 28.727(1)(f), "[i]f the individual lacks a fixed employment location, the information obtained under this subdivision must include the general areas where the individual works and the normal travel routes taken by the individual in the course of his or her employment." MCL 28.727(1)(f).

Encourage

- As used in MCL 750.455, *encourage* "indicates a less active role [that] falls short of persuading." *People v Springs*, 101 Mich App 118, 127 (1980). *Persuade*, used with *induce*, *inveigle*, and *entice* in MCL 750.455, "all imply an active leading to a particular action." *Springs*, 101 Mich App at 127.

Enterprise

- For purposes of MCL 750.159f *et seq.*, *enterprise* "includes an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity[and] illicit as well as licit enterprises." MCL 750.159f(a).

Entice

- As used in MCL 750.455, *induce*, *inveigle*, *persuade*, and *entice*" all imply an active leading to a particular action." *People v Springs*, 101 Mich App 118, 127 (1980).

Erotic fondling

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq*.), *erotic fondling* is "touching a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, for the purpose of sexual gratification or stimulation." MCL 722.672(c).

- For purposes of MCL 750.145c, *erotic fondling* is "touching a person's clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved. Erotic fondling does not include physical contact, even if affectionate, that is not for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved." MCL 750.145c(1)(g).

Erotic nudity

- For purposes of MCL 750.145c, *erotic nudity* is "the lascivious exhibition of the genital, pubic, or rectal area of any person. As used in this subdivision, 'lascivious' means wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions." MCL 750.145c(1)(h).

Caselaw discussion of *erotic nudity*: MCL 750.145c(1)'s "definition of erotic nudity does not violate the First Amendment[of the United States Constitution]. The definition is narrowly drawn so that there is no infringement upon protected forms of free speech." *People v Riggs*, 237 Mich App 584, 595 (1999).

Exhibit

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq*.), *exhibit* is "to do 1 or more of the following:

  (*i*) Present a performance.

  (*ii*) Sell, give, or offer to agree to sell or give a ticket to a performance.

  (*iii*) Admit a minor to premises where a performance is being presented or is about to be presented." MCL 722.671(c).

Existing action

- For purposes of Subchapter 3.700 of the Michigan Court Rules and unless the context indicates otherwise, *existing action* "means an action in this court or any other court in which both the petitioner and the respondent are parties; existing actions include, but are not limited to, pending and completed domestic relations actions, criminal actions, other actions for personal protection orders." MCR 3.702(5).

F

Family or household member

- For purposes of MCL 768.27b and MCL 768.27c, *family or household member* "means any of the following:

  (*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a child in common.

  (*iv*) An individual with whom the person has or has had a dating relationship. As used in this subparagraph, 'dating relationship' means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 768.27b(6)(b); MCL 768.27c(6)(c).

- For purposes of the Domestic and Sexual Violence Act, MCL 400.1501 *et seq*., *family or household member* "includes any of the following:

  (*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a dating relationship.

  (*iv*) An individual with whom the person is or has engaged in a sexual relationship.

(*v*) An individual to whom the person is related or was formerly related by marriage.

(*vi*) An individual with whom the person has a child in common.

(*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)." MCL 400.1501(e).

Felony

- For purposes of MCL 750.520m, *felony* is "a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 750.520m(9)(c).

- For purposes of the Code of Criminal Procedure, MCL 761.1 *et seq.*, and the Sex Offenders Registration Act (SORA), a *felony* is "a violation of a penal law of this state for which the offender, upon conviction, may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f); MCL 28.722(e).

- For purposes of MCL 28.172(e), *felony* is "a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 28.172(e).

- For purposes of the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq.*, *felony* is "either of the following, as applicable:

  (*i*) For purposes of the offense to be set aside, felony means a violation of a penal law of this state that is punishable by imprisonment for more than 1 year or that is designated by law to be a felony.

  (*ii*) For purposes of identifying a prior offense, felony means a violation of a penal law of this state, of another state, or of the United States that is punishable by imprisonment for more than 1 year or is designated by law to be a felony." MCL 780.621(4)(c).

Financial harm

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq.*), *financial harm* means criminal usury (MCL 438.41),[6] extortion, employment contracts in violation of the wage and benefit provisions in MCL 408.471 to MCL

408.490, or any other adverse financial consequence. MCL 750.462a(e)(*i*)-(*v*).

Force

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq*.), *force* "includes, but is not limited to, physical violence or threat of physical violence or actual physical restraint or confinement or threat of actual physical restraint or confinement without regard to whether injury occurs."MCL 750.462a(f).

Forced labor or services

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq*.), *forced labor or services* "means labor or services that are obtained or maintained by force, fraud, or coercion." MCL 750.462a(g).

Force or coercion

- For purposes of MCL 750.520b–MCL 750.520e, *force or coercion* means that term as defined in MCL 750.520b(1)(f). See MCL 750.520b(1)(f); MCL 750.520c(1)(d)(*ii*); MCL 750.520c(1)(f); MCL 750.520d(1)(b); *People v Green*, 313 Mich App 526, 538 (2015) (extending the definition in MCL 750.520b to MCL 750.520e). Under MCL 750.520b(1)(f) that term "includes, but is not limited to, any of the following circumstances:

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

  [**Note:** "[T]he act of pinching is an act of physical force because it requires a person to exert strength or power on another person" and may "satisf[y] the force element of [MCL 750.520b(1)(f)(*i*).] *People v Premo*, 213 Mich App 406, 409 (1995).]

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

  (*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the

[6] *Criminal usury* means to knowingly charge, take, or receive money or other property as interest on a loan or forbearance of any money or other property at a rate exceeding 25 percent at simple interest per year or the equivalent rate for a longer or shorter period, when not authorized by law to do so. MCL 438.41.

ability to execute this threat. As used in this subdivision, 'to retaliate' includes threats of physical punishment, kidnapping, or extortion.

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

> [**Note:** "'[M]edical treatment' under the criminal sexual conduct statute should be read broadly to include forms of health care beyond just those practiced by medical doctors." *People v Regts*, 219 Mich App 294, 296-298 (1996) (the term applies to health care practiced psychologists even though they are not "medical doctors"). See also *People v Alter*, 255 Mich App 194, 202-203 (2003) ("the coercion element was satisfied because defendant, as the victim's therapist, engaged in sexual contact with the victim through the use of an unethical or unacceptable manner of treatment" when "defendant unbuttoned [the victim's] blouse, . . . fondl[ed] her breasts, [and] . . . placed her hand on his penis" without the victim's permission during their therapy session).
>
> "[I]t is common knowledge that penile penetration constitutes an unethical and unacceptable method of 'medical treatment.'" *People v Baisden*, 482 Mich 1000, 1000 (2008) ("overrul[ing] *People v Capriccioso*, 207 Mich App 100, 105 (1994), and *People v Thangavelu*, 96 Mich App 442, 450 (1980), to the extent that they hold that medical testimony is required in all prosecutions under MCL 750.520b(1)(f)(*iv*)[, and] . . . to the extent that they limit the application of the statute to situations in which the medical examination or treatment is used as a pretext to secure a patient's consent to sexual conduct"; "[t]he statute also applies to situations where nonconsensual sexual conduct is perpetrated during or in the context of medical treatment or examination").]

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

> **Note:** Although "the term 'concealment' is not defined in [MCL 750.520b(1)(f)], . . . *[t]he Random House College Dictionary* (1995) defines 'conceal' as 'to hide; cover or keep from sight; to keep secret; avoid disclosing or divulging.'" *People v Crippen*, 242 Mich App 278, 283-284 (2000) ("evidence that defendant disguised himself, and took advantage of the complainant's misidentification of him as her fiancé to induce her to submit to his sexual

advances was sufficient to establish the requisite coercion by concealment or surprise").

For purposes of MCL 750.520b(1)(f)(*v*), the element of surprise may be met where defendant has permission to engage in one sexual act but surprises the victim by engaging in another unconsented sexual act. *People v Phelps*, 288 Mich App 123, 133 (2010) ("The evidence showed force or coercion through the element of surprise" where the victim "consented only to digital penetration, and she testified that she was surprised when [the defendant] penetrated her vagina with his penis."), overruled on other grounds by *People v Hardy*, 494 Mich 430, 438 n 18 (2013).[7]

Caselaw discussion of *force or coercion:* "Michigan case law has consistently held that 'force or coercion' is not limited to the examples listed in [MCL 750.520b(1)(f)] and that each case must be examined on its own facts." *People v Crippen*, 242 Mich App 278, 283 n 2 (2000). "[T]he existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence. Coercion 'may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse,'" and "[t]he definition of the term 'force' includes, among other things, 'strength or power exerted upon an object.'" *People v Premo*, 213 Mich App 406, 419-411 (1996) (internal citations omitted). See also *People v Brown*, 197 Mich App 448, 450 (1992) (defendant used force or coercion on the victim despite his assertion that he did not know that the victim had been kidnapped and raped by her kidnapper and by other men in the house"; his assertion was "not sufficient to negate the fact that he forced himself upon her in a situation where her lack of consent and physical helplessness were clear"). "[T]he 'force' contemplated in MCL 750.520d(1)(b) does not mean 'force' as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor . . . does it follow that force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. . . . [T]he prohibited 'force' encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." *People v Carlson*, 466 Mich 130, 140 (2002).

A victim's reasonable belief. Force or coercion may exist where "a defendant's conduct induces a victim to reasonably believe that the victim has no practical choice because of a history of child sexual abuse or for some other similarly valid reason." *People v Eisen*, 296 Mich App 326, 334-335 (2012) (although the victim was not explicitly threatened, the jury could reasonably conclude she felt forced to comply where there was a long history of the defendant sexually abusing her and making her comply with his sexual demands and where she testified to believing "the sexual conduct would 'happen whether [she] wanted it or not'").

Reasonable fear of dangerous consequences. "[A] finding of force or coercion may be based upon a showing that the defendant's actions were sufficient to create a reasonable fear of dangerous consequences." *People v Cowley*, 174 Mich App 76, 77-78, 81 (1989) (although

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

"defendant did not threaten [the victim] in any way and she could have [walked] around defendant," defendant frightened the victim by stepping in front of her, blocking her path, grabbing her breast, and then grabbing her arm when she turned to walk away, and "defendant's blocking the victim's path while putting her in fear could constitute the element of force and coercion because the victim's fear was arguably a reasonable fear of dangerous consequences"); *People v McGill*, 131 Mich App 465, 472, 474 (1984) ("while defendant did not use actual violence or verbally threaten the [13-year-old] complainant with violence," there was sufficient evidence of coercion where the older and presumably stronger defendant "took the complainant to a state park far from her home" where she knew no one, "repeatedly and intimately touched the complainant despite her continued requests and orders to defendant to remove his hands from her, "and testified that she was frightened"; "[g]iven the totality of the circumstances, it could certainly be inferred that a coercive atmosphere existed and that defendant knew, or should have known, that his actions were coercive to a child"). Noting that "the type of conduct described in the [*McGill*] case will [not] always satisfy the 'force or coercion' element. Were the victim older or had the undesired touching occurred in a place from which the victim could easily leave or from which she could summon help, a fear of dangerous consequences might not be deemed reasonable and an atmosphere of coercion might not exist. Each case must be examined on its own facts to determine whether force or coercion is indeed present." *McGill*, 131 Mich App at 474-475.

Defendant is in position of authority over victim. A victim is in a position of special vulnerability and subjugation where the defendant is in a position of authority over the victim. *People v Premo*, 213 Mich App 406, 419-411 (1996) (A high school teacher's conduct of pinching students' butts on school property was "unprofessional, irresponsible and an abuse of his authority as a teacher . . . [and] sufficient to constitute coercion under [MCL 750.520b(1)(f)]."); *People v Reid*, 233 Mich App 457, 471 (1999) (complainant, "'constrained by subjugation,' . . . and, thus, coerced into submitting to the[] acts of sexual penetration" by defendant's use of authority over the complainant where defendant, counseling complainant, used the counseling relationship "to place the complainant in a confused and disoriented condition and then [take] advantage of the complainant's condition to perform fellatio on the complainant and to instruct successfully the complainant to perform fellatio on him"); *People v Knapp*, 244 Mich App 361, 369, 371, 373 (2001) ("defendant abuse[d] his position of authority to constrain a vulnerable victim by subjugation to submit to sexual contact" where defendant, a master reiki teacher and practitioner, "took advantage of complainant's mother's extreme naiveté and complainant's extreme vulnerability and manipulated his own role as a teacher to convince the [complainant, a 14 year old] boy, that naked, genital touching was part of the class curriculum"); *People v Green (Gabriel)*, 313 Mich App 526, 539, 541, 543-544 (2015) ("the complainants were '"in a position of special vulnerability with respect to the defendant[]"'" where "defendant's initial contacts with the complainants . . . were the result of his position as the CPS worker assigned to investigate the abuse or neglect complaints filed in their respective cases[, and] . . . both complainants testified that they only 'consented' to the sexual contact or acts because of their fear that defendant would otherwise take their children away").

Foster family home

- For purposes of the MCL 750.520b–MCL 750.520e, *foster family home* is that term as defined in MCL 722.111. See MCL 750.520b(1)(b)(*vi*); MCL 750.520c(1)(b)(*vi*); MCL 750.520d(1)(g); MCL 750.520e(1)(h). MCL 722.111(p)(*i*) defines *foster family home* as "the private home of an individual who is licensed to provide 24-hour care for 1 but not more than 4 minor children who are placed away from their parent, legal guardian, or legal

custodian in foster care. The licensed individual providing care is required to comply with the reasonable and prudent parenting standard as defined in . . . MCL 712A.1."

Foster family group home

- For purposes of the Criminal Sexual Conduct Act, MCL 750.520b–MCL 750.520e, *foster family group home* is that term as defined in MCL 722.111. See MCL 750.520b(1)(b)(*vi*); MCL 750.520c(1)(b)(*vi*); MCL 750.520d(1)(g); MCL 750.520e(1)(h). MCL 722.111(p)(*ii*)defines that term as "the private home of an individual who has been licensed by the department to provide 24-hour care for more than 4 but fewer than 7 minor children who are placed away from their parent, legal guardian, or legal custodian in foster care. The licensed individual providing care is required to comply with the reasonable and prudent parenting standard as defined in . . . MCL 712A.1"

Fraud

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq*.), *fraud* "includes, but is not limited to, a false or deceptive offer of employment or marriage." MCL 750.462a(h).

H

Harmful to minors

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq*.), *harmful to minors* is "sexually explicit matter that meets all of the following criteria:

  (*i*) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.

  (*ii*) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.

  (*iii*) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors." MCL 722.674(a).

Health care facility

- For purposes of the Sexual Assault Kit Evidence Submission Act, MCL 752.931 *et seq.*, *health care facility* "includes a hospital, clinic, or urgent care center that is regulated under the public health code, . . . MCL 333.1101 to [MCL] 333.25211, and any other facility that is authorized to provide sexual assault medical forensic exams under that act." MCL 752.932(d).

Health care provider

- For purposes of MCL 18.355a, *health care provider* is "any of the following:

  (*i*) A health professional licensed or registered under . . . MCL 333.16101 to [MCL] 333.18838.

  (*ii*) A health facility or agency licensed under . . . MCL 333.20101 to [MCL] 333.22260.

  (*iii*) A local health department as that term is defined in . . . MCL 333.1105." MCL 18.355a(11)(a).

Hearsay

- For purposes of MRE 801–MRE 807, *hearsay* is "a statement that:

  (1) the declarant does not make while testifying at the current trial or hearing; and

  (2) a party offers in evidence to prove the truth of the matter asserted in the statement." MRE 801(c).

Human trafficking violation

- A human trafficking violation is any violation of MCL 750.459, or MCL 750.462b to MCL 750.462e.

- For purposes of the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq.*, *human trafficking violation* is "a violation of . . . MCL 750.462a to [MCL] 750.462h, or of former [MCL 750.462i] or [MCL 750.462j]." MCL 780.621(4)(e).

I

Identified

- For purposes of MCL 767.24(3)-(4), *identified* means "the individual's legal name is known and he or she has been

determined to be the source of the DNA." MCL 767.24(5)(b). For purposes of MCL 767.24(6)(b), *identified* means "the individual's legal name is known." MCL 767.24(6)(b).

Indigent

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq*., *indigent* is "an individual fitting to whom 1 or more of the following apply:

  (*i*) The individual has been found by a court to be indigent within the last 6 months.

  (*ii*) The individual qualifies for and receives assistance from the department of health and human services food assistance program.

  (*iii*) The individual demonstrates an annual income below the current federal poverty guidelines." MCL 28.722(f).

Induce

- As used in MCL 750.455, *induce*, *inveigle*, *persuade*, and *entice* "all imply an active leading to a particular action." *People v Springs*, 101 Mich App 118, 127 (1980).

Insane

- For purposes of the Revised Judicature Act, Limitations of Actions Chapter (MCL 600.5801 *et seq*.), *insane* is "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." MCL 600.5851(2).

Intellectual disability

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *intellectual disability* is that term as defined in MCL 330.1100b. MCL 750.520a(d). MCL 330.1100b(13) defines that term as "a condition manifesting before the age of 18 years[8] that is characterized by significantly subaverage intellectual functioning and related limitations in 2 or more adaptive skills and that is diagnosed based on the following assumptions:

[8] For a discussion on the calculation of age, see Section 2.1(D).

(a) Valid assessment considers cultural and linguistic diversity, as well as differences in communication and behavioral factors.

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

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

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

Intermediate school district

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *intermediate school district* is "a corporate body established under part 7 of the revised school code, . . . MCL 380.601 to [MCL] 380.705." MCL 750.520a(e).

Internet

- For purposes of MCL 750.145d, *internet* "means that term as defined in . . . 47 USC 230." MCL 750.145d(9)(f). 47 USC 230(f)(1) defines *internet* as "the international computer network of both Federal and non-Federal interoperable packet switched data networks."

Internet identifier

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, *internet identifier* "means all designations used for self-identification or routing in internet communications or posting." MCL 28.722(g).

Intimate parts

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *intimate parts* "includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(f).

Institution of higher education

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq*., *institution of higher education* is "1 or more of the following:

  (*i*) A public or private community college, college, or university.

  (*ii*) A public or private trade, vocational, or occupational school." MCL 28.722(h).

Inveigle

- As used in MCL 750.455 *induce*, *inveigle*, *persuade*, and *entice* "all imply an active leading to a particular action." *People v Springs*, 101 Mich App 118, 127 (1980).

Investigating law enforcement agency

- For purposes of MCL 750.520m, *investigating law enforcement agency* is "the law enforcement agency responsible for the investigation of the offense for which the person is arrested or convicted. Investigating law enforcement agency includes the county sheriff but does not include a probation officer employed by the department of corrections." MCL 750.520m(9)(b).

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq*., *investigating law enforcement agency* is "the local, county, or state law enforcement agency with the primary responsibility for investigating an alleged sexual assault offense case and includes the employees of that agency. Investigating law enforcement agency includes a law enforcement agency of a community college or university if that law enforcement agency of a community college or university is responsible for collecting sexual assault evidence." MCL 752.952(b).

J

Jail

- For purposes of the Day Parole of Prisoners Act (MCL 801.251 *et seq*.), *jail* is "a facility that is operated by a county for the detention of persons charged with, or convicted of, criminal offenses or ordinance violations, or persons found guilty of civil or criminal contempt, for not more than 1 year." MCL 801.251(4).

Juvenile

- For purposes of the Crime Victim Rights Act, Article 2 (MCL 780.781 *et seq.*), *juvenile* is "an individual alleged or found to be within the court's jurisdiction under [MCL 712A.2(a)(1)] for an offense, including, but not limited to, an individual in a designated case." MCL 780.781(1)(e).

L

Labor

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq.*), *labor* "means work of economic or financial value." MCL 750.462a(i).

Law enforcement agency

- For purposes of the Sexual Assault Kit Evidence Submission Act, MCL 752.931 *et seq.*, *law enforcement agency* is "the local, county, or state law enforcement agency with the primary responsibility for investigating an alleged sexual assault offense case and includes employees of that agency." MCL 752.932(d).

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *law enforcement agency* is "the local, county, or state law enforcement agency and includes the employees of that agency. Law enforcement agency includes a law enforcement agency of a community college or university." MCL 752.952(c).

Law enforcement officer

- For purposes of MCL 776.21, *law enforcement officer* is "a police officer of a county, city, village, township, or this state; a college or university public safety officer; a prosecuting attorney, assistant prosecuting attorney, or an investigator for the office of prosecuting attorney; or any other person whose duty is to enforce the laws of this state." MCL 776.21(1)(a).

Listed offense

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, the Holmes Youthful Trainee Act (MCL 762.11 *et seq.*), MCL 768.27a, and MCL 771.2a, *listed offense* is "a tier I, tier

II, or tier III offense." MCL 28.722(i); MCL 762.11(7)(a); MCL 768.27a(2)(a); MCL 771.2a(14)(a).

Listed sexual act

- For purposes of MCL 750.145c, *listed sexual acts* is "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(i).

Local community

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq*.), *local community* is "the county in which the matter was disseminated." MCL 722.674(b).

Local law enforcement agency

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq*., *local law enforcement agency* "means the police department of a municipality." MCL 28.722(j).

Loiter

- For purposes of MCL 771.2a, *loiter* "means to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors." MCL 771.2a(14)(b).

M

Make

- For purposes of MCL 750.145c, *make* is "to bring into existence by copying, shaping, changing, or combining material, and specifically includes, but is not limited to, intentionally creating a reproduction, copy, or print of child sexually abusive material, in whole or part. Make does not include the creation of an identical reproduction or copy of child sexually abusive material within the same digital storage device or the same piece of digital storage media." MCL 750.145c(1)(j).

Masturbation

- For purposes of MCL 750.145c, *masturbation* is "the real or simulated touching, rubbing, or otherwise stimulating of a

person's own clothed or unclothed genitals, pubic area, buttocks, or, if the person is female, breasts, or if the person is a child, the developing or undeveloped breast area, either by manual manipulation or self-induced or with an artificial instrument, for the purpose of real or simulated overt sexual gratification or arousal of the person." MCL 750.145c(1)(k).

Caselaw discussion of *masturbation*: "The statutory definition of 'masturbation,' MCL 750.145c(1)(k), [is not unconstitutionally vague because it] plainly provides specific criteria for its application, was not arbitrarily applied to create criminal conduct, and gives fair notice of the illegal nature of the proscribed conduct, in the context of a [child sexually abusive activity] prosecution." *People v Sardy*, 313 Mich App 679, 714 (2015) (rejecting "defendant's vagueness argument . . . that a person of ordinary intelligence is forced to speculate in ascertaining whether the particular actions and movements of the child as seen in the videos fall within the statutory definition of 'masturbation'"; "[o]n the basis of th[e] plain and unambiguous statutory language, a person of ordinary intelligence would reasonably know that filming" the child rubbing or otherwise stimulating "the child's own clothed genitals by manual manipulation or with an artificial instrument for the purpose of real or simulated overt sexual gratification or arousal" was "prohibited, absent the need to speculate regarding the meaning of 'masturbation' as defined in the statute"), vacated in part on other grounds 500 Mich 887 (2016). For more information on the precedential value of an opinion with a negative subsequent history, see our note.

Medically frail

- For purposes of MCL 791.235, *medically frail* "describes an individual who is a minimal threat to society as a result of his or her medical condition, who has received a risk score of low on a validated risk assessment, whose recent conduct in prison indicates he or she is unlikely to engage in assaultive conduct, and who has 1 or both of the following:

  (*i*) A permanent or terminal physical disability or serious and complex medical condition resulting in the inability to do 1 or more of the following without personal assistance:

    (A) Walk.

    (B) Stand.

    (C) Sit.

  (*ii*) A permanent or terminal disabling mental disorder, including dementia, Alzheimer's, or similar degenerative brain disorder that results in the need for nursing home level of care, and a significantly impaired ability to perform 2 or more activities of daily living." MCL 791.235(22)(c).

Medical treatment

- For purposes of MCL 750.90, *medical treatment* "includes an examination or a procedure." MCL 750.90(5)(a).

Mental health professional

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *mental health professional* is that term as defined in MCL 330.1100b. MCL 750.520a(g). MCL 330.1100b(19) defines that term as "an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following:

  (a) A physician.

  (b) A psychologist.

  (c) A registered professional nurse licensed or otherwise authorized to engage in the practice of nursing under part 172 of the public health code, . . . MCL 333.17201 to [MCL] 333.17242.

  (d) A licensed master's social worker licensed or otherwise authorized to engage in the practice of social work at the master's level under part 185 of the public health code, . . . MCL 333.18501 to [MCL] 333.18518.

  (e) A licensed professional counselor licensed or otherwise authorized to engage in the practice of counseling under part 181 of the public health code, . . . MCL 333.18101 to [MCL] 333.18117.

  (f) A marriage and family therapist licensed or otherwise authorized to engage in the practice of marriage and family therapy under part 169 of the public health code, . . . MCL 333.16901 to [MCL] 333.16915."

Mental illness

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *mental illness* is "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.520a(h).

Mentally disabled

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *mentally disabled* is "a person [who] has a mental illness, is intellectually disabled, or has a developmental disability." MCL 750.520a(i).

Mentally incapable

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *mentally incapable* is "a person [who] suffers from a mental disease or defect that renders that person temporarily or permanently incapable of appraising the nature of his or her conduct." MCL 750.520a(j).

Caselaw discussion of *mentally incapable*: MCL 750.520a(j) "is meant to encompass not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act." *People v Breck*, 230 Mich App 450, 455-456 (1998) ("the prosecution proved that the victim suffered from a mental disease or defect that rendered him incapable of appraising the nature of his conduct" where "the victim was unable to appraise the nature of the sexual activity in this case as either morally right or wrong[, and did not] . . . understand that others could not engage in sexual activity with him without his consent"). See also *People v Cox*, 268 Mich App 440, 444-445 (2005) (although the 17-year-old victim "'knew what was proposed' and was aware of his conduct," "there was ample evidence from which to conclude that the victim was mentally incapable of consenting to the sexual relationship with defendant" where "mentally, the victim was about twelve or thirteen", "could not appreciate the social or moral significance of his acts relating to the homosexual encounter with defendant, and was incapable of making an informed decision about sexual involvement").

Mentally incapacitated

- For purposes of the Criminal Sexual Conduct Act, MCL 750.520a *et seq.*, *mentally incapacitated* is "a person [who] is rendered temporarily incapable of appraising or controlling the person's conduct due to the influence of a narcotic, anesthetic, alcohol, or other substance, or due to any act committed upon that person without the person's consent." MCL 750.520a(k).

Minor

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*); the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq.*); and MCL 750.145d, *minor* is a person under the age of 18.[9] MCL 722.671(d); MCL 750.462a(j); MCL 750.145d(9)(g).

- For purposes of the Code of Criminal Procedure, Trials Chapter (MCL 768.1 *et seq.*), *minor* is "an individual less than 18 years of age." MCL 768.27a(2)(b).

- For purposes of MCL 770.9b, *minor* is "an individual less than 16 years of age." MCL 770.9b(3)(a).

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, *minor* "means a victim of a listed offense who was

[9] For a discussion on the calculation of age, see Section 2.1(D).

less than 18 years of age at the time the offense was committed." MCL 28.722(k).

Misdemeanor

- For purposes of the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq*., *misdemeanor* is "a violation of any of the following:

  (*i*) A penal law of this state, another state, an Indian tribe, or the United States that is not a felony.

  (*ii*) An order, rule, or regulation of a state agency that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, or both.

  (*iii*) A local ordinance of a political subdivision of this state substantially corresponding to a crime listed in subparagraph (*i*) or (*ii*) that is not a felony.

  (*iv*) A violation of the law of another state or political subdivision of another state substantially corresponding to a crime listed under subparagraph (*i*) or (*ii*) that is not a felony.

  (*v*) A violation of the law of the United States substantially corresponding to a crime listed under subparagraph (*i*) or (*ii*) that is not a felony." MCL 780.621(4)(g).

Municipality

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq*., *municipality* "means a city, village, or township of this state." MCL 28.722(*l*).

N

Nonpublic school

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *nonpublic school* is "a private, denominational, or parochial elementary or secondary school." MCL 750.520a(*l*).

Nudity

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq*.), *nudity* is "the lewd display of the human male or female genitals or pubic area." MCL 722.672(a).

- For purposes of MCL 750.145e, *nudity* "means displaying a person's genitalia or anus or, if the person is a female, her nipples or areola." MCL 750.145e(5)(b).

O

Offense involving domestic violence

- For purposes of MCL 768.27b and MCL 768.27c, *offense involving domestic violence* is "the occurrence of 1 or more of the following acts by a person that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 768.27b(6)(a); MCL 768.27c(5)(b).

P

Passive sexual involvement

- For purposes of MCL 750.145c, *passive sexual involvement* is "an act, real or simulated, that exposes another person to or draws another person's attention to an act of sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, sexual excitement, or erotic nudity because of viewing any of these acts or because of the proximity of the act to that person, for the purpose of real or simulated overt sexual gratification or stimulation of 1 or more of the persons involved." MCL 750.145c(1)(*l*).

Patient

- For purposes of MCL 750.90, *patient* "means a person who has undergone or is seeking to undergo medical treatment." MCL 750.90(5)(b).

Personal injury

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *personal injury* is "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(n).

Caselaw discussion of *personal injury*: "Because bodily injury, mental anguish, and the other conditions listed in MCL 750.520a(j) are merely different ways of defining the single element of personal injury, . . . they should not be construed to represent alternative theories upon which jury unanimity is required. Accordingly, if the evidence of any one of the listed definitions is sufficient, then the element of personal injury has been proven." *People v Asevedo*, 217 Mich App 393, 397-398 (1996) (affirming defendant's CSC-I convictions where although the case "was submitted to the jury under both the mental anguish and the bodily injury definitions of personal injury, defendant d[id] not challenge the sufficiency of the evidence regarding mental anguish[, and] . . . on that basis alone, . . . the evidence of personal injury was sufficient").

No temporal requirement. "[T]here is nothing in [MCL 750.520a(n)] to suggest that the Legislature intended to limit temporally any of the elements of 'personal injury.'" *People v Petrella*, 424 Mich 221, 276-277 (1985) (nothing in MCL 750.520b requires "the mental anguish element . . . be limited to 'suffering which occurs at the time of the alleged act"; "'disfigurement,' chronic pain,' and 'loss or impairment of a sexual or reproductive organ' all suggest the prospect of permanent or long-lasting injuries").

Mental anguish. "'[M]ental anguish, in its ordinary and generally understood sense, means 'extreme or excruciating pain, distress, or suffering of the mind,' and that term, so defined, is not unconstitutionally vague." *People v Petrella*, 424 Mich 221, 257 (1985). "[W]hile virtually all rape victims may *in fact* suffer mental anguish, the prosecution is limited by the availability of probative, admissible, and credible *evidence* of such anguish. In order to support a conviction of first-degree CSC, based on the aggravating factor of mental anguish, the prosecution is required to produce evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the victim experienced extreme or excruciating pain, distress, or suffering of the mind." *Id*. at 259. The *Petrella* Court provided a nonexhaustive list of factors the Court of Appeals has considered when determining if a victim suffered mental anguish (noting "that each case must be decided on its own facts, and that no single factor listed . . . should be seen as necessary"): (1) Testimony that the victim was upset, crying, sobbing, or hysterical during or after the assault. (2) The need by the victim for psychiatric or psychological care or treatment. (3) Some interference with the victim's ability to conduct a normal life, such as absence from the workplace. (4) Fear for the victim's life or safety, or that of those near to her. (5) Feelings of anger and humiliation by the victim. (6) Evidence that the victim was prescribed some sort of medication to treat her anxiety, insomnia, or other symptoms. (7) Evidence that the emotional or psychological effects of the assault were long-lasting. (8) A lingering fear, anxiety, or apprehension about being in vulnerable situations in which the victim may be subject to another attack. (9) The fact that the assailant was the victim's natural father." *Id*. at 270 (mental anguish was established to support a CSC-I conviction where the evidence "proved beyond a reasonable doubt that the victim suffered severe emotional and psychological consequences following the assault where the record reflected

"evidence of crying, hysteria, fright, loss of sleep and absence from the workplace, [and] . . . the victim never stay[ing] another night in the apartment [where the rape occurred]"; however, in the companion case where the only "evidence of mental anguish was the testimony that the complainant was crying and upset, . . . this evidence, standing alone, [did not rise] to the level of 'extreme or excruciating pain, distress, or suffering of the mind"). See *People v Russell*, 182 Mich App 314, 320-321 (1990) (extending the last *Petrella* factor to a stepparent relationship where the complainants' lived with the defendant, who was their stepfather, for 10 years, and they viewed him as a father-figure), rev'd on other grounds by 434 Mich 922 (1990). For more information on the precedential value of an opinion with negative subsequent history, see our note.

See also *People v Himmelein*, 177 Mich App 365, 376-377 (1989) (mental anguish was established to support a CSC-I conviction where "the victim was subjected to several sexual penetrations, the last with her hands taped behind her and her eyes taped shut, . . . the victim's three-year old daughter was placed in a nearby closet, where she remained crying, . . . the victim[testified] that she was terrified and frightened, . . . [the husband found] the victim and the daughter crying, [a]n examining physician later observed that the victim was tense and reserved to the point that it was difficult to talk to her, [and t]he victim testified that she would not stay at home by herself for several months following the incident"); *People v Swinford*, 150 Mich App 507, 514 (1986) (mental anguish was established to support a CSC-I conviction where, "as a result of the rape, the complainant regularly saw a therapist and experienced marital problems, . . . she [was] fearful of working at night and relinquished her duties on the night shift, which result[ed] in a substantial pay cut").

Bodily injury. "[B]odily injuries need not be permanent or substantial." *People v Himmelein*, 177 Mich App 365, 377-378 (1989) (finding "that evidence of even insubstantial physical injuries" such as bruises, welts, or other marks "is sufficient to support a conviction for criminal sexual conduct in the first degree")). See *People v Mackle*, 241 Mich App 583, 598 (2000) (bodily injury was established and supported a conviction of CSC-I where defendant tied the complainant's "hands so tightly that her fingers went numb", "repeatedly str[u]ck her with an open hand", "wrapped a necktie around complainant's throat that prevented her from breathing", and "struck her in the leg with his fist and slapped her in the face at least twice"); *People v Swinford*, 150 Mich App 507, 512 (1986) (bodily injury was established and supported a conviction of CSC-I where the defendant choked the complainant and "left visible handprints which lasted several days and caused the complainant to have muscle spasms in her neck[, a] pelvic examination performed directly after the rape revealed that parts of complainant's vaginal areas were swollen and torn and would take up to two weeks to heal[, and i]t was indicated that these tears were consistent with 'very, very, very forceful intercourse'"); *People v Gwinn*, 111 Mich App 223, 239 (1981) (bodily injury was established and supported a conviction of CSC-I where "[c]omplainant sustained scratches on her back, bruises on her nose, and tenderness in her perineal area, particularly around the anus").

Causation of personal injury. "[MCL 750.520b(1)(f)] does not require that defendant be the sole cause of the victim's injury"; rather, "a defendant 'takes his victim as he finds [her]' and therefore any special susceptibility of the victim to the injury at issue does not constitute an independent 'cause' exonerating defendant." *People v Brown*, 197 Mich App 448, 451 (1992) (second alteration in original). See *People v Alter*, 255 Mich App 194, 205 (2003) (extending the *Brown* holding to MCL 750.520c(1)(f)).

Personal protection order (PPO)

- For purposes MCL 600.2950a, *personal protection order* "means an injunctive order issued by the family division of circuit

court restraining or enjoining conduct prohibited under subsection [MCL 600.2950a(1)] or [MCL 600.2950a(3)]." MCL 600.2950a(31)(d).

- For purposes of Subchapter 3.700 of the Michigan Court Rules, *personal protection order* "means a protection order as described under MCL 600.2950 and [MCL] 600.2950a[.]" MCR 3.702(1).

Persuade

- As used in MCL 750.455, *induce*, *inveigle*, *persuade*, and *entice* "all imply an active leading to a particular action." *People v Springs*, 101 Mich App 118, 127 (1980).

Petition

- For purposes of Subchapter 3.700 of the Michigan Court Rules, *petition* "refers to a pleading for commencing an independent action for personal protection and is not considered a motion as defined in MCR 2.119[.]" MCR 3.702(2).

Petitioner

- For purposes of Subchapter 3.700 of the Michigan Court Rules, *petitioner* "refers to the party seeking protection[.]" MCR 3.702(3).

Physically helpless

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *physically helpless* is "a person [that] is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." MCL 750.520a(m).

Caselaw discussion of *physically helpless*: "[T]here was insufficient evidence that the victim was physically helpless" where although "the victim was asleep when defendant entered the home," "the victim [was] awake when the assault occurred and could physically communicate her unwillingness to the act", and "not[ing] that a different result would follow if the victim had been penetrated by defendant while asleep or had awakened during the process." *People v Perry*, 172 Mich App 609, 622 (1988).

Prior conviction

- For purposes of MCL 750.145b, *prior conviction* is "a violation of [MCL 750.145a] or a violation of a law of another state substantially corresponding to [MCL 750.145a]." MCL 750.145b(3).

- For purposes of MCL 750.451, *prior conviction* means a violation of MCL 750.448, MCL 750.449, MCL 750.449a(1), MCL 750.450, MCL 750.462, or a violation of a law of another state or of a political subdivision of this state or another state substantially corresponding to those statutes. MCL 750.451(9).

Prisoner

- For purposes of MCL 600.2950a, *prisoner* "means a person subject to incarceration, detention, or admission to a prison who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of federal, state, or local law or the terms and conditions of parole, probation, pretrial release, or a diversionary program." MCL 600.2950a(31)(e).

- For purposes of MCL 771.3g and MCL 771.3h, *prisoner* is "an individual committed or sentenced to imprisonment under [MCL 769.28]." MCL 771.3g(7)(c).

Program participant

- For purposes of MCL 752.954(1), *program participant* "means that term as defined in [MCL 780.853] of the address confidentiality program act." MCL 752.954(6). MCL 780.853(n) defines *program participant* as "an individual who is certified by the department of the attorney general as a program participant under [MCL 780.855]."

Prurient interest

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *prurient interest* is "a lustful interest in sexual stimulation or gratification. In determining whether sexually explicit matter appeals to the prurient interest, the matter shall be judged with reference to average 17-year-old minors. If it appears from the character of the matter that it is designed to appeal to the prurient interest of a particular group of persons, including, but not limited to, homosexuals or sadomasochists, then the matter shall be judged with reference to average 17-year-old minors within the particular group for which it appears to be designed." MCL 722.674(c).

- For purposes of MCL 750.145c, *prurient interest* is "a shameful or morbid interest in nudity, sex, or excretion." MCL 750.145c(1)(m).

Public school

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq.*), *public school* is "a public elementary or secondary educational entity or agency that is established under the revised school code, . . . MCL 380.1 to [MCL] 380.1852." MCL 750.520a(o).

R

Reasonably available

- For purposes of MCL 750.145c, *reasonably available* means that "the prosecuting attorney [has provided] an opportunity to the defendant and his or her attorney, and any person the defendant may seek to qualify as an expert witness at trial, to inspect, view, and examine that evidence at a facility approved by the prosecuting attorney."MCL 750.145c(11).

Registering authority

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, *registering authority* "means the local law enforcement agency or sheriff's office having jurisdiction over the individual's residence, place of employment, or institution of higher learning, or the nearest department post designated to receive or enter sex offender registration information within a registration jurisdiction." MCL 28.722(m).

Registration jurisdiction

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, *registration jurisdiction* "means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Northern Mariana Islands, the United States Virgin Islands, American Samoa, and the Indian tribes within the United States that elect to function as a registration jurisdiction." MCL 28.722(n).

Relevant evidence

- For purposes of the Michigan Rules of Evidence, *relevant evidence* is evidence that:

  "(a) . . . has any tendency to make a fact more or less probable than it would be without the evidence; and

  (b) the fact is of consequence in determining the action." MRE 401.

Residence

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, *residence*, "for registration and voting purposes means that place at which a person habitually sleeps, keeps the person's personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a person has a residence separate from that of the person's spouse, that place at which the person resides the greater part of the time must bethe person's official residence for the purposes of [the SORA]. If a person is homeless or otherwise lacks a fixed or temporary residence, residence means the village, city, or township where the person spends a majority of his or her time. This section does not affect existing judicial interpretation of the term residence for purposes other than the purposes of this act." MCL 28.722(o).

Respondent

- For purposes of Subchapter 3.700 of the Michigan Court Rules, *respondent* "refers to the party to be restrained[.]" MCR 3.702(4).

Restrain

- For purposes of MCL 750.349(1), *restrain* "means to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." MCL 750.349(2).

- For purposes of MCL 750.349b, *restrain* "means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." MCL 750.349b(3)(a).

S

Sadomasochistic abuse

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *sadomasochistic abuse* is "either of the following:

(*i*) Flagellation, or torture, for sexual stimulation or gratification, by or upon a person who is nude or clad only in undergarments or in a revealing or bizarre costume.

(*ii*) The condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification, of a person who is nude or clad only in undergarments or in a revealing or bizarre costume." MCL 722.672(d).

- For purposes of MCL 750.145c, *sadomasochistic abuse* is "either of the following:

  (*i*) Flagellation or torture, real or simulated, for the purpose of real or simulated sexual stimulation or gratification, by or upon a person.

  (*ii*) The condition, real or simulated, of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person." MCL 750.145c(1)(p).

Sample

- For purposes of MCL 750.520m and the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, *sample* is "a portion of a person's [individual's] blood, saliva, or tissue collected from the person [individual]." MCL 28.172(g); MCL 750.520m(9)(d).

School

- For purposes of MCL 750.520o, *school* is "a public school as that term is defined in . . . the revised school code, . . . MCL 380.5, that offers developmental kindergarten, kindergarten, or any grade from 1 through 12." MCL 750.520o(2)(a).

- For purposes of MCL 801.251a, *school* is "any of the following:

  (*i*) A school of secondary education.

  (*ii*) A community college, college, or university.

  (*iii*) A state-licensed technical or vocational school or program.

  (*iv*) A program that prepares the person for the general education development (GED) test." MCL 801.251a(2)(b).

- For purposes of MCL 771.2a, *school* "means a public, private, denominational, or parochial school offering developmental kindergarten, kindergarten, or any grade from 1 through 12. School does not include a home school." MCL 771.2a(14)(d).

- For purposes of MCL 28.727(1)(g), MCL 28.728(1)(g), and MCL 28.728(2)(e) in the Sex Offenders Registration Act, MCL 28.721 *et seq*., *school* "means a public or private postsecondary school or school of higher education, including a trade school." MCL 28.727(1)(g); MCL 28.728(1)(g); MCL 28.728(2)(e).

School bus

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

School district

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *school district* is "a general powers school district organized under the revised school code, . . . , MCL 380.1 to [MCL] 380.1852." MCL 750.520a(p).

School property

- For purposes of MCL 771.2a, *school property* "means a building, facility, structure, or real property owned, leased, or otherwise controlled by a school, other than a building, facility, structure, or real property that is no longer in use on a permanent or continuous basis, to which either of the following applies:

  (*i*) It is used to impart educational instruction.

  (*ii*) It is for use by students not more than 19 years of age for sports or other recreational activities." MCL 771.2a(14)(e).

Second or subsequent offense

- For purposes of MCL 750.520f, "an offense is considered a *second or subsequent offense* if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under [MCL 750.520b (CSC-I), MCL 750.520c (CSC-II), or MCL 750.520d (CSC-III),] or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense." MCL 750.520f(2) (emphasis added).

Secretly confined

- For purposes of MCL 750.349b, *secretly confined* means "[t]o keep the confinement of the restrained person a secret [or t]o keep the location of the restrained person a secret." MCL 750.349b(3)(b).

Serious bodily injury

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq.*), *serious bodily injury* "means any physical injury requiring medical treatment, regardless of whether the victim seeks medical treatment." MCL 750.462a(k).

Serious misdemeanor

- For purposes of the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq.*, and the Crime Victim's Rights Act, Article 3, MCL 780.751 to MCL 780.775 and except as otherwise defined in that article, *serious misdemeanor* is one or more of the following:

  "(*i*) A violation of [MCL 750.81], assault and battery, including domestic violence.

  (*ii*) A violation of [MCL 750.81a], assault; infliction of serious injury, including aggravated domestic violence.

  (*iii*) Beginning January 1, 2024, a violation of [MCL 750.81c(1)], threatening a department of health and human services' employee with physical harm.

  (*iv*) A violation of [MCL 750.115], breaking and entering or illegal entry.

  (*v*) A violation of [MCL 750.136b(7)], child abuse in the fourth degree.

  (*vi*) A violation of [MCL 750.145], contributing to the neglect or delinquency of a minor.

  (*vii*) A misdemeanor violation of [MCL 750.145d], using the internet or a computer to make a prohibited communication.

  (*viii*) Beginning January 1, 2024, a violation of [MCL 750.147a(2) or MCL 750.174a(3)(b)], embezzlement from a vulnerable adult of an amount of less than $200.00.

  (*ix*) Beginning January 1, 2024, a violation of [MCL 750.174a(3)(a)], embezzlement from a vulnerable adult of an amount of $200.00 to $1,000.00.

(*x*) A violation of [MCL 750.233], intentionally aiming a firearm without malice.

(*xi*) A violation of [MCL 750.234], discharge of a firearm intentionally aimed at a person.

(*xii*) A violation of [MCL 750.235], discharge of an intentionally aimed firearm resulting in injury.

(*xiii*) A violation of [MCL 750.335a], indecent exposure.

(*xiv*) A violation of [MCL 750.411h], stalking.

(*xv*) A violation of [MCL 257.601b(2)], injuring a worker in a work zone.

(*xvi*) Beginning January 1, 2024, a violation of [MCL 257.601d(1)], moving violation causing death.

(*xvii*) Beginning January 1, 2024, a violation of [MCL 257.601d(2)], moving violation causing serious impairment of a body function.

(*xviii*) A violation of [MCL 257.617a], leaving the scene of a personal injury accident.

(*xix*) A violation of [MCL 257.625], operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

(*xx*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of [MCL 436.1701], if the violation results in physical injury or death to any individual.

(*xxi*) A violation of [MCL 324.80176(1) or MCL 324.80176(3)], operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.

(*xxii*) A violation of a local ordinance substantially corresponding to a violation enumerated in subparagraphs (*i*) to (*xxi*).

(*xxiii*) A violation charged as a crime or serious misdemeanor enumerated in subparagraphs (*i*) to (*xxii*) but subsequently reduced to or pleaded to as a misdemeanor. As used in this

subparagraph, 'crime' means that term as defined in [MCL 780.752(1)(b)]."

MCL 780.811(1)(a); MCL 780.621(4)(i).

Services

- For purposes of the Michigan Penal Code, Human Trafficking (MCL 750.462a *et seq*.), *services* "means an ongoing relationship between a person and an individual in which the individual performs activities under the supervision of or for the benefit of the person, including, but not limited to, commercial sexual activity and sexually explicit performances." MCL 750.462a(*l*).

Sexual assault

- For purposes of MCL 600.2950a, *sexual assault* "means an act, attempted act, or conspiracy to engage in an act of criminal conduct as defined in . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g, or an offense under a law of the United States, another state, or a foreign country or tribal or military law that is substantially similar to an offense listed in this subdivision." MCL 600.2950a(31)(f).

- For purposes of MCL 768.27b, *sexual assault* is "a listed offense as that term is defined in . . . MCL 28.722." MCL 768.27b(6)(c).

- For purposes of MCL 600.2157a, *sexual assault* "means assault with intent to commit criminal sexual conduct." MCL 600.2157a(1)(c).

- For purposes of MCL 18.355a, *sexual assault* is "a criminal violation of . . . MCL 750.520a to [MCL] 750.520n." MCL 18.355a(11)(b).

Sexual assault counselor

- For purposes of MCL 600.2157a, *sexual assault or domestic violence counselor* "means a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling, or other assistance to victims of sexual assault or domestic violence and their families." MCL 600.2157a(1)(d).

Sexual assault evidence kit

- For purposes of MCL 333.21527 and the Sexual Assault Kit Evidence Submission Act, MCL 752.931 *et seq*., *sexual assault evidence kit* means "a standardized set of equipment and

written procedures approved by the department of state police that have been designed to be administered to an individual principally for the purpose of gathering evidence of sexual conduct, which evidence is of the type offered in court by the forensic science division of the department of state police for prosecuting a case of criminal sexual conduct under . . . MCL 750.520a to [MCL] 750.520*l*." MCL 333.21527(2); MCL 752.932(g).

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *sexual assault evidence kit* "means that term as defined in . . . MCL 333.21527." MCL 752.952(d).

Sexual assault kit evidence

- For purposes of the Sexual Assault Kit Evidence Submission Act, MCL 752.931 *et seq.*, *sexual assault kit evidence* means "evidence collected from the administration of a sexual assault evidence kit under . . . MCL 333.21527." MCL 752.932(f).

Sexual assault of a minor

- For purposes of MCL 770.9b, *sexual assault of a minor* is "a violation of any of the following:

  (*i*) [MCL 750.520b, MCL 750.520c, MCL 750.520d(1)(b)-(e)], in which the victim is a minor.

  (*ii*) [MCL 750.520d(1)(a)], if the actor is 5 or more years older than the victim.

  (*iii*) [MCL 750.520g], for assaulting an individual with the intent to commit criminal sexual conduct described in subparagraphs (*i*) and (*ii*)." MCL 770.9b(3)(b).

Sexual assault offense

- For purposes of the Sexual Assault Kit Evidence Submission Act, MCL 752.931 *et seq.*, *sexual assault offense* means "a violation or attempted violation of . . . MCL 750.520b to [MCL] 750.520g." MCL 752.932(h).

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq.*, *sexual assault offense* is "a violation or attempted violation of . . . MCL 750.520b to [MCL] 750.520g." MCL 752.952(e).

Sexual assault or domestic violence crisis center

- For purposes of MCL 600.2157a, *sexual assault or domestic violence crisis center* is "an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling." MCL 600.2157a(1)(e).

Sexual assault medical forensic examination

- For purposes of MCL 18.355a, *sexual assault medical forensic examination* is "that term as described in [MCL 18.355a(1)(a)-(d)]." MCL 18.355a(11)(c). MCL 18.355a(1) indicates that to qualify for payment, a *sexual assault medical forensic examination* must include "all of the following:

  (a) The collection of a medical history.

  (b) A general medical examination, including, but not limited to, the use of laboratory services and the dispensing of prescribed pharmaceutical items.

  (c) One or more of the following:

    (*i*) A detailed oral examination.

    (*ii*) A detailed anal examination.

    (*iii*) A detailed genital examination."

  (d) Administration of a sexual assault evidence kit under . . . MCL 333.21527 and related medical procedures and laboratory and pharmacological services." MCL 18.355a(1).

Sexual assault victim

- For purposes of the Sexual Assault Victim's Access to Justice Act, MCL 752.951 *et seq*., *sexual assault victim* is "an individual subjected to a sexual assault offense and, for the purposes of making communications and receiving notices under this act, a person designated by the sexual assault victim under [MCL 752.954]." MCL 752.952(f).

Sexual contact

- For purposes of MCL 750.160d, *sexual contact* is "intentionally touching the genital area, groin, inner thigh, buttock, or breast, or the clothing covering that area, of a dead human body, or the actor intentionally causing the dead human body to touch the actor's genital area, groin, inner thigh, buttock, or breast, or the clothing covering that area if the intentional touching can reasonably be construed as being for the purpose of sexual

arousal or gratification, done for a sexual purpose, or in a sexual manner for the following purposes:

(*i*) Revenge.

(*ii*) To inflict humiliation.

(*iii*) Out of anger." MCL 750.160d(4)(a).

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *sexual contact* "includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

  (*i*) Revenge.

  (*ii*) To inflict humiliation.

  (*iii*) Out of anger." MCL 750.520a(q).

- For purposes of MCL 333.5129, *sexual contact* "means that term as defined in . . . MCL 750.520a." MCL 333.5129(12)(a).

- For purposes of MCL 750.90, *sexual contact* "means the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or done in a sexual manner." MCL 750.90(5)(c).

Caselaw discussion of *sexual contact*:

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

Constitutionality. MCL 750.520a(q) is not unconstitutionally vague because the statute requires "proof that the defendant engaged in intentional touching of the complainant's intimate parts or the clothing covering that area[, and] . . . requires that the prosecution prove that the intentional touching could '*reasonably be construed* as being for [a] sexual purpose.' The statute's language is clear and its inclusion of a reasonable person standard provides a structure to guide the jury's determination of the purpose of the contact." *People v Piper*, 223 Mich App 642, 646-647 (1997). *Piper* discussed former MCL 750.520a(k), which has since then been amended and relettered to MCL 750.520a(q).Sexually delinquent person

- For purposes of the Michigan Penal Code, *sexually delinquent person* is "any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature, or by the commission of sexual aggressions against children under the age of 16." MCL 750.10a.

Sexual excitement

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *sexual excitement* is "the condition of human male or female genitals when in a state of sexual stimulation or arousal." MCL 722.672(b).

- For purposes of MCL 750.145c, *sexual excitement* is "the condition, real or simulated, of human male or female genitals in a state of real or simulated overt sexual stimulation or arousal." MCL 750.145c(1)(q).

Sexually explicit matter

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *sexually explicit matter* is "sexually explicit visual material, sexually explicit verbal material, or sexually explicit performance." MCL 722.673(f).

Sexually explicit performance

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *sexually explicit performance* is "a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse." MCL 722.673(g).

Sexually explicit verbal material

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *sexually explicit verbal material* is "a book, pamphlet, magazine, printed matter reproduced in any manner, or sound recording that contains an explicit and detailed verbal description or narrative account of sexual

excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse." MCL 722.673(h).

Sexually explicit visual material

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *sexually explicit visual material* is "picture, photograph, drawing, sculpture, motion picture film, video game, or similar visual representation that depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse, or a book, magazine, or pamphlet that contains such a visual representation. An undeveloped photograph, mold, or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent." MCL 722.673(i).

- For purposes of the Michigan Penal Code, Children Chapter (MCL 750.135 *et seq.*), *sexually explicit visual material* "means that term as defined in [MCL 750.145e]." MCL 750.145h(5)(a). MCL 750.145e defines *sexually explicit visual material* as "a photograph or video that depicts nudity, erotic fondling, sexual intercourse, or sadomasochistic abuse." MCL 750.145e(5)(c).

Sexually transmitted infection

- For purposes of Article 5 of the Public Health Code (MCL 333.5101 *et seq.*), *sexually transmitted infection* "means syphilis, gonorrhea, chancroid, lymphogranuloma venereum, granuloma inguinale, and other sexually transmitted infections that the department may designate and require to be reported under [MCL 333.5111]." MCL 333.5101(1)(h)

Sexual intercourse

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq.*), *sexual intercourse* is "intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal." MCL 722.672(e).

- For purposes of MCL 750.145c, *sexual intercourse* is "intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal, or with an artificial genital." MCL 750.145c(1)(r).

Sexual penetration

- For purposes of MCL 750.160d, *sexual penetration* "means entry into the dead human body's genital opening, anal opening, or mouth by the actor's penis, finger, tongue, or other object, or the touching of the dead human body's genital opening or organs by the actor's mouth or tongue. Sexual penetration may also be entry by any part of the actor's body or some object into the genital or anal opening of the dead human body. Any entry, no matter how slight, is sexual penetration. Sexual penetration occurs whether or not the sexual act was completed or whether or not semen was ejaculated." MCL 750.160d(4)(b).

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *sexual penetration* is "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r).

- For purposes of MCL 333.5129, *sexual penetration* "means that term as defined in . . . MCL 750.520a." MCL 333.5129(12)(b).

- For purposes of MCL 750.90, *sexual penetration* "means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, regardless of whether semen is emitted, if that intrusion can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or done in a sexual manner." MCL 750.90(5)(d).

Caselaw discussion of *sexual penetration*:

Intercourse. Although the term *intercourse* is not defined in MCL 750.520a(r), "'intercourse' in [*Webster's New Collegiate Dictionary*] is defined in one sense as being 'copulation or coitus.'" *People v Harris*, 158 Mich App 463, 469 (1987).

Cunnilingus. Cunnilingus is "commonly referred to, and understood to be, 'oral sex.'" *Harris*, 158 Mich App at 469. "[C]unnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes. Therefore, there is no requirement if cunnilingus is performed, that there be something additional in the way of penetration for that sexual act to have been performed. *Id*. at 470 ("trial court correctly indicated that an act of cunnilingus involved by definition an act of sexual penetration"). See also *People v Lemons*, 454 Mich 234, 255 (1997) ("cunnilingus . . . by definition does not require penetration"); *People v Legg*, 197 Mich App 131, 133-134 (1992) ("[jury] instruction for cunnilingus should reflect the definition given in *Harris*, which does not limit the offense to touching of the vagi-

na itself"; in this case, "[d]efendant's touching with his mouth of the urethal opening, vaginal opening, or labia establish[ed] cunnilingus").

Fellatio. Fellatio is "commonly referred to, and understood to be, 'oral sex.'" *Harris*, 158 Mich App at 469. "'[F]ellatio' does *not* consist merely of 'any oral contact with the male genitals,' but rather requires entry of a penis into another person's mouth." *People v Reid*, 233 Mich App 457, 480 (1999). See also *Lemons*, 454 Mich at 254 ("penetration for the purpose of establishing fellatio requires actual penetration rather then mere kissing or contact"), citing *People v Johnson*, 432 Mich 931 (1989). But see *People v Waclawski*, 286 Mich App 634, 677, 677 n 7 (2009) ("the definition of 'fellatio' as adopted by *Reid* is incorrect because it ignores the plain meaning of the term and therefore the language of [MCL 750.520a(r)]" but because the Court of Appeals was "bound by its own decision in *Reid*, by virtue of MCR 7.215(J)(1)," it declined to call for a conflict resolution panel under MCR 7.215(J)(2) because it was "not at all necessary to the holding in this case").

Any other intrusion, however slight. "According to the law, 'penetration' is *any* intrusion, however slight, into the vagina *or* the labia majora." *People v Lockett*, 295 Mich App 165, 188 (2012) ("the jury could have reasonably inferred that [defendant's] penis intruded, however, slight, into [the victim's] vagina or labia majora" where the victim "testified that she and [defendant] were attempting to have sexual intercourse and that [defendant's] 'private' was touching her 'private' . . . and that she experienced pain going into her 'private parts'"). See also *People v Hammons*, 210 Mich App 554, 557 (1995) (rejecting defendant's contention that "'there [was] no intrusion 'into' the genital opening where that opening [was] covered by the victim's clothing'" and finding defendant 'sexually penetrated the complainant's genital opening" where the defendant "without removing [the victim's] underwear, forced at least one finger, possibly more, into her vaginal opening").

Genital opening. "The fact that the Legislature used 'genital opening' rather than 'vagina' [in MCL 750.520a(r)] indicates an intent to include the labia." *People v Bristol*, 115 Mich App 236, 238 (1981) ("penetration of the labia majora is beyond the body surface, [and] a definition of the female genital opening that excluded the labia would be inconsistent with the ordinary meaning of female genital openings").

Solicit

- For purposes of MCL 750.157b, *solicit* "means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive a debt or obligation." MCL 750.157b(1).

Stalking

- For purposes of MCL 750.411h, *stalking* "means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized,

frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(e).

State correctional facility

- For purposes of MCL 769.2a, *state correctional facility* is "a facility or institution which is maintained and operated, or contracted for, by the department of corrections, other than a community corrections center, halfway house, resident home, prison farm housing unit, camp, the Cassidy lake technical school, or the Michigan reformatory trustee division, located at Ionia." MCL 769.2a(2).

Statement

- For purposes of MRE 801–MRE 807, *statement* is "a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion." MRE 801(a).

Student

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq*., *student* "means an individual enrolled on a full- or part-time basis in a public or private educational institution, including, but not limited to, a secondary school, trade school, professional institution, or institution of higher education." MCL 28.722(p).

Student safety zone

- For purposes of MCL 771.2a, *student safety zone* is "the area that lies 1,000 feet or less from school property." MCL 771.2a(14)(f).

Surveil

- For purposes of MCL 750.539j, *surveil* is "to subject an individual to surveillance as that term is defined in [MCL 750.539a]." MCL 750.539j(6). *Surveillance* is "to secretly observe the activities of another person for the purpose of spying upon and invading the privacy of the person observed." MCL 750.539a(3).

T

Tier I offender

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, a *tier I offender* is "an individual convicted of a tier I offense who is not a tier II or tier III offender." MCL 28.722(q).

Tier II offender

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, a *tier II offender* is "either of the following:

  (*i*) A tier I offender who is subsequently convicted of another offense that is a tier I offense.

  (*ii*) An individual convicted of a tier II offense who is not a tier III offender." MCL 28.722(s).

Tier III offender

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, a *tier III offender* is "either of the following:

  (*i*) A tier II offender subsequently convicted of a tier I or II offense.

  (*ii*) An individual convicted of a tier III offense." MCL 28.722(u).

Tier I offense

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, a *tier I offense* is one or more of the offenses found in MCL 28.722(r)(*i*)-(*xi*):

  "(*i*) A violation of [MCL 750.145c(4)].

  (*ii*) A violation of [MCL 750.335a(2)(b)], if a victim is a minor.

  (*iii*) A violation of [MCL 750.349b], if the victim is a minor.

  (*iv*) A violation of [MCL 750.449a(2)].

  (*v*) A violation of [MCL 750.520e or MCL 750.520g(2)], if the victim is 18 years or older.

  (*vi*) A violation of [MCL 750.539j], if a victim is a minor.

  (*vii*) A violation of [MCL 750.160d(1)].

  (*viii*) Any other violation of a law of this state or a local ordinance of a municipality, other than a tier II or tier III offense, that by its nature constitutes a sexual offense against an individual who is a minor.

(*ix*) An offense committed by a person who was, at the time of the offense, a sexually delinquent person as defined in . . . MCL 750.10a.

(*x*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*ix*).

(*xi*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*x*) under a law of the United States that is specifically enumerated in 34 USC 20911, under a law of any state or any country, or under tribal or military law."

Tier II offense

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq*., a *tier II offense* is one or more of the offenses found in MCL 28.722(t)(*i*)-(*xiii*):

  "(*i*) A violation of [MCL 750.145a].

  (*ii*) A violation of [MCL 750.145b].

  (*iii*) A violation of [MCL 750.145c(2) or MCL 750.145c(3)].

  (*iv*) A violation of [MCL 750.145d(1)(a)], except for a violation arising out of a violation of . . . MCL 750.157c.

  (*v*) A violation of [MCL 750.158], committed against a minor unless either of the following applies:

    (A) All of the following:

      (I) The victim consented to the conduct constituting the violation.

      (II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

      (III) The individual is not more than 4 years older than the victim.

    (B) All of the following:

      (I) The victim consented to the conduct constituting the violation.

      (II) The victim was 16 or 17 years of age at the time of the violation.

      (III) The victim was not under the custodial authority of the individual at the time of the violation.

(*vi*) A violation of [MCL 750.338, MCL 750.338a, and MCL 750.338b], committed against an individual 13 years of age or older but less than 18 years of age. This subparagraph does not apply if the court determines that either of the following applies:

(A) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

(III) The individual is not more than 4 years older than the victim.

(B) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was 16 or 17 years of age at the time of the violation.

(III) The victim was not under the custodial authority of the individual at the time of the violation.

(*vii*) A violation of [MCL 750.462e(a)].

(*viii*) A violation of [MCL 750.448], if the victim is a minor.

(*ix*) A violation of [MCL 750.455].

(*x*) A violation of [MCL 750.520c, MCL 750.520e, or MCL 750.520g(2)], committed against an individual 13 years of age or older but less than 18 years of age.

(*xi*) A violation of [MCL 750.520c] committed against an individual 18 years of age or older.

(*xii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*xi*).

(*xiii*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*xii*) under a law of the United States that is specifically enumerated in 34 USC 20911, under a law of any state or any country, or under tribal or military law."

Tier III offense

- For purposes of the Sex Offenders Registration Act, MCL 28.721 *et seq.*, a *tier III offense* is one or more of the offenses found in MCL 28.722(v)(*i*)-(*ix*):

  "(*i*) A violation of [MCL 750.338, MCL 750.338a, and MCL 750.338b], committed against an individual less than 13 years of age.

  (*ii*) A violation of [MCL 750.349], committed against a minor.

  (*iii*) A violation of [MCL 750.350].

  (*iv*) A violation of [MCL 750.520b, MCL 750.520d, or MCL 750.520g(1)]. This subparagraph does not apply if the court determines that the victim consented to the conduct constituting the violation, that the victim was at least 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim.

  (*v*) A violation of [MCL 750.520c or MCL 750.520g(2)], committed against an individual less than 13 years of age.

  (*vi*) A violation of [MCL 750.520e], committed by an individual 17 years of age or older against an individual less than 13 years of age.

  (*vii*) A violation of [MCL 750.160d(2)].

  (*viii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*vii*).

  (*ix*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*viii*) under a law of the United States that is specifically enumerated in 34 USC 20911, under a law of any state or any country, or under tribal or military law."

Traffic offense

- For purposes of the Holmes Youthful Trainee Act (MCL 762.11 *et seq.*), *traffic offense* is "a violation of the Michigan vehicle code, [MCL 257.1 to MCL 257.923], or a violation of a local ordinance substantially corresponding to that act, that involves the operation of a vehicle and, at the time of the violation, is a felony or a misdemeanor." MCL 762.11(7)(b).

Travel services

- For purposes of MCL 750.459, *travel services* "means transportation by air, sea, or ground, hotel or other lodging accommodations, package tours, or the provision of vouchers

or coupons to be redeemed for future travel, or accommodations for a fee, commission, or other valuable consideration." MCL 750.459(5).

V

Valid foreign protection order

- For purposes of MCL 764.15b, *valid foreign protection order* is "a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i."

Vehicle

- For purposes of the Sex Offenders Registration Act (MCL 28.721 *et seq*.), *vehicle* "means that term as defined in . . . MCL 257.79." MCL 28.722(w).

Victim

- For purposes of the Michigan Penal Code, Rape Chapter (MCL 750.520a *et seq*.), *victim* is "the person alleging to have been subjected to criminal sexual conduct." MCL 750.520a(s).

Caselaw discussion of *victim*: "[T[he crime of criminal sexual conduct requires a live victim at the time of the penetration. . . . A dead body is not a person." *People v Hunter*, 209 Mich App 280, 283-284 (1995) ("the essential element of the completed crime of third-degree criminal sexual conduct were not established" where "it [was] undisputed that the victim died before penetration, and that defendant knew she was dead").

- For purposes of MCL 600.2157a, *victim* "means a person who was or who alleges to have been the subject of a sexual assault or of domestic violence." MCL 600.2157a(1)(f).

- For purposes of MCL 333.5129, *victim* "means that term as defined in . . . MCL 750.520a." MCL 333.5129(12)(c).

- For purposes of MCL 776.21, *victim* "means a person who is a victim of a crime under [MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g]." MCL 776.21(1)(b).

- For purposes of MCL 769.1a, *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a felony, misdemeanor, or ordinance violation." MCL 769.1a(1)(b).

- For purposes of the CVRA, Article 1 (Felony Article), MCL 780.751 *et seq.*, and except as otherwise defined in Article 1, a *victim* is:

  "(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

  (*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):

    (A) The spouse of the deceased victim.

    (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

    (C) A parent of the deceased victim if sub-subparagraphs (A) and (B) do not apply.

    (D) The guardian or custodian of a child of the deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

    (E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

    (F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

  (*iii*) A parent, guardian, or custodian of the victim, if the victim is less than 18 years of age, who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.

  (*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the defendant nor incarcerated.

  (*v*) for the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

    (A) The spouse of the victim.

    (B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.752(1)(m).

- For purposes of MCL 780.766 (governing restitution under CVRA, Article 1 (Felony Article)), *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. As used in [MCL 780.766(2)], [MCL 780.766(3)], [MCL 780.766(6)], [MCL 780.766(8)], [MCL 780.766(9)], and [MCL 780.766(13)] only, victim includes 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 780.766(1).

- For purposes of the CVRA, Article 2 (Juvenile Article), MCL 780.781 *et seq.*, and except as otherwise defined in Article 2, *victim* is

  "(*i*) A person who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

  (*ii*) The following individuals other than the juvenile if the victim is deceased, except as provided in subparagraph (*v*):

  (A) The spouse of the deceased victim.

  (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

  (C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

  (D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

(E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

(F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

(*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the juvenile nor incarcerated, if the parent, guardian, or custodian so chooses.

(*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the juvenile nor incarcerated.

(*v*) for the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the juvenile:

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.781(1)(j).

- For purposes of MCL 780.794 (governing restitution under CVRA, Article 2 (Juvenile Article)), *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense. As used in [MCL 780.794(2)], [MCL 780.794(3)], [MCL 780.794(6)], [MCL 780.794(8)], [MCL 780.794(9)], and [MCL 780.794(13)] only, victim includes a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of an offense." MCL 780.794(1)(b).

- For purposes of the CVRA, Article 3 (Misdemeanor Article), MCL 780.811 *et seq.*, and except as otherwise defined in Article 3, *victim* is

  "(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a serious misdemeanor, except as provided in subparagraph (*ii*), (*iii*), (*iv*), or (*v*).

  (*ii*) The following individuals other than the defendant if the victim is deceased, except as provided in subparagraph (*v*):

  (A) The spouse of the deceased victim.

  (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.

  (C) A parent of a deceased victim if sub-subparagraphs (A) and (B) do not apply.

  (D) The guardian or custodian of a child of a deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.

  (E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.

  (F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.

  (*iii*) A parent, guardian, or custodian of a victim who is less than 18 years of age and who is neither the defendant nor incarcerated, if the parent, guardian, or custodian so chooses.

  (*iv*) A parent, guardian, or custodian of a victim who is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process if he or she is not the defendant and is not incarcerated.

  (*v*) for the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:

  (A) The spouse of the victim.

  (B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated." MCL 780.811(1)(h).

- For purposes of MCL 780.826 (governing restitution under CVRA, Article 3 (Misdemeanor Article)), *victim* is "an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a misdemeanor. As used in [MCL 780.826(2)], [MCL 780.826(3)], [MCL 780.826(6)], [MCL 780.826(8)], [MCL 780.826(9)], and [MCL 780.826(13)] only, victim includes 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 misdemeanor." MCL 780.826(1)(b).

- For purposes of the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq.*, *victim* is "defined in . . . the William Van Regenmorter crime victim's rights act, . . . MCL 780.752, [MCL] 780.781, and [MCL] 780.811." MCL 780.621(4)(j).

- For purposes of the Human Trafficking Victims Compensation Act (MCL 752.981 *et seq.*), *victim* "means a victim of a violation of . . . MCL 750.462a to [MCL] 750.462h." MCL 752.982.

- For purposes of the Crime Victims Compensation Board Act (MCL 18.351 *et seq.*), *victim* is "a person who suffers a personal injury as a direct result of a crime." MCL 18.351(k).

Videoconferencing

- For purposes of subchapter 2.400 of the Michigan Court Rules, *videoconferencing* "means the use of an interactive technology, including a remote digital platform, that sends video, voice, and/or data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video codecs, monitors, cameras, audio microphones, and audio speakers. It includes use of a remote video platform through an audio-only platform." MCR 2.407(A)(2).

Video game

- For purposes of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors, Part I Sexually Explicit Matter (MCL 722.671 *et seq*.), *video game* is "an object or device that stores recorded data or instructions generated by a person who uses it, and by processing the data or instructions creates an interactive game capable of being played, viewed, or experienced on or through a computer, gaming system, game console, or other technology." MCL 722.673(j).

Videorecorded statement

- For purposes of MCL 600.2163a, a *videorecorded statement* "means a witness's statement taken by a custodian of the videorecorded statement as provided in [MCL 600.2163a(7)]. Videorecorded statement does not include a videorecorded deposition taken as provided in [MCL 600.2163a(20)-(21)]." MCL 600.2163a(1)(e).

Video service

- For purposes of MCL 750.145e, *video service* is defined in MCL 484.3301 *et seq*. See MCL 750.145e(2)(*v*). MCL 484.3301(2)(p) defines *video service* as "video programming, cable services, IPTV [internet protocol television], or OVS [open video system] provided through facilities located at least in part in the public rights-of-way without regard to delivery technology, including internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined in 47 USC 332(d) or provided solely as part of, and via, a service that enables users to access content, information, electronic mail, or other services offered over the public internet." MCL 484.3301(2)(p).

Violent felony

- For purposes of MCR 6.106(B)(1), *violent felony* is a felony that contains an element involving "a violent act or threat of a violent act against any other person." MCR 6.106(B)(2).

- For purposes of MCL 771.2a, the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq*., and MCL 791.236, *violent felony* "means an offense against a person in violation of . . . [MCL 750.82, MCL 750.83, MCL 750.84, MCL 750.86, MCL 750.87, MCL 750.88, MCL 750.89, MCL 750.316, MCL 750.317, MCL 750.321, MCL 750.349, MCL 750.349a, MCL 750.350, MCL 750.397, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, MCL 750.520g, MCL 750.529, MCL 750.529a, or MCL

750.530]." MCL 791.236(20); see also MCL 771.2a(14)(g) and MCL 780.621(4)(k) (both defining *violent felony* as that term is defined in MCL 791.236).

Violent offender

- For purposes of the Revised Judicature Act, Mental Health Court Chapter (MCL 600.1090 *et seq.*), *violent offender* "means an individual who is currently charged with, or has been convicted of, an offense involving the death of, or a serious bodily injury to, any individual, whether or not any of these circumstances are an element of the offense, or with criminal sexual conduct in any degree."

Vulnerable adult

- For purposes of MCL 600.2163a, *vulnerable adult* "means that term as defined in . . . MCL 750.145m." MCL 600.2163a(1)(f). MCL 750.145m(u) defines *vulnerable adult* as "one or more of the following:

  (*i*) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.

  (*ii*) An adult as defined in . . . MCL 400.703.

  (*iii*) An adult as defined in . . . MCL 400.11."

- For purposes of the Michigan Penal Code, Children Chapter (MCL 750.135 *et seq.*), *vulnerable adult* "means that term as defined in [MCL 750.145m]." MCL 750.145h(5)(b). MCL 750.145m defines *vulnerable adult* as "1 or more of the following:

  (*i*) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.

  (*ii*) An adult as defined in [MCL 400.703(1)(b)].

  (*iii*) An adult as defined in [MCL 400.11(b)]."

W

Witness

- For purposes of MCL 600.2163a, *witness* is "an alleged victim of an offense listed under [MCL 600.2163a(2)] who is any of the following:

  (*i*) A person under 16 years of age.

  (*ii*) A person 16 years of age or older with a developmental disability.

  (*iii*) A vulnerable adult." MCL 600.2163a(1)(g).

Subject Matter Index

A

C

D

E

F

G

H

I

K

L

M

N

O

P

R

S

T

U

V

Y

Tables of Authority

Tables of Authority

Cases

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

R

S

T

U

W

Michigan Statutes

N

Michigan Court Rules

Michigan Rules of Evidence

Constitutional Authority

Michigan Constitutional Authority

U.S. Constitutional Authority

Michigan Criminal Jury Instructions

United States Code