Juvenile Justice Benchbook

DELINQUENCY AND CRIMINAL PROCEEDINGS—THIRD EDITION

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Michigan Supreme Court

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- The Honorable Noah P. Hood, *MJI Liaison Justice*
- The Honorable Brian K. Zahra, *Justice*
- The Honorable Richard H. Bernstein, *Justice*
- The Honorable Elizabeth M. Welch, *Justice*
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This third edition was initially published in 2012, and the text has been revised, reordered, and updated through April 22, 2026. 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

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. "The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept." *Hudson v Dep't of Corrections*, ___ Mich App ___, ___ (2025) (quotation marks and citation omitted). "Maintaining consistency in the law is one of the primary benefits of stare decisis, as it provides the public with some level of predictability in how the courts have interpreted the law." *Plachta v Plachta*, ___ Mich App ___, ___ (2026). Generally, trial courts "must follow the published decisions of the Court of Appeals and the Michigan Supreme Court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382 (2007).

Negative subsequent history. 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. 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"). However, other cases provide that a "decision that has been reversed on other grounds has no precedential value." *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing *Taylor v Kurapati*, 236 Mich App 315 (1999). See also *Horace v City of Pontiac*, 456 Mich 744, 754–755 (1998) (holding that where 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 remain[s] from the Court of Appeals decision"). 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. *Stein*, 303 Mich App at 389.

Because it may be unclear under certain circumstances 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.

United States Supreme Court. Michigan courts are bound by "our state Supreme Court precedent, unless the United States Supreme Court has addressed a federal

constitutional question." *People v Beasley*, 239 Mich App 548, 559 (2000). "A plurality opinion of the United States Supreme Court, however, is not binding precedent." *Id*., citing *Texas v Brown*, 460 US 730, 737 (1983).

Federal appellate and district courts. "Cases from foreign jurisdictions, which are not binding, can be persuasive." *Bazzy v Citizens Ins Co of America*, ___ Mich App ___, ___ (2025) (cleaned up). Accordingly, state courts are not bound by the decisions of lower federal courts construing federal law, and Michigan courts "are free to follow or reject their authority." *People v Gillam*, 479 Mich 253, 261 (2007).

Michigan Supreme Court. A Michigan "Supreme Court opinion becomes binding precedent for intermediate appellate and trial courts at the time a signed opinion is date-stamped and filed with the Clerk of the Supreme Court, unless" the opinion "specifically states that the opinion is effective at a different date." *Riley v Northland Geriatric Center*, 425 Mich 668, 678 (1986). "'The clear rule in Michigan is that a majority of the [Michigan Supreme] Court must agree on a ground for decision in order to make that binding precedent for future cases.'" *People v Sexton*, 458 Mich 43, 65 (1998), quoting *People v Anderson*, 389 Mich 155, 170 (1973). See MCR 7.315(A) ("Except for affirmance of action by a lower court or tribunal by even division of the justices, a decision of the Court must be made by concurrence of a majority of the justices voting."). "Plurality decisions in which no majority of the justices participating agree as to the reasoning are not an authoritative interpretation binding . . . under the doctrine of *stare decisis*." *Negri v Slotkin*, 397 Mich 105, 109 (1976). However, "a [plurality] decision rendered by less than four justices who nevertheless constitute a majority of a legally constituted quorum is binding on the Court of Appeals and the trial courts." *Id*. at 106. "'If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties.'" *Sexton*, 458 Mich at 65, quoting *Anderson*, 389 Mich at 170. In other words, "plurality opinions in which no majority of the participating justices agree with respect to the reasoning for the holding are not generally considered authoritative interpretations that are binding under the doctrine of stare decisis." *Auto Club Group Ins Co v Booth*, 289 Mich App 606, 613 (2010).

For information regarding the precedential value of an order or judgment issued by the Michigan Supreme Court, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Section 1.4(B).

Michigan Court of Appeals. "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). Accordingly, "the publication of an opinion of the Court of Appeals creates binding precedent until the Michigan Supreme Court enters a decision altering [the] Court's decisions or its rationale." *Esordi v Macomb Twp*, ___ Mich App ___, ___ (2025) (citation omitted). "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 [MCR 7.215]." MCR 7.215(J)(1). "Under the plain terms of MCR 7.215(C)(2), all published decisions of [the] Court [of Appeals] issued prior to November 1, 1990, are binding, precedential decisions under stare decisis." *Plachta*, ___ Mich App at ___. "They are *not* merely persuasive and are not on par with unpublished decisions." *Id*. at ___. Although the Court of Appeals is "not strictly required to follow uncontradicted opinions . . . decided before November 1, 1990, those opinions are nonetheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *People v Bensch*, 328 Mich App 1, 7 n 6 (2019) (quotation marks and citation omitted). See also *People v Schurr*, ___ Mich App ___, ___ n 6 (2024) (stating "decisions published before November 1, 1990, [are binding] only on the trial courts and only are precedent if uncontradicted"). In other words, "there is no difference in the precedential effect of a pre- versus post-1990 decision." *Plachta*, ___ Mich App at ___. "Instead, the only difference between a pre- and post-November 1, 1990 decision is that the latter must be followed by a subsequent panel unless it is overruled by a conflict panel or the Supreme Court, while the former must be followed unless a subsequent three-judge panel concludes it is distinguishable or warrants reversal." *Id*. at ___.

For more information regarding the precedential nature of Court of Appeals opinions, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*, Section 1.4(C).

Acknowledgments

Work on the third edition of this benchbook was overseen by an Editorial Advisory Committee facilitated by MJI Publications Manager Sarah Roth and MJI Research Attorney Kimberly Muschong, who revised this edition of the benchbook. Mary Ann McDaid Mink, MJI Multimedia Specialist, and Amy Feinauer, MJI Program Assistant, also assisted in the publication of this benchbook.

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The first and revised editions of the Juvenile Justice Benchbook: Delinquency & Criminal Proceedings were funded by a grant from the State of Michigan, Department of State Police, Michigan Justice Training Commission. MJI thanks the Michigan Justice Training Commission for its generous support. Tobin L. Miller, former MJI Publications/Program Manager, authored both previous editions of this benchbook.

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Chapter 1: Introduction

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In this chapter. . .

This chapter provides an overview of the topics addressed in this benchbook. Section 1.1 summarizes the different types of proceedings described in this benchbook and contains cross-references to the chapters applicable to each type of proceeding. Section 1.2 and Section 1.3 discuss the court rules and statutes that govern proceedings involving juveniles. Section 1.6 briefly addresses the appointment of foreign language interpreters, which may be required in any proceeding involving a juvenile; Section 1.7 briefly addresses the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*, which applies to juveniles who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings; and Section 1.8 briefly addresses juvenile mental health courts. Section 1.9 summarizes the procedural options available to the Family Division when a delinquency

petition is filed, including diversion, the consent calendar, and the formal calendar. Section 1.10 provides a brief introduction to minor personal protection order (PPO) proceedings. Finally, Section 1.11 compares the various methods by which a juvenile may be tried and sentenced in the same manner as an adult (traditional waiver, designated, and automatic waiver proceedings).

1.1 Summary of Benchbook Contents

This benchbook discusses the procedures applicable to juvenile delinquency cases, personal protection order cases involving a juvenile respondent, and cases in which a juvenile may be tried and sentenced in the same manner as an adult, either by designation in the Family Division or by waiver to a court of general criminal jurisdiction.[1]

The organization of this benchbook reflects five different types of proceedings involving juveniles charged with criminal offenses, status offenses, and violations of personal protection orders, as follows.[2]

A. Delinquency Proceedings—Chapters 4–12

Delinquency proceedings concern juveniles under age 17 who are charged with a violation of a criminal law, criminal ordinance, or traffic law, or with a status offense[3] (running away from home, incorrigibility, truancy, or status as a so-called "wayward minor").[4] Delinquency proceedings occur within the Family Division. If the juvenile is found responsible for the offense, the Family Division may order a juvenile disposition, such as placing the juvenile on probation or committing the juvenile to state wardship.

B. Minor Personal Protection Order Proceedings—Chapter 13

A personal protection orders (PPO) may be used to enjoin abusive conduct and stalking. The Family Division has jurisdiction under the Juvenile Code to conduct PPO proceedings involving a respondent who is under age 18. A violation of a PPO results in contempt proceedings. If the respondent is under 17 years old at the time of the

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[1] Throughout this benchbook, "Family Division" is used to describe the family division of the circuit court. The division of the circuit court that has jurisdiction over felony offenses committed by adults is generally referred to as "Criminal Division" or "court of general criminal jurisdiction." References to the probate court, "juvenile court," and Recorder's Court in statutes, court rules, and case law have been altered to conform to this usage. See MCR 3.903(A)(4) ("'[c]ourt' means the family division of the circuit court[]" when used in subchapter 3.900 of the Michigan Court Rules, which governs proceedings involving juveniles); MCL 600.1009 ("[a] reference to the former juvenile division of probate court in any statute of this state shall be construed to be a reference to the family division of circuit court[]"); MCL 600.9931(1) ("[t]he recorder's court of the city of Detroit is abolished and merged with the third judicial circuit of the circuit court effective October 1, 1997[]").

[2] Chapters 1, 2, 3, 17, 18, 19, 20, and 21 contain material that is generally applicable to more than one of the five types of proceedings discussed in this benchbook.

[3] Although the Michigan Court Rules include proceedings involving status offenses within the definition of "delinquency proceeding," see MCR 3.903(A)(5); MCR 3.903(B)(3), several special requirements apply only to status offenders. For example, a status offender may be placed in a secure (locked) facility only in limited circumstances. See Section 3.6.

[4] See Section 2.3 for discussion of jurisdiction over status offenders, including wayward minors.

violation, the court may impose a juvenile disposition for the violation. If the respondent is 17 years old or older, the court must impose a criminal sanction for a criminal contempt violation of a PPO or a civil contempt sanction for a civil contempt violation of a PPO.

C. Traditional Waiver Proceedings—Chapter 14

If a juvenile who is 14, 15, or 16 years old is accused of committing a felony, the prosecuting attorney may file a motion asking the Family Division to waive its delinquency jurisdiction to allow the juvenile to be tried in the same manner as an adult in a court of general criminal jurisdiction. The Family Division then conducts a two-phase hearing to determine (1) whether there is probable cause that the juvenile committed a felony and (2) whether it is in the best interests of the juvenile and the public to grant a waiver of jurisdiction. If the Family Division waives jurisdiction over the juvenile, a criminal trial takes place in the court of general criminal jurisdiction. Following conviction, the juvenile must be sentenced as an adult.

D. Designated Proceedings—Chapter 15

If a petition alleges a specified juvenile violation,[5] the prosecutor may designate the case for trial in the Family Division in the same manner as an adult. If the petition alleges an offense that is not a specified juvenile violation, the prosecutor may request that the Family Division conduct a hearing to determine if the best interests of the juvenile and the public would be served by trying the juvenile in the Family Division in the same manner as an adult. A plea of guilty or nolo contendere, or a verdict of guilty, results in a criminal conviction. Following conviction in a designated proceeding, the court may enter a juvenile disposition; impose any sentence that could be imposed upon an adult convicted of the same offense, if the court determines that the best interests of the public would be served by imposing such a sentence; or delay imposing a sentence of imprisonment and place the juvenile on probation. If the court delays sentencing and orders probation, certain requirements concerning review, probation violation, and probation revocation are applicable.

E. Automatic Waiver Proceedings—Chapter 16

When a juvenile who is 14, 15, or 16 years old commits a specified juvenile violation,[6] the prosecutor may elect to initiate automatic waiver proceedings by filing a complaint and warrant in district court

[5] See Section (A) for a list of specified juvenile violations.

[6] See Section 16.3 for a list of specified juvenile violations.

rather than a petition in the Family Division of Circuit Court. If the juvenile is bound over for trial following a preliminary examination, he or she faces trial in a court of general criminal jurisdiction. If the juvenile is convicted of a specified juvenile violation, he or she must be sentenced in the same manner as an adult if the conviction is for any of 12 enumerated very serious specified juvenile violations. If a juvenile is convicted of an offense that is not enumerated as a crime requiring imposition of adult sentence, the court must hold a juvenile sentencing hearing to determine whether to impose an adult sentence or to place the juvenile on probation and commit him or her to state wardship. If the court places the juvenile on probation and commits him or her to state wardship, certain requirements concerning review, probation violation, and probation revocation are applicable.

1.2 Application of Court Rules to Family Division Proceedings

Subchapter 3.900 of the Michigan Court Rules governs proceedings involving juveniles in the Family Division.

MCR 3.901(A) provides as follows, in relevant part:

> "(1) The rules in [subchapter 3.900], in subchapter 1.100 [(general provisions regarding applicability and construction of court rules)], and in subchapter 8.100 [(general administrative orders)] govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.
>
> "(2) Other Michigan Court Rules apply to juvenile cases in the family division of the circuit court only when [subchapter 3.900] specifically provides."

Other court rules that are made specifically applicable to juvenile proceedings include:

- MCR 2.003 (disqualification of judge)[7];
- MCR 2.004 (incarcerated parties)[8];
- MCR 2.104(A) (proof of service of summons)[9];

[7] See MCR 3.912(D).

[8] See MCR 3.920(A)(2).

[9] See MCR 3.920(I)(1).

- MCR 2.106(G)(1) and MCR 2.106(G)(3) (proof of service by publication)[10];
- MCR 2.107(D) (proof of service of documents other than summons)[11];
- MCR 2.117(B) (appearance of attorney)[12];
- MCR 2.119 (motion practice)[13];
- MCR 2.313 (sanctions for disclosure and discovery violations)[14];
- MCR 2.401, "except as otherwise provided in or inconsistent with the rules of [subchapter 3.900]" (scope and effect of pretrial conferences)[15];
- MCR 2.406 (filing of records by use of facsimile communication equipment)[16];
- MCR 2.506, "[e]xcept as otherwise stated in [MCR 3.920(E)]" (service of subpoenas)[17];
- MCR 2.508–MCR 2.516, "except as provided in [MCR 3.911(C)]" (jury procedure)[18];
- MCR 2.602(A)(1)-(2) (form and signing of judgments)[19];
- MCR 2.613 (limitations on corrections of error)[20];
- MCR 3.205 (manner of notice from Family Division to another Michigan court that has issued a prior order concerning the juvenile; authority of Family Division to proceed)[21];

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[10] See MCR 3.920(I)(3).

[11] See MCR 3.920(I)(2).

[12] See MCR 3.915(C).

[13] See MCR 3.922(D).

[14] See MCR 3.922(A)(4).

[15] See MCR 3.922(E).

[16] See MCR 3.929.

[17] See MCR 3.920(E)(3).

[18] See MCR 3.911(C).

[19] See MCR 3.925(C).

[20] See MCR 3.902(A).

[21] See MCR 3.927.

- MCR 3.604, "[e]xcept as otherwise provided by [MCR 3.935]" (cash or surety bond)[22];
- MCR 3.606 (contempt of court, except for contempt of a minor personal protection order[23] [PPO])[24];
- Subchapter 3.700 of the Michigan Court Rules (issuance, dismissal, modification, or rescission of minor PPOs)[25];
- MCR 3.709 (appeals related to minor PPOs[26])[27];
- MCR 3.907 (screening tools and risk and needs assessments in delinquency and designated proceedings)[28];
- MCR 6.108 (procedure for probable cause conferences in designated cases)[29];
- MCR 6.110 (procedure for preliminary examinations in designated cases)[30];
- Subchapter 6.300 of the Michigan Court Rules (pleas in designated cases)[31];
- Subchapter 6.400 of the Michigan Court Rules, "except for MCR 6.402(A) [(time of waiver of jury trial)][]" (trial of designated cases)[32];
- MCR 6.401–MCR 6.420, except MCR 6.402(A)[33] (jury procedure in designated cases)[34];

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[22] See MCR 3.935(F)(1).

[23] MCR 3.982–MCR 3.989 govern proceedings against a minor for contempt of a minor PPO. MCR 3.928(B).

[24] See MCR 3.928(B).

[25] See MCR 3.981.

[26] MCR 3.993 also governs appeals related to minor PPOs. MCR 3.981.

[27] See MCR 3.981.

[28] See MCR 3.901(B)(2).

[29] See MCL 766.4. It is unclear to what extent MCL 766.4 (governing preliminary examinations and probable cause conferences) and the corresponding court rules, including MCR 6.108, may also apply to traditional waiver proceedings under MCL 712A.4. See MCL 766.4(1) (as amended by 2014 PA 123, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015), providing that "*[e]xcept as provided in . . . MCL 712A.4*," the court must schedule, at arraignment for a felony charge, a probable cause conference and a preliminary examination.

[30] See MCR 3.953(E). It is unclear to what extent MCL 766.4 (governing preliminary examinations and probable cause conferences) and the corresponding court rules, including MCR 6.110, may also apply to traditional waiver proceedings under MCL 712A.4. See MCL 766.4(1) (as amended by 2014 PA 123, effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015), providing that "*[e]xcept as provided in . . . MCL 712A.4*," the court must schedule, at arraignment for a felony charge, a probable cause conference and a preliminary examination.

- MCR 6.425 (sentencing hearing when adult sentence is imposed in designated cases, including procedure for appointment of appellate counsel)[35];
- Subchapter 6.900 of the Michigan Court Rules (automatic waiver proceedings)[36];
- Chapter 7 of the Michigan Court Rules, "[e]xcept as modified by [MCR 3.993]" (appeals from Family Division)[37]; and
- MCR 8.108[38] (stenographic, mechanical, or electronic recording of proceedings on formal calendar).[39]

1.3 Applicability of Criminal Statutes and Rules of Criminal Procedure in Juvenile Delinquency Proceedings

A. Applicability of Penal Statutes

1. Criminal Offenses

Juvenile delinquency proceedings are not criminal proceedings. MCL 712A.1(2); *In re Lee*, 282 Mich App 90, 99 (2009). Nevertheless, "substantive criminal law applies" in such proceedings, "because the critical issue is whether the juvenile violated the law." *In re Alton*, 203 Mich App 405, 407 (1994), citing MCL 712A.2(a)(1); see also *In re McDaniel*, 186 Mich App 696, 699-700 (1991) ("'criminal statutes' apply to juvenile offenders").

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[31] See MCR 3.954.

[32] See MCR 3.954.

[33] See MCR 3.954. Note, however, that effective September 1, 2011, ADM 2005-19 deleted former MCR 6.414 (governing conduct of jury trial); much of the material contained in former MCR 6.414 was added to MCR 2.513, which applies in juvenile proceedings (see MCR 3.911[C]).

[34] See MCR 3.911(C)(4).

[35] See MCR 3.955(C).

[36] See MCR 6.901(A)-(B). MCR 6.901(A) provides that "[t]he rules in [subchapter 6.900] take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders."

[37] See MCR 3.993(C)(1).

[38] MCR 3.925(B) provides that "[a]ll proceedings on the formal calendar must be recorded by stenographic recording or by mechanical or electronic recording *as provided by statute or* MCR 8.108." (Emphasis supplied.)

[39] See MCR 3.925(B).

The Family Division has jurisdiction over proceedings involving a juvenile under age 18 who "has violated any municipal ordinance or law of the state or of the United States." MCL 712A.2(a)(1). Under the Michigan Court Rules, a delinquency proceeding is "a proceeding concerning an offense by a juvenile, as defined in MCR 3.903(B)(3)." MCR 3.903(A)(5). MCR 3.903(B)(3), in turn, defines "[o]ffense by a juvenile" as including "an act that violates a criminal statute, a criminal ordinance[, or] a traffic law[.]"

2. Criminal Penalties

Because the disposition of a juvenile in a delinquency proceeding is governed by the Juvenile Code, the penalty provisions contained in criminal statutes are generally inapplicable. MCR 3.943(E)(1) provides that "[i]f the juvenile has been found to have committed an offense and the court has considered the results of a risk and needs assessment pursuant to MCR 3.907, the court may enter an order of disposition as provided by MCL 712A.18." The court must "order the juvenile returned to his or her parent if the return of the juvenile to his or her parent would not cause a substantial risk of harm to the juvenile or society." MCL 712A.18(1). MCL 712A.18(1)(a)-(o), in turn, provides the Family Division with several additional dispositional options following adjudication,[40] including warning and dismissal, probation, commitment to a public or private institution, and placement in a juvenile boot camp. The Family Division may also "order [a] juvenile to pay a civil fine in the amount of the civil or penal fine provided by the [violated] ordinance or law." MCL 712A.18(1)(j).

"'[J]uvenile justice procedures are governed by the applicable statutes and court rules, with an emphasis on rehabilitation rather than retribution.'" *Lee*, 282 Mich App at 99 (citation omitted). MCR 3.902(B) reflects this goal, providing as follows:

> "**(B) Philosophy.** The [court] rules must be interpreted and applied in keeping with the philosophy expressed in the Juvenile Code. The court shall ensure that each minor coming within the jurisdiction of the court shall:
>
> > (1) receive the care, guidance, and control, preferably in the minor's own home, that is conducive to the minor's welfare and the best interests of the public; and

[40] See Chapter 10 for discussion of the Family Division's dispositional options in delinquency proceedings.

> (2) when removed from parental control, be placed in care as nearly as possible equivalent to the care that the minor's parents should have given the minor."

MCL 712A.1(3) contains substantially similar language. See also *In re Whittaker*, 239 Mich App 26, 29 n 1 (1999) (noting that placement of a juvenile on probation following his delinquency adjudication for first- and second-degree criminal sexual conduct involving a four-year-old victim demonstrated the significant difference between a juvenile disposition and an adult sentence).

B. Applicability of Statutory Rules of Criminal Procedure

MCR 1.104 provides that "[r]ules of practice set forth in any statute, if not in conflict with any of [the Michigan Court Rules], are effective until superseded by rules adopted by the Supreme Court."[41] Accordingly, statutory rules of criminal procedure, if not in conflict with the court rules governing juvenile delinquency proceedings, are generally applicable in such proceedings. See *McDaniel*, 186 Mich App at 698-700 (MCL 767.39, abolishing the common-law distinction between principal and accessory, applied to delinquency proceedings, since the statute did not duplicate or conflict with any other procedural rule applicable to juvenile proceedings).

C. Applicability of Rules of Evidence

MCR 3.901(A)(3) states, in relevant part:

> "The Michigan Rules of Evidence, except with regard to privileges, do not apply to proceedings under [subchapter 3.900 of the Michigan Court Rules], except where a rule in [subchapter 3.900] specifically so provides. . . ."

See also MRE 1101(b)(7) (the Michigan Rules of Evidence, other than those with respect to privileges, do not apply in Family Division proceedings involving juveniles "whenever MCR subchapter 3.900 states that the Michigan Rules of Evidence do not apply[]").

The Michigan Rules of Evidence *are* applicable at trial in delinquency proceedings. MCR 3.942(C). The applicability of the Michigan Rules

[41] MCR 1.104 applies to juvenile delinquency proceedings. MCR 3.901(A)(1) ("[t]he rules . . . in subchapter 1.100 . . . govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code").

of Evidence in other contexts is explained in relevant sections throughout this benchbook.

D. Applicability of Constitutional Protections

"'[T]he full panoply of constitutional rights' does not apply to juvenile proceedings." *Whittaker*, 239 Mich App at 28, quoting *People v Hana*, 443 Mich 202, 225 (1993). However, "a degree of procedural regularity . . . that comports with 'the basic requirements of due process and fairness' and 'full investigation[]'" is required. *Id.* at 218-219, quoting *Kent v United States*, 383 US 541, 553 (1966); see also *McKeiver v Pennsylvania*, 403 US 528, 543 (1971) ("the applicable due process standard in juvenile proceedings . . . is fundamental fairness[]"); *In re Gault*, 387 US 1, 12 (1967).

"While juveniles are entitled to appropriate notice, to counsel, to confrontation and cross-examination, to a privilege against self-incrimination, and to a standard of proof beyond a reasonable doubt, there is no constitutional right to a jury trial." *Whittaker*, 239 Mich App at 28, citing *McKeiver*, 403 US at 533.[42] Moreover, there is no constitutional right to be treated as a juvenile. *Hana*, 443 Mich at 220. "Rather, and in derogation of the common law, juvenile justice procedures are governed by statutes and court rules that the [Family Division is] required to follow in the absence of constitutional infirmity." *Id*.

1.4 Use of Videoconferencing Technology in Juvenile Proceedings

A. Delinquency, Designated, and Personal Protection Violation Proceedings

MCR 3.904(A) provides:

> "Delinquency, Designated, and Personal Protection Violation Proceedings. Courts may use videoconferencing technology in delinquency, designated, and personal protection violation proceedings as follows.
>
> (1) **Preliminary Hearing, Preliminary Examination, Dispositional Hearing, and Postdispositional Progress Review.** Courts may use videoconferencing technology when

[42] Note, however, that under MCR 3.911, a juvenile may demand a jury trial.

> conducting preliminary hearings under MCR 3.935(A)(1), preliminary examinations under MCR 3.953 and MCR 3.985, dispositional hearings, and postdispositional progress reviews.
>
> (2) **Other Proceedings.** Except as otherwise provided in this rule, as long as the juvenile is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under [subchapter 3.900 of the Michigan Court Rules].
>
> (3) **Trial.** At trial, the court may use videoconferencing technology with the consent of the parties. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting."

The use of videoconferencing technology under MCR 3.904 must comply with the standards established by the State Court Administrative Office, and any proceedings conducted using the technology must be recorded verbatim. MCR 3.904(C).[43]

B. Automatic Waiver Proceedings

"The courts may use telephonic, voice, or videoconferencing technology under [subchapter 6.900 of the Michigan Court Rules] as prescribed by MCR 6.006." MCR 6.901(C). "Except as otherwise provided in [MCR 2.407], the use of videoconferencing is subject to MCR 2.407." MCR 6.006(A)(1). MCR 6.006(B)-(C) identify certain proceedings in both circuit and district/municipal court for which videoconferencing technology is the preferred mode.[44] "In all other

[43] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." "Notwithstanding any other provision in [MCR 2.407], until further order of the Court, AO No. 2012-7 is suspended." MCR 2.407(E).

[44] For purposes of MCR 6.006, *preferred mode* "means schedule to be conducted remotely subject to a request made under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by [MCL 780.752(m)], or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(B)(2); MCR 6.006(C)(1).

proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed." MCR 6.006(B)(3); MCR 6.006(C)(2). However, "[a] court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding." MCR 6.006(A)(2). "The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the [SCAO], and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).[45] MCR 6.006 "does not supersede a participant's ability to participate by telephonic means under MR 2.402." MCR 6.006(A)(4).

"When determining whether to utilize videoconferencing technology," courts must "consider constitutional requirements, in addition to the factors contained in MCR 2.407." MCR 6.006(A)(3). Accordingly, "[i]f there is a request 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. Subject to [MCR 2.407(B)(5)], the court must allow other participants to participate using videoconferencing technology." MCR 2.407(B)(4).

A court may determine "that a case is not suited for videoconferencing, and may require any hearing, even a proceeding categorized as presumptively subject to videoconferencing technology, to be conducted in person." MCR 2.407(B)(5). However, a court must "consider the factors listed in [MCR 2.407(C)]" and "state its decision and reasoning, either in writing or on the record, when requiring in-person proceedings in each case where there is a presumption for the use of videoconferencing technology." MCR 2.407(B)(5)(a)-(b).

Courts "must provide reasonable notice to participants of the time and mode of a proceeding. If a proceeding will be held using videoconferencing technology, the court must provide reasonable notice of the way(s) to access that proceeding." MCR 2.407(B)(6). Courts must also "allow a party and their counsel to engage in confidential communication during a proceeding being conducted by videoconferencing technology." MCR 2.407(B)(7). "If, during the

[45] Effective January 1, 2013, Administrative Order No. 2012-7 provides that, in certain specific situations, "[t]he State Court Administrative Office is authorized, until further order of [the Michigan Supreme] Court, to approve the use of two-way interactive video technology in the trial courts to allow judicial officers to preside remotely in any proceeding that may be conducted by two-way interactive technology or communication equipment without the consent of the parties under the Michigan Court Rules and statutes." "Notwithstanding any other provision in [MCR 6.006], until further order of the Court, AO No. 2012-7 is suspended." MCR 6.006(E).

course of a videoconference proceeding, the court or a participant is unable to proceed due to failure of technology, the court must reschedule the proceeding and promptly notify the participants of the rescheduled date and time and whether the proceeding will be held using videoconferencing technology or in person." MCR 2.407(B)(8). "All proceedings that are held using videoconferencing technology or communication equipment must be recorded verbatim by the court with the exception of hearings that are not required to be recorded by law." MCR 2.407(B)(9). "Courts must provide access to a proceeding held using videoconferencing technology to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule." MCR 2.407(B)(10).

MCR 2.407(C) directs the court to consider the following factors "in determining in a particular case the use of videoconferencing technology and the manner of proceeding with videoconferencing:

> (1) The capabilities of the court and the parties to participate in a videoconference.
>
> (2) Whether a specific articulable prejudice would result.
>
> (3) The convenience of the parties and the proposed witness(es), the cost of producing the witness in person in relation to the importance of the offered testimony, and the potential to increase access to courts by allowing parties and/or their counsel to appear by videoconferencing technology.
>
> (4) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
>
> (5) Whether the court has reason to believe that the participants in this hearing will not be able to maintain the dignity, solemnity, and decorum of court while using videoconferencing technology, or that the use of videoconferencing technology will undermine the integrity, fairness, or effectiveness of the proceeding.
>
> (6) Whether a physical liberty or other fundamental interest is at stake in the proceeding.
>
> (7) Whether the court can sufficiently control the

> participants in this hearing or matter so as to effectively extend the courtroom to the remote location.
>
> (8) Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom.
>
> (9) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.
>
> (10) Whether the parties or witness(es) have waived personal appearance or stipulated to videoconferencing.
>
> (11) The proximity of the videoconferencing request date to the proposed appearance date.
>
> (12) Any other factors that the court may determine to be relevant." MCR 2.407(C).

"A participant who requests the use of videoconferencing technology shall ensure that the equipment available at the remote location meets the technical and operational standards established by [SCAO]." MCR 2.407(D)(1). Additionally, a "participant who will be using videoconferencing technology must provide the court with the participant's contact information, including mobile phone number(s) and email address(es), in advance of the court date when videoconferencing technology will be used. A court may collect the contact information using an SCAO-approved form. The contact information form used under this provision shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan." MCR 2.407(D)(2). "There is no motion fee for requests submitted under [MCR 2.407]." MCR 2.407(D)(3).

1. Mode of Proceedings in Circuit Court

"Circuit courts may use videoconferencing technology to conduct any non-evidentiary or trial proceeding." MCR 6.006(B)(1). However, MCR 6.006(B)(4) prohibits the use of videoconferencing technology "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 [its] use[.]"

In circuit court, the use of videoconferencing technology is the preferred mode[46] 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). "In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed." MCR 6.006(B)(3).

"Nothing in [MCR 6.006] prevents a defendant, who otherwise has the right to appear in person, from demanding to physically appear in person for any proceeding. 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. Subject to MCR 2.407(B)(5), the court must allow other participants to participate using videoconferencing technology." MCR 6.006(B)(5). See also M Crim JI 5.16, which addresses witness testimony introduced via video rather than in-person:

> "The next witness, [*identify witness*], will testify by videoconferencing technology. You are to judge the witness's testimony by the same standards as any other witness, and you should give the witness's testimony the same consideration you would have given it had the witness testified in person. If you cannot hear something that is said or if you have any difficulty observing the witness on the videoconferencing screen, please raise your hand immediately."

2. Mode of Proceedings in District and Municipal Court

In district and municipal court, the use of videoconferencing technology is the preferred mode[47] for "conducting arraignments and probable cause conferences for in-custody

[46]For purposes of MCR 6.006, *preferred mode* "means schedule to be conducted remotely subject to a request made under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by [MCL 780.752(m)], or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(B)(2).

[47]For purposes of MCR 6.006, *preferred mode* "means schedule to be conducted remotely subject to a request made under MCR 2.407(B)(4) to appear in person by any participant, including a victim as defined by [MCL 780.752(m)], or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(C)(1).

defendants." MCR 6.006(C)(1). "In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed." MCR 6.006(C)(2).

However, "[n]otwithstanding any other provision of [the court 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). Nonetheless, "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). See also M Crim JI 5.16, which addresses witness testimony introduced via video rather than in-person:

> "The next witness, [*identify witness*], will testify by videoconferencing technology. You are to judge the witness's testimony by the same standards as any other witness, and you should give the witness's testimony the same consideration you would have given it had the witness testified in person. If you cannot hear something that is said or if you have any difficulty observing the witness on the videoconferencing screen, please raise your hand immediately."

1.5 Use of Restraints on a Juvenile

"Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the following factors:

> (1) Instruments of restraint are necessary to prevent physical harm to the juvenile or another person.
>
> (2) The juvenile has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.
>
> (3) There is a founded belief that the juvenile presents a substantial risk of flight from the courtroom." MCR 3.906(A).

"The court's determination that restraints are necessary must be made prior to the juvenile being brought into the courtroom and appearing before the court. The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order." MCR 3.906(B).

"Any restraints used on a juvenile in the courtroom shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained using fixed restraints to a wall, floor, or furniture." MCR 3.906(C).

1.6 Court-Appointed Foreign Language Interpreter[48]

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1).[49] A person financially able to pay for the interpretation costs may be ordered to reimburse the court for those costs. MCR 1.111(F)(5). See also MCR 1.111(A)(4).

- "'Case or Court Proceeding' means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

- "'Party' means a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

1.7 Michigan Indigent Defense Commission Act (MIDCA)

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., creating the Michigan Indigent Defense Commission (MIDC) and establishing a system for the appointment of defense counsel for indigent defendants, applies to juveniles who are charged with felony offenses in traditional waiver,[50] designated,[51] and automatic waiver[52] proceedings. MCL 780.983(a)(*ii*)(A)-(D).

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[48] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters.

[49] In addition, "[t]he court may appoint a foreign language interpreter for a person other than a party or witness who has a substantial interest in the case or court proceeding." MCR 1.111(B)(2).

See Chapter 17 for discussion of the MIDCA.

1.8 Juvenile Mental Health Courts[53]

"A family division of circuit court . . . may adopt or institute a juvenile mental health court pursuant to statute or court rules." MCL 600.1099c(1).[54]

MCL 600.1099b(e) defines "[j]uvenile mental health court" as any of the following:

> (*i*) A court-supervised treatment program for juveniles who are diagnosed by a mental health professional with having a serious emotional disturbance, co-occurring disorder, or developmental disability.[55]
>
> (*ii*) Programs designed to adhere to the 7 common characteristics of a juvenile mental health court as described under [MCL 600.1099c(3)].
>
> (*iii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the Bureau of Justice Assistance, or amended, that include all of the . . . characteristics[set out in MCL 600.1099b(e)(*iii*)(A)-(J).[56]]

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[50] In traditional waiver proceedings, the requirements of the MIDCA are applicable both "[d]uring consideration of a petition filed under . . . MCL 712A.4[] to waive jurisdiction . . . and upon granting a waiver of jurisdiction." MCL 780.983(a)(*ii*)(A). See Chapter 14 for discussion of traditional waiver.

[51] The MIDCA applies to all stages of a *prosecutor*-designated case. See MCL 780.983(a)(*ii*)(B). However, the MIDCA applies to *court*-designated cases only "[d]uring consideration of a request by a prosecuting attorney . . . that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult." MCL 780.983(a)(*ii*)(C). It is unclear whether this distinction was intentional or an oversight. See Chapter 15 for discussion of designated cases.

[52] The MIDCA applies to "[a]n individual less than 18 years of age at the time of the commission of a felony" if "[t]he prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under . . . MCL 764.1f." MCL 780.983(a)(*ii*)(D). See Chapter 16 for discussion of automatic waiver.

[53] Effective March 28, 2019, 2018 PA 590 added Chapter 10C, MCL 600.1099b *et seq.*, to the Revised Judicature Act to establish juvenile mental health courts to provide "court-supervised treatment program[s] for juveniles who are diagnosed by a mental health professional with having a serious emotional disturbance, co-occurring disorder, or developmental disability," and "[p]rograms designed to adhere to the 7 common characteristics of a juvenile mental health court as described under [MCL 600.1099c(3)]," and "[p]rograms designed to adhere to the 10 essential elements of a mental health court promulgated by the Bureau of Justice Assistance" that include certain defined characteristics. See MCL 600.1099b(e).

This section briefly addresses juvenile mental health courts. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for a thorough discussion of mental health courts.

A. Adopting or Instituting a Juvenile Mental Health Court

"A family division of circuit court adopting or instituting a juvenile mental health court shall enter into a memorandum of understanding with all participating prosecuting authorities in the circuit" and representatives of various specified entities, including "a representative of the bar specializing in juvenile law[.]" MCL 600.1099c(1).

"The creation or existence of a juvenile mental health court does not alter or affect the law or court rules concerning discharge or dismissal of an offense, or adjudication." MCL 600.1099c(1).

B. Eligibility

"Admission into a juvenile mental health court program is at the discretion of the court based on the juvenile's legal and clinical eligibility." MCL 600.1099e(1). Prior participation in or completion of a juvenile mental health court program does not preclude admission; however, a violent offender[57] may not be admitted. *Id*.

"Admission to a juvenile mental health court does not disqualify a juvenile for any other dispositional options available under state law or court rule." MCL 600.1099e(2).

C. Preadmission Screening and Evaluation Assessment

MCL 600.1099e(3) provides:

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[54] A juvenile mental health court, or a court seeking to adopt or institute a juvenile mental health court, must be certified by the State Court Administrative Office. MCL 600.1099c(4).

[55] "'Co-occurring disorder' means having 1 or more disorders relating to the use of alcohol or other controlled substances of abuse as well as any serious mental illness, serious emotional disturbance, or developmental disability. A diagnosis of co-occurring disorders occurs when at least 1 disorder of each type can be established independent of the other and is not simply a cluster of symptoms resulting from 1 disorder." MCL 600.1099b(a). "Developmental disability," "serious emotional disturbance," and "serious mental illness" mean those terms as defined in the Mental Health Code, MCL 330.1100 *et seq*. MCL 600.1099b(c); MCL 600.1099b(h); MCL 600.1099b(i); see also MCL 330.1100a; MCL 330.1100d.

[56] Required characteristics include "[e]ligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for juveniles with mental illnesses, and that take into account the relationship between mental illness and a juvenile's offenses, while allowing the individual circumstances of each case to be considered," MCL 600.1099b(e)(*iii*)(B), and the provision of "legal counsel to juvenile respondents [in accordance with the Michigan Indigent Defense Commission Act, MCL 780.981 *et seq*.,] to explain program requirements, including voluntary participation, and guide juveniles in decisions about program involvement. . . ." MCL 600.1099b(e)(*iii*)(E).

[57] "'Violent offender' means a juvenile who is adjudicated on or has been, within the preceding 5 years, adjudicated on 1 or more of the following offenses: (*i*) First degree murder. (*ii*) Second degree murder. (*iii*) Criminal sexual conduct in the first, second, or third degree. (*iv*) Assault with intent to do great bodily harm less than murder in violation of . . . MCL 750.84." MCL 600.1099b(j).

> "To be admitted to a juvenile mental health court, a juvenile shall cooperate with and complete a preadmission screening and assessment and shall submit to any future assessment as directed by the juvenile mental health court. A preadmission screening and assessment must include all of the following:
>
> > (a) A review of the juvenile's delinquency history. A review of the law enforcement information network may be considered sufficient for purposes of this subdivision unless a further review is warranted. The court may accept other verifiable and reliable information from the prosecution or defense to complete its review and may require the juvenile to submit a statement as to whether or not he or she has previously been admitted to a juvenile mental health court and the results of his or her participation in the prior program or programs.
> >
> > (b) An assessment of the risk of danger or harm to the juvenile, others, and the community using standardized instruments that have acceptable reliability and validity.
> >
> > (c) A mental health assessment, performed by a mental health professional[58], for an evaluation of a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.
> >
> > (d) A review of the juvenile's family situation, special needs, or circumstances that may potentially affect the juvenile's ability to receive mental health or substance abuse treatment and follow the court's orders, including input from family, caregivers, or other collateral supports.

"In addition to rights accorded a victim under the . . . [C]rime [V]ictim's [R]ights [A]ct[(CVRA)], . . . MCL 780.751 to [MCL]

[58]A *mental health professional* is defined as "an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following: (*i*) A physician. (*ii*) A psychologist. (*iii*) 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. (*iv*) 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. (*v*) 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. (*vi*) 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." MCL 600.1099b(f).

780.834, the juvenile mental health court shall permit any victim of the offense or offenses for which the juvenile has been petitioned to submit a written statement to the court regarding the advisability of admitting the juvenile into the juvenile mental health court." MCL 600.1099g.

D. Conditions of Admission

MCL 600.1099f(1) provides, in relevant part:

> "If the juvenile is alleged to have engaged in activity that would constitute a criminal act if committed by an adult, his or her admission to juvenile mental health court is subject to all of the following conditions:
>
> (a) The juvenile admits responsibility for the violation or violations that he or she is accused of having committed.
>
> (b) The parent, legal guardian, or legal custodian, and juvenile are required to sign all documents for the juvenile's admission in the juvenile mental health court, including a written agreement to participate in the juvenile mental health court."

E. Withdrawal of Plea If Not Admitted

"A juvenile who has admitted responsibility, as part of his or her referral process to a juvenile mental health court, and who is subsequently not admitted to a juvenile mental health court may withdraw his or her admission of responsibility." MCL 600.1099f(3).

F. Post-Admission Procedures

"Upon admitting a juvenile into a juvenile mental health court, . . . the court shall enter an adjudication upon acceptance of a juvenile's admittance of responsibility to the offense." MCL 600.1099h(a). At this point, the court may also receive jurisdiction over the juvenile's parents or guardians under MCL 712A.6 and collect a reasonable fee to offset the cost to the court for administering the program. MCL 600.1099h(b)-(c). See Section 1.8(J) for more information on taking jurisdiction over the juvenile's parents or guardians and Section 1.8(I) for more information on monetary issues.

A juvenile mental health court must provide the participant with:

> "(a) Consistent and close monitoring of the juvenile's treatment and recovery.

> (b) If found necessary or appropriate, periodic and random testing for the presence of any nonprescribed controlled substance of alcohol as well as compliance with or effectiveness of prescribed medication using to the extent practicable the best available, accepted, and scientifically valid methods.
>
> (c) Periodic judicial reviews of the participant's circumstances and progress in the program.
>
> (d) A regiment or strategy of individualized and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of detainment.
>
> (e) Mental health services, substance use disorder services, education, and vocational opportunities as appropriate and practical." MCL 600.1099i(1).

"The responsible mental health provider shall notify the court of a participant's formal objection to his or her written individual plan of services developed under . . . MCL 330.1712. However, the court is not obligated to take any action in response to a notice received under this subsection." MCL 600.1099j(4).

"In order to continue to participate in and successfully complete a juvenile mental health court program, a juvenile shall comply with all court orders, violations of which may be sanctioned at the court's discretion." MCL 600.1099j(1).

G. Successful Completion of Mental Health Court Program

"Upon a participant's completion . . . of the juvenile mental health court program, the court shall find on the record or place a written statement in the court file indicating . . . the participant completed the program successfully[.]" MCL 600.1099k(1).

"Upon a juvenile's completion of the required juvenile mental health court program participation, an exit evaluation should be conducted in order to assess the juvenile's continuing need for mental health, developmental disability, or substance abuse services." MCL 600.1099i(2).

Although "[a]dmission to a juvenile mental health court does not disqualify a juvenile for any other dispositional options available under state law or court rule," MCL 600.1099e(2), "[t]he court, with the agreement of the prosecutor and in conformity with the terms and conditions of the memorandum of understanding under [MCL

600.1099c], may discharge and dismiss the proceedings," MCL 600.1099k(2).

Except as provided in MCL 600.1099k(2), if a juvenile has successfully completed probation or other court supervision, the court, if it has not already done so, must proceed to disposition according to the agreement, and send a record of adjudication of responsibility and disposition to the Department of State Police. MCL 600.1099k(3).

H. Failure to Successfully Complete Mental Health Court Program (Termination)

"If the juvenile is accused of a new offense, the judge has the discretion to terminate the juvenile's participation in the juvenile mental health court program. If the juvenile is adjudicated on or convicted of 1 or more of the offenses listed under [MCL 600.1099b(j)[59]] that was committed after he or she was admitted into the juvenile mental health court program, the juvenile must be immediately discharged from the program as unsuccessful." MCL 600.1099j(2).

If a juvenile's participation is terminated, "the court shall find on the record or place a written statement in the court file indicating . . . the juvenile's participation in the program was terminated and . . . the reason for the termination." MCL 600.1099k(1).

"Except for program termination due to the commission of a new offense, failure to complete a juvenile mental health court program must not be a prejudicial factor in disposition." MCL 600.1099k(4).

I. Costs, Fees, and Restitution

Except to the extent properly waived, "[t]he court shall require that a juvenile pay all court fines, costs, court fees, restitution, and assessments." MCL 600.1099j(3). "However, except as otherwise provided by law, if the court determines that the payment of court fines, court fees, or drug or alcohol testing expenses under this subsection would be a substantial hardship for the juvenile and the juvenile's family or would interfere with the juvenile's treatment, the court may waive all or part of those court fines, court fees, or drug or alcohol expenses except those required by statute." *Id*.

In addition to the monies ordered under MCL 600.1099j(3), the court may also order the juvenile-participant and his or her parent, legal

[59] The offenses requiring immediate discharge from the program are first degree murder, second degree murder, CSC-I, CSC-II, CSC-III, or assault with intent to do great bodily harm less than murder. See MCL 600.1099b(j).

guardian, or legal custodian "to pay a reasonable juvenile mental health court fee that is reasonably related to the cost to the court for administering the juvenile mental health court program as provided in the memorandum of understanding. The juvenile mental health court shall transmit the fees collected to the treasurer of the local funding unit at the end of each month." MCL 600.1099h(c).

J. Jurisdiction Over Participant and Participant's Parents or Guardians

A case may be completely transferred from a court of original jurisdiction to a juvenile mental health court, prior to or after adjudication, if those courts—with the approval of the chief judge and assigned judge of each court, a prosecuting attorney from each court, and the defendant—have executed a memorandum of understanding as provided in MCL 600.1088(1)(a)-(e). See MCL 600.1088(1)-(2). Unless a memorandum of understanding provides otherwise, the original court of jurisdiction maintains jurisdiction over the juvenile mental health court participant until final disposition of the case. MCL 600.1099h(b).

The court may also "receive jurisdiction over the juvenile's parents or guardians under . . . MCL 712A.6, in order to assist in ensuring the juvenile's continued participation and successful completion of the juvenile mental health court and may issue and enforce any appropriate and necessary order regarding the parent or guardian." MCL 600.1099h(b).

K. Use of Statements or Information Obtained During Preadmission Screening or Participation in Juvenile Mental Health Court

Except as otherwise permitted by the Juvenile Mental Health Court Act, "any statement or other information obtained as a result of participating in a preadmission screening and assessment under [MCL 600.1099e(3)] is confidential and is exempt from disclosure under the freedom of information act, . . . MCL 15.231 to [MCL] 15.246, and must not be used in any future juvenile delinquency proceeding. MCL 600.1099e(4). Additionally, any statement or information obtained due to participation in a juvenile mental health court assessment, treatment, or testing must not be used in a criminal prosecution unless it reveals criminal acts other than, or inconsistent with, personal controlled substance use. MCL 600.1099i(3).

L. Records of Proceedings

MCL 600.1099k(4) provides, in relevant part:

> "All records of the proceedings regarding the participation of the juvenile in the juvenile mental health court must remain closed to public inspection and are exempt from public disclosure, including disclosure under the freedom of information act, . . . MCL 15.231 to [MCL] 15.246."

1.9 Overview of Procedural Options in Juvenile Delinquency Proceedings

Under the Juvenile Code and related court rules, the Family Division has several procedural options when a petition is filed in a delinquency proceeding. Effective October 1, 2024, courts are required to conduct screenings and risk and needs assessments established by SCAO on juveniles at various decision-making points in the juvenile justice process. MCR 3.907. Subject to procedural requirements imposed under the Crime Victim's Rights Act (CVRA),[60] MCR 3.932(A)(1)-(5) (preliminary inquiries)[61] allow a court to choose one of the following procedural avenues that will serve the interest of the juvenile and the public after completion and consideration of the results of a risk screening tool and mental health screening tool pursuant to MCR 3.907:

- deny authorization of the petition;
- refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act;[62]
- direct that the juvenile and his or her parent, guardian, or legal custodian be notified to appear so that the matter can be handled through further informal inquiry;
- proceed on the consent calendar[63] under MCL 712A.2f; or
- authorize the filing of the petition and proceed on the formal calendar under MCR 3.932(D).[64]

Subject to procedural requirements under the CVRA, MCR 3.935(B)(3) (preliminary hearings)[65] requires the court to choose one of the following

[60] For a thorough discussion of the applicability of the CVRA to juvenile offenders, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[61] MCR 3.932(A), governing preliminary inquiries, applies "[w]hen a petition is not accompanied by a request for detention of the juvenile[.]" See Section 6.2.

[62] See Section 4.3.

[63] See Section 4.4.

[64] See Section 4.5.

procedural avenues after considering the results of a juvenile's risk screening tool and mental health screening tool:

- dismiss the petition;
- refer the matter to alternative services under the Juvenile Diversion Act;
- proceed on the consent calendar under MCL 712A.2f; or
- continue with the preliminary hearing.

Diversion. Except for a case involving a "specified juvenile violation" under MCL 722.822(e) and MCL 722.823(3),[66] and subject to the requirements of MCL 722.823(4) and MCL 722.823(5), a law enforcement official or court intake worker may "divert" a case from adjudication. MCL 722.823(1)(b). Restitution cannot be considered when deciding if the minor may be diverted. *Id*. MCL 722.823(5) requires a law enforcement official or court intake worker to use the results of a risk screening tool and a mental health screening tool to inform a decision to divert a juvenile. The juvenile may be required to comply with the terms of a diversion agreement. MCL 722.825(5). If the juvenile fails to comply with the agreement, the court may authorize a petition formally charging the juvenile with the offense. *Id*.[67]

Consent calendar. "Subject to [MCL 712A.2f(2)], if the court determines that formal jurisdiction should not be acquired over a juvenile, the court may proceed in an informal manner referred to as a consent calendar." MCL 712A.2f(1); see also MCR 3.932(C). "The court shall not consider restitution when determining if the case should be placed on the consent calendar under [MCL 712A.2f]." MCL 712A.2f(1); see also MCR 3.932(C)(2)(a). Before placing a case on the consent calendar, the court must consider the results of the risk screening tool and mental health screening tool conducted on the juvenile pursuant to MCR 3.907. MCR 3.932(C)(2)(b).

"Subject to [MCL 712A.2f(2)], the court may transfer a case from the formal calendar to the consent calendar at any time before disposition." MCL 712A.2f(5); see also MCL 712A.11(1); MCR 3.932(C)(1). "A case must not be placed on the consent calendar unless all of the following apply:

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[65] A preliminary hearing must be commenced within 24 hours, excluding Sundays and holidays, after a juvenile is taken into court custody. See Section 6.3.

[66] See Section 4.3(A) for a list of the specified juvenile violations set out in MCL 722.822(e).

[67] See Section 4.3 for discussion of diversion.

- "The juvenile and the parent, guardian, or legal custodian and the prosecutor agree to have the case placed on the consent calendar." MCL 712A.2f(2)(a); MCR 3.932(C)(2)(a).

- "The court considers the results of the risk screening tool and mental health screening tool conducted on the juvenile by a designated individual or agency that is trained in those screening tools." MCL 712A.2f(2)(b); MCR 3.932(C)(2)(b).

- "The court determines that the case should proceed on the consent calendar in compliance with [MCL 712A.11(1)]." MCL 712A.2f(2)(c).

"The period for a juvenile to complete the terms of a consent calendar case plan must not exceed 6 months, unless the court determines that a longer period is needed for the juvenile to complete a specific treatment program and includes this determination as part of the consent calendar case record." MCL 712A.2f(9)(c); MCR 3.932(C)(5). The case may be transferred back to the formal calendar at any time as provided by MCL 712A.2f(12) and MCR 3.932(C)(9). "The court shall not enter an order of disposition in a case while it is on the consent calendar." MCL 712A.2f(10); MCR 3.932(C)(7).[68]

Formal calendar. If the case is placed on the formal calendar, the court will conduct a formal adjudicative hearing and, if the juvenile is adjudicated responsible for the offense, a dispositional hearing. See MCR 3.932(D); MCR 3.942; MCR 3.943.[69] The court may transfer the matter to the consent calendar at any time before disposition. MCL 712A.11(1); MCR 3.932(D). Alternatively, a court may accept the juvenile's plea of admission or of no contest. MCR 3.941.[70]

Criminal traffic violations. A court may utilize an informal procedure contained in the Juvenile Code for certain criminal traffic violations. Under MCL 712A.2b, if a violation of the Michigan Vehicle Code is alleged, the court may hold an informal hearing; if the court finds that the allegation is true, it may impose a disposition.[71]

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[68] See Section 4.4 for discussion of the consent calendar.

[69] The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A). See Section 10.11 for additional information on MCR 3.937.

[70] See Section 4.5 for discussion of the formal calendar.

[71] See Section 4.4, Section 6.1(G), and Section 21.13 for discussion of juveniles charged with violations of the Michigan Vehicle Code.

1.10 Summary of Minor Personal Protection Order Proceedings[72]

Under MCL 712A.2(h), the Family Division has jurisdiction over respondents ages 10 through 17 in personal protection order (PPO) proceedings under both the "domestic relationship" PPO statute, MCL 600.2950, and the "non-domestic relationship" PPO statute, MCL 600.2950a. The "domestic relationship PPO" may be issued to protect the petitioner from "a spouse, a former spouse, an individual with whom he or she has had a child in common, an individual with whom he or she has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner[.]" MCL 600.2950(1). The "non-domestic PPO" protects victims of stalking, aggravated stalking, cyberstalking, and sexual assault; victims who have received obscene material under MCL 750.142; and individuals who have been placed in reasonable fear of sexual assault. MCL 600.2950a(1)-(2).

Issuance of a minor PPO is subject to the provisions of the Juvenile Code, MCL 600.2950(27); MCL 600.2950a(28), and Family Division jurisdiction continues until the PPO expires, even if the respondent reaches the age of 18 during that time, MCL 712A.2a(6). "Procedure for the issuance, dismissal, modification, or recision of minor personal protection orders" is governed by subchapter 3.700 of the Michigan Court Rules, which governs procedure related to PPOs with adult respondents. MCR 3.981; see also MCR 3.701(A). However, proceedings to *enforce* a minor PPO are governed by subchapter 3.900 of the Michigan Court Rules, unless the respondent is 18 years old or older at the time of the enforcement proceeding. MCR 3.701(A); MCR 3.708(A)(2); MCR 3.982(B). Proceedings to enforce a minor PPO "still in effect when the respondent is 18 or older" are governed by MCR 3.708, MCR 3.708(A)(2), and "action regarding the personal protection order after the respondent's eighteenth birthday is not subject to [the Juvenile Code][,]" MCL 712A.2a(6).

Court action to enforce a PPO against a respondent under age 18 is initiated by a supplemental petition that may be filed by the original petitioner, a law enforcement officer, a prosecuting attorney, a probation officer, or a caseworker. MCL 712A.2c; MCR 3.983(A). Upon receipt of a supplemental petition, the court must either set a date for a preliminary hearing and issue a summons to appear, or issue an apprehension order. MCR 3.983(B)(1)-(2). If there is "reasonable cause to believe" a respondent "is violating or has violated" a minor PPO, a law enforcement officer may apprehend the respondent without a court order. MCL 712A.14(1); see also MCR 3.984(A)-(B). In that case, the

[72] Minor PPO proceedings are discussed in detail in Chapter 13. For more information on PPOs, see the Michigan Judicial Institute's *Domestic Violence Benchbook*.

officer is responsible for ensuring that a supplemental petition is prepared and filed with the Family Division. MCR 3.984(B)(4).

Respondents in minor PPO actions are subject to the contempt powers of the court. See MCL 712A.26, which provides that "[t]he court shall have the power to punish for contempt of court under . . . MCL 600.1701 to [MCL] 600.1745[] any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce [the Juvenile Code]."[73]

If a respondent who is 17 years of age or older pleads or is found guilty of criminal contempt they must be sanctioned accordingly. MCL 600.2950(23); MCR 3.988(D)(1).[74] A respondent "not less than age 17" who violates a PPO may be imprisoned in a county jail within the adult prisoner population. MCL 712A.18(1)(e). Additionally, if a respondent age 17 years or older pleads or is found guilty of *civil* contempt, the court must "impose a fine or imprisonment as specified in MCL 600.1715 and [MCL] 600.1721[.]" MCR 3.988(D)(2)(a).

A respondent who is under 17 years of age and who violates a minor PPO is subject to a juvenile disposition under MCL 712A.18.[75] MCL 600.2950(23); MCL 600.2950a(23); see also MCR 3.988(D)(2)(b) (requiring the court to subject a respondent under age 17 to the dispositional alternatives listed in MCL 712A.18 if the respondent "pleads or is found guilty of civil contempt").

1.11 A Comparison of Designated Cases and Waiver Cases

As discussed in Section 1.1, there are five options available to prosecuting attorneys when a juvenile commits a criminal offense. The first option is to file a delinquency petition in the Family Division. If the juvenile is adjudicated responsible of the offense following a plea or trial, he or she may be required to remain under the jurisdiction of the Family Division until age 19, with possible extension of jurisdiction until age 21. Because delinquency proceedings are not criminal proceedings, a juvenile who is found responsible for an offense in a delinquency case may not be sentenced as an adult.

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[73] For a thorough discussion of the court's contempt powers, see the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 1.

[74] Note that MCL 600.2950(23) *requires* the court to sentence the respondent to up to 93 days' imprisonment, while MCR 3.988(D)(1) states that the court *may* do so. Both provisions allow the court to also impose a fine of up to $500.

[75] See Chapter 10 for detailed discussion of juvenile disposition. For discussion of the costs of disposition and orders for reimbursement, see Chapter 18.

As alternatives to a delinquency proceeding, the Legislature has made available to prosecuting attorneys four different types of proceedings that can result in a criminal conviction for a juvenile. These are:

- traditional waiver proceedings[76];
- prosecutor-designated proceedings[77];
- court-designated proceedings[78]; and
- automatic waiver proceedings.[79]

Although each of these proceedings can lead to a criminal conviction, each has distinguishing characteristics.

A. Age Requirements

In both prosecutor-designated and court-designated cases, the juvenile may be any age under 18 when the offense occurs. MCL 712A.2(a)(1); MCL 712A.2d(1), MCL 712A.2d(2). In automatic and traditional waiver cases, the juvenile must be older than 14 but younger than 18 when the offense occurs. MCL 712A.2(a)(1); MCL 712A.4(1).

B. Judicial Discretion That Must Be Exercised

Each type of proceeding may require a court to decide whether the juvenile should be tried and/or sentenced as an adult. When such a decision is required, the criteria that judges must evaluate are substantially identical in all four types of cases.[80] However, the proceedings differ with respect to when the decisions must be made and the interests that the judge must consider when making them.

- In a traditional waiver case, the Family Division must evaluate the relevant criteria in determining whether the best interests of the juvenile and the public would be served by granting a waiver to the court of general criminal jurisdiction for trial. If convicted following waiver, the juvenile must be sentenced as an adult. See Section 14.14.

[76] See Chapter 14 for discussion of traditional waiver proceedings.

[77] See Chapter 15 for discussion of designated proceedings.

[78] See Chapter 15 for discussion of designated proceedings.

[79] See Chapter 16 for discussion of automatic waiver proceedings.

[80] These criteria are discussed in Section 14.8(B) (second-phase traditional waiver hearing), Section 15.8(D) (designation hearing), Section 15.18 (imposing sentence or disposition in designated proceeding), and Section 16.15 (juvenile sentencing hearing in automatic waiver proceeding).

- In a prosecutor-designated case, no hearing is held prior to trial to determine whether to try the juvenile in criminal proceedings. However, following conviction, the Family Division must evaluate the relevant criteria in determining whether the best interests of the public would be served by imposing an adult sentence rather than a juvenile disposition or probation. See Section (A) and Section 15.18.

- In a court-designated case, the Family Division must evaluate the relevant criteria in order to determine whether the best interests of both the juvenile and the public would be served by designating the case for trial in the same manner as an adult. Following conviction, the Family Division must again evaluate the relevant criteria in determining whether the best interests of the public would be served by imposing an adult sentence rather than a juvenile disposition or probation. See Section 15.8(D) and Section 15.18.

- In an automatic waiver case, no hearing is held prior to trial to determine whether to try the juvenile in criminal proceedings in a court of general criminal jurisdiction. For certain serious offenses, the juvenile must be sentenced as an adult following conviction. For other offenses, the court must evaluate the relevant criteria in determining whether the best interests of the public would be served by imposing an adult sentence or by placing the juvenile on probation and committing him or her to state wardship. See Section 16.15.

C. Types of Offenses That May Be Charged

Prosecutor-designated and automatic waiver proceedings may be used only when a specified juvenile violation[81] is alleged. MCL 712A.2(a)(1)(A)-(I); MCL 712A.2d(1).

Court-designated proceedings may be used for any type of offense (felony or misdemeanor), MCL 712A.2d(2), and traditional waiver proceedings may be used when a juvenile is accused of an act that, if committed by an adult, would be a felony, MCL 712A.4(1).

D. Court That Has Jurisdiction

The Family Division of the Circuit Court has jurisdiction over both types of designated cases; additionally, it has jurisdiction over traditional waiver cases prior to the decision to waive jurisdiction.

[81] The specified juvenile violations are listed in Section (A) and Section 16.3.

The court of general criminal jurisdiction has jurisdiction over automatic waiver cases; additionally, it has jurisdiction over traditional waiver cases after jurisdiction has been waived by the Family Division. See Section 2.1.

E. Types of Sentences That May Be Imposed

- In a traditional waiver case, the juvenile must be sentenced as an adult following conviction. See Section 14.14.

- In a prosecutor-designated case, the Family Division may order a juvenile disposition, sentence the juvenile as an adult, or delay imposition of the sentence and place the juvenile on probation. If an adult sentence is imposed, the juvenile may be committed to the jurisdiction of the Department of Corrections. If sentencing is delayed and probation is ordered, the Family Division must periodically review the case during the time in which it has jurisdiction to determine whether sentence should be imposed at any point during that period. See Chapter 15, Parts D and E.

- In a court-designated case, the Family Division has the same options as in a prosecutor-designated case, except that the juvenile may not be committed to the jurisdiction of the Department of Corrections. See Chapter 15, Parts D and E.

- In an automatic waiver case, the court of general criminal jurisdiction must sentence the juvenile as an adult following conviction of any of 12 enumerated very serious specified juvenile violations.[82] For offenses not requiring adult sentencing, the court may either impose an adult sentence or place the juvenile on probation and commit the juvenile to state wardship. If the juvenile is placed on probation as a state ward, the court must periodically review the case to determine whether sentence should be imposed at any point during that period. See Chapter 16, Parts C and D.

[82] See Section 16.11(A) for a list of the 12 very serious specified juvenile violations.

Chapter 2: Jurisdiction, Transfer, and Venue

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In this chapter. . .

This chapter discusses:

- Jurisdiction over juvenile offenders
- Transfer of cases because of age, residence, or membership in an Indian tribe
- Interstate Compact for Juveniles
- Judges and referees in juvenile proceedings
- Requesting judicial review of a referee's recommendation

Related topics are discussed elsewhere in this benchbook. For a discussion of the extension of jurisdiction, see Section 12.2. Placement of juveniles in other states is discussed in Section 10.10(E).

2.1 Jurisdiction Over Juvenile Offenders

Before January 1, 1998, the juvenile division of the *probate court* had "original jurisdiction in all cases of juvenile delinquents . . . except as otherwise provided by law." Const 1963, art 6, § 15. Effective January 1, 1998, the newly created Family Division of Circuit Court ("Family Division") was assigned jurisdiction over "[c]ases involving juveniles as provided in [the Juvenile Code], MCL 712A.1 to [MCL] 712A.32."[1] MCL 600.1021(1)(e). See also MCL 600.601(4); MCL 600.1001; MCL 712A.1(1)(e). As used in the Juvenile Code, the term *juvenile* generally refers to a person who is less than 18 years of age. See MCL 712A.1(1)(i); MCL 712A.2(a).[2] The term *juvenile* also includes "a person 18 years of age or older . . . over whom the [Family Division] has continuing jurisdiction[.]" MCL 712A.2a(9). See also MCR 3.903(B)(2) (when used in delinquency proceedings, "juvenile" generally means "a minor alleged or found to be within the jurisdiction of the [Family Division] for having committed an offense"); MCR 3.903(A)(16) (when used in subchapter 3.900 of the Michigan Court Rules, "'[m]inor' means a person under the age of 18, and may include a person of age 18 or older over whom the [Family Division] has continuing jurisdiction pursuant to MCL 712A.2a").[3]

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[1] MCL 600.1009 states that a reference to the former juvenile division of probate court in any statute shall be construed as a reference to the Family Division of Circuit Court. See also MCL 712A.1(1)(e); MCR 3.903(A)(4) ("[c]ourt" means the Family Division of Circuit Court when used in the Juvenile Code, MCL 712A.1 *et seq*., and in subchapter 3.900 of the Michigan Court Rules ["Proceedings Involving Juveniles"]).

[2] Prior to October 1, 2021, the term *juvenile* generally referred to a person less than 17 years of age. MCL 712A.1(1)(i). See also 2019 PA 113, amending MCL 712A.2(a) effective October 1, 2021.

The scope of the Family Division's jurisdiction under the Juvenile Code is dependent upon the age of a juvenile and the type of proceeding. "Except as otherwise provided in [MCL 712A.2(a)(1)]," the Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court" over a proceeding in which a juvenile under the age of 18 is accused of violating a law or ordinance, MCL 712A.2(a)(1), or of committing a status offense,[4] MCL 712A.2(a)(2)-(4). The Family Division also has jurisdiction over proceedings involving personal protection orders (PPOs), including a PPO proceeding in which a juvenile under the age of 18 is the respondent,[5] MCL 712A.2(h); MCL 600.1021(1)(k).[6]

The Family Division and the court of general criminal jurisdiction have concurrent jurisdiction over certain classes of cases. The Family Division has jurisdiction over a juvenile between the ages of 14 and 18 who is charged with a specified juvenile violation only if the prosecutor files a petition in the Family Division rather than in the court of general criminal jurisdiction. MCL 712A.2(a)(1); *People v Veling*, 443 Mich 23, 30-31 (1993).[7] The Family Division may waive its jurisdiction over a proceeding in which a juvenile 14, 15, 16, or 17 years of age is accused of an act that if committed by an adult would be a felony (traditional waiver proceedings).[8] MCL 712A.4. The Family Division also has concurrent jurisdiction over proceedings involving 17-year-old "wayward minors."[9] MCL 712A.2(d). Additionally, the Family Division has concurrent jurisdiction over "proceedings concerning a juvenile under 18 years of age" if "the juvenile is dependent and is in danger of substantial physical or psychological harm" under certain circumstances, MCL 712A.2(b)(3), including if the juvenile "is alleged to have committed a commercial sexual activity" under MCL 750.462a "or a delinquent act that is the result of force, fraud, coercion, or manipulation exercised by a parent or other adult," MCL 712A.2(b)(3)(C).[10]

"[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

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[3] See Section 12.2 for a discussion of continuing jurisdiction over a juvenile.

[4] See Section 2.3 for a discussion of status offenses.

[5] See Chapter 13 for discussion of minor personal protection order proceedings.

[6] The Family Division has exclusive jurisdiction over several other types of cases that are outside the scope of this benchbook, such as termination of parental rights, divorce, adoption, child custody, paternity, and child support proceedings. See MCL 600.1021(1); see also MCL 712A.2(b)-(c).

[7] See Chapter 16 for discussion of automatic waiver proceedings.

[8] See Chapter 14 for discussion of traditional waiver proceedings.

[9] The Michigan Court Rules generally refer to the provisions of MCL 712A.2(a)(2)-(4) *and* MCL 712A.2(d)(1)-(5) as "status offenses." See MCR 3.903(F) (referring to status offenses as "violation[s] of MCL 712A.2(a)(2)-(4) *or [MCL 712A.2](d)*" (emphasis supplied); see also MCR 3.905(B); MCR 3.905(C); MCR 3.935(B)(5). However, for ease of reference, this benchbook will refer to the provisions of MCL 712A.2(d)(1)-(5) as governing "wayward minors." See Section 2.3(D) for a discussion of these provisions.

the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

"A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013). "[A d]efendant's age when [an] offense was committed does not pertain to the 'kind or character' of the case, but rather constitutes a defendant-specific, 'particular fact['; thus, w]hether [a] defendant [is] of an age that ma[kes] circuit court jurisdiction appropriate is . . . a question of personal jurisdiction." *Id*. at 923-924 (quoting *People v Lown*, 488 Mich 242, 268 (2011),[11] and holding that because "'[a] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction,'" the juvenile defendant, "by entering a guilty plea in the circuit court[] and failing to contest the circuit court's jurisdiction, . . . implicitly consented to that court's exercise of personal jurisdiction").

Once the Family Division establishes personal jurisdiction over a juvenile, it must "order the juvenile returned to his or her parent if the return of the juvenile to his or her parent would not cause a substantial risk of harm to the juvenile or society." MCL 712A.18(1). The court also has incidental jurisdiction to "make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction." MCL 712A.6; see also *In re Contempt of Dorsey*, 306 Mich App 571, 582-583 (2014), vacated in part on other grounds and aff'd in part 499 Mich 948 (2016)[12]; *In re Macomber*, 436 Mich 386, 390-391 (1990).[13] Furthermore, where a "court conclude[s] that [a parent has] interfered with the court's [judicial] function, [he or she may] be punished for contempt." *In re Contempt of Dorsey*, 306 Mich App at 583 (citation omitted).

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[10] In addition, the Family Division has ancillary jurisdiction over cases involving guardians and conservators as provided in article 5 of the Estates and Protected Individuals Code (EPIC), MCL 700.5101 *et seq*., and over cases involving mentally ill or developmentally disabled persons under the Mental Health Code, MCL 330.1001 *et seq*. MCL 600.1021(2)(a)-(b).

[11] "'Subject matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of the case.'" *Kiyoshk*, 493 Mich at 923, quoting *Lown*, 488 Mich at 268.

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

[13] See Section 2.12 for a discussion of the Family Division's authority to exercise incidental personal jurisdiction over adults.

Additionally, MCL 712A.2(i) provides:

> "In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary. This subdivision does not apply after May 1, 2018. As used in this subdivision, 'party' means 1 of the following:
>
> (*i*) In a delinquency proceeding, the petitioner and juvenile.
>
> (*ii*) In a child protective proceeding, the petitioner, department, child, respondent, parent, guardian, or legal custodian, and any licensed child caring institution or child placing agency under contract with the department to provide for a juvenile's care and supervision."

The failure to provide adequate notice of proceedings as required by statute constitutes a jurisdictional defect. See MCL 712A.12; *In re AMB*, 248 Mich App 144, 173 (2001); *In re Mayfield*, 198 Mich App 226, 230-231 (1993).

2.2 Informal Jurisdiction and Diversion

The Family Division may determine that services should be offered to a juvenile without the filing or authorization of a formal petition. See MCL 712A.2(e). The Family Division has the "[a]uthority to establish or assist in developing a program or programs within the county to prevent delinquency and provide services to act upon reports submitted to the court related to the behavior of a juvenile who does not require formal court jurisdiction but otherwise falls within [the provisions of MCL 712A.2(a) (criminal and status offenses and civil infractions)]." MCL 712A.2(e). These services must be voluntarily accepted by the juvenile and his or her parents, guardian, or custodian. *Id.* Furthermore, the court may use informal procedures only if the court complies with the requirements of the Juvenile Diversion Act, MCL 722.821 *et seq*. MCL 712A.11(7).[14]

"[A] case involving the alleged commission of an offense, as defined in [MCL 780.781], by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the

[14] See Chapter 4 for a detailed explanation of diversion and informal procedures.

prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process." MCL 780.786b(1). Before removing a case from the adjudicative process or before finalizing an informal disposition, any victim involved in the case is entitled to notice of the possible removal from adjudication, an opportunity to address the court at the removal hearing, and an opportunity to consult with the prosecuting attorney before the disposition is finalized. MCL 780.786b(1)-(2).[15] Although the court must notify the prosecutor under MCL 780.786b(1), it does not require prosecutorial consent before the court can remove the case. See *In re Diehl*, 329 Mich App 671, 693-694 (2019) (because the statute authorizes trial courts "to remove a case from the adjudication process *preadjudication*, so long as the trial court complies with certain procedural requirements," removal was proper where the petitions had not been adjudicated and the trial court provided written notice to the prosecution).

Because "authorization [of a petition] is not the equivalent of adjudication," the trial court did not abuse "its discretion when it unauthorized [two petitions involving offenses as defined in MCL 780.781] and removed them from the adjudicative process without the consent of the prosecution [under MCL 780.786b]." *Diehl*, 329 Mich App at 688, 692. Although "there does not appear to be any explicit statute, court rule, or published caselaw that refers to 'unauthorization' of a petition, . . . there is also no authority prohibiting the trial court from taking such action–particularly when the juvenile is already under the trial court's jurisdiction and supervision because of an earlier, seperate adjudication and disposition[.]" *Id*. at 692-693. Accordingly, the court did not abuse its discretion when it "provided written notice to the prosecution of its intent to remove the case from the adjudicative process [as required by MCL 780.786b(1)]," because it found that "it was not in the best interests of either respondent or the public to add more adjudications to respondent's juvenile record" where "he was already on probation from an earlier disposition and no additional services would be provided to him if the second and third petitions proceeded to disposition." *Diehl*, 329 Mich App at 693.

[15] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for more information regarding a victim's rights prior to the use of informal procedures.

2.3 Jurisdiction Over Status Offenders[16]

"Status offender" is the term commonly used to refer to juveniles who are alleged to fall within the exclusive original jurisdiction of the Family Division pursuant to MCL 712A.2(a)(2) (runaways), MCL 712A.2(a)(3) (incorrigibles), or MCL 712A.2(a)(4) (truants). The term is also now used to refer to juveniles (sometimes referred to as "wayward minors") who are alleged to fall within the concurrent jurisdiction of the Family Division and all other courts of record pursuant to MCL 712A.2(d) and MCL 764.27.

A. Runaways

The Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age who is found within the county[17] if . . . the following applies:

* * *

> "The juvenile has deserted his or her home without sufficient cause, and the court finds on the record that the juvenile has been placed or refused alternative placement or the juvenile and the juvenile's parent, guardian, or custodian have exhausted or refused family counseling." MCL 712A.2(a)(2).

B. Incorrigibles

The Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age who is found within the county[18] if . . . the following applies:

* * *

> "The juvenile is repeatedly disobedient to the reasonable and lawful commands of his or her parents,

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[16] The court must determine whether a juvenile charged with a status offense is an Indian child for purposes of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. See MCL 712B.3(b)(*v*); MCL 712B.9(1). See Section 2.15 for a brief discussion of the additional procedural requirements that apply if a juvenile accused of a status offense is, or may be, an Indian child.

[17] "As used in MCL 712A.2, a child is 'found within the county' . . . in which the offense committed by the juvenile occurred[] or in which the minor is physically present." MCR 3.926(A).

[18] "As used in MCL 712A.2, a child is 'found within the county' . . . in which the offense committed by the juvenile occurred[] or in which the minor is physically present." MCR 3.926(A).

> guardian, or custodian, and the court finds on the record by clear and convincing evidence that court-accessed services are necessary." MCL 712A.2(a)(3).

The court properly assumed jurisdiction over a juvenile under MCL 712A.2(a)(3) where the juvenile was "caught smoking marijuana, had gotten into trouble for bringing a bow and arrow to school, and was arrested for committing retail fraud." *In re Weiss*, 224 Mich App 37, 38-42 (1997). On appeal, the juvenile argued that he should have been charged with criminal violations or "truancy" rather than "incorrigibility" under MCL 712A.2(a)(3). *In re Weiss*, 224 Mich App at 39-40. The Court of Appeals disagreed, holding that "the concept of disobeying one's parents' commands encompasses getting suspended from school or performing illegal acts." *Id.* at 41. Although the prosecuting attorney could have charged the juvenile with criminal violations, he or she chose to charge the juvenile with general disobedience under the "incorrigibility" provision, and the court properly considered the criminal violations in deciding whether the juvenile had committed this status offense. *Id.*

C. Truants

The court has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age who is found within the county[19] if . . . the following applies:

* * *

> "The juvenile willfully and repeatedly absents himself or herself from school or other learning program intended to meet the juvenile's educational needs, or repeatedly violates rules and regulations of the school or other learning program, and the court finds on the record that the juvenile, the juvenile's parent, guardian, or custodian, and school officials or learning program personnel have met on the juvenile's educational problems and educational counseling and alternative agency help have been sought. As used in [MCL 712A.2(a)(4)] only, 'learning program' means an organized educational program that is appropriate, given the age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar." MCL 712A.2(a)(4).

[19] "As used in MCL 712A.2, a child is 'found within the county' . . . in which the offense committed by the juvenile occurred[] or in which the minor is physically present." MCR 3.926(A).

Truancy under MCL 712A.2(a)(4), which "specifies that a juvenile must have *willfully* absented himself or herself from school[,]" is not a strict liability offense; rather, "truancy [is] an act requiring repeated, willful conduct[.]" *In re Napieraj*, 304 Mich App 742, 747 (2014). Moreover, because MCL 712A.2(a)(4) "'prohibits the willful doing of an act, the act must be done with the specific intent to bring about the particular result the statute seeks to prohibit.'" *In re Napieraj*, 304 Mich App at 746 (quoting *People v Janes*, 302 Mich App 34, 41 (2013), and holding that there was insufficient evidence to support the respondent's adjudication of guilt on a charge of truancy where "[t]he referee failed to address the evidence presented on the record or make any reference to the 'willful' element of [MCL 712A.2(a)(4)]") (additional quotation marks and citation omitted).

The "compulsory education statute," MCL 380.1561, under which a child is legally required to attend a public school subject to certain exceptions enumerated in the statute,[20] may be applied to children through the truancy provision of the Juvenile Code. *In re Marable*, 90 Mich App 7, 10-11 (1979). In the case of a child in a special education program who allegedly repeatedly violates school rules, a school board may not petition the court under MCL 712A.2(a)(4) until "administrative proceedings under the school code's special education provisions have terminated and a final decision has been made that no program within the school system can adequately address the child's special needs and satisfactorily develop the child's maximum potential." *Flint Bd of Educ v Williams*, 88 Mich App 8, 17 (1979).

D. "Wayward Minor" Status Offenses[21]

MCL 712A.2(d) confers concurrent jurisdiction on the Family Division and all other courts of record with respect to certain categories of 17-year-old criminal defendants, sometimes referred to as "wayward minors."

MCL 712A.2(d) provides that the Family Division has concurrent jurisdiction in proceedings concerning a 17-year-old if the Family Division finds on the record that voluntary services have been exhausted or refused and the juvenile "is 1 or more of the following:

[20] Exceptions to compulsory public school attendance include attendance at a state approved nonpublic school, MCL 380.1561(3)(a), and "homeschooling," MCL 380.1561(3)(f); MCL 380.1561(4).

[21] The "wayward minor" provisions of MCL 712A.2(d) are rarely, if ever, used by the trial courts in Michigan. Consequently, there will be no further substantive discussion of these provisions in this benchbook. Note, however, that the court must determine whether a juvenile accused of being a wayward minor is an Indian child for purposes of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. See MCL 712B.3(b)(*v*); MCL 712B.9(1). See Section 2.15 for a brief discussion of the additional procedural requirements that apply if a juvenile accused of a status offense is, or may be, an Indian child.

> "(1) Repeatedly addicted to the use of drugs or the intemperate use of alcoholic liquors.
>
> (2) Repeatedly associating with criminal, dissolute, or disorderly persons.
>
> (3) Found of his or her own free will and knowledge in a house of prostitution, assignation, or ill-fame.
>
> (4) Repeatedly associating with thieves, prostitutes, pimps, or procurers.
>
> (5) Willfully disobedient to the reasonable and lawful commands of his or her parents, guardian, or other custodian and in danger of becoming morally depraved." MCL 712A.2(d)(1)-(5).

2.4 Jurisdiction of Juvenile Delinquency Cases

"Except as otherwise provided in [MCL 712A.2(a)(1)]," the Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age who is found within the county[22]" if the juvenile "has violated any municipal ordinance or law of the state or of the United States." MCL 712A.2(a)(1).

As used in subchapter 3.900 of the Michigan Court Rules (governing practice and procedure in cases filed under the Juvenile Code), a "[d]elinquency proceeding" is "a proceeding concerning an offense by a juvenile, as defined in MCR 3.903(B)(3)." MCR 3.903(A)(5). MCR 3.903(B)(3), in turn, defines "[o]ffense by a juvenile" as "an act that violates a criminal statute, a criminal ordinance, a traffic law, or a provision of MCL 712A.2(a) [(governing violations of law or ordinance, civil infractions, and status offenses)] or [MCL 712A.2](d) [(governing wayward minors)]."

MCL 712A.11(4) states, in relevant part, that "[i]f the juvenile attains his or her eighteenth birthday after the filing of the petition, the court's jurisdiction shall continue beyond the juvenile's eighteenth birthday and the court may hear and dispose of the petition under [the Juvenile Code]."

[22] "As used in MCL 712A.2, a child is 'found within the county' . . . in which the offense committed by the juvenile occurred[] or in which the minor is physically present." MCR 3.926(A). See Section 2.14 for discussion of transfer to the juvenile's county of residence.

2.5 Jurisdiction of Minor PPO Proceedings[23]

MCL 712A.2(h) states, in part:

> "[The Family Division has j]urisdiction over a proceeding under . . . MCL 600.2950 [or MCL] 600.2950a[] in which a minor less than 18 years of age is the respondent, or a proceeding to enforce a valid foreign protection order issued against a respondent who is a minor less than 18 years of age. A personal protection order must not be issued against a respondent who is a minor less than 10 years of age."

If the court exercises its jurisdiction under MCL 712A.2(h), jurisdiction continues until the order expires, regardless of the respondent's age, but any action regarding a minor PPO after the respondent's 18th birthday is no longer subject to the Juvenile Code. MCL 712A.2a(3).[24]

MCL 764.15b(6) provides that the Family Division has jurisdiction to conduct contempt proceedings based upon a violation of a PPO:

> "The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued under . . . [MCL 712A.2(h)][] by the family division of circuit court in any county of this state or a valid foreign protection order issued against a respondent who is less than 18 years of age at the time of the alleged violation of the foreign protection order in this state."

Venue for the issuance of a minor PPO is proper in the county of residence of either the petitioner or respondent. MCL 712A.2(h); MCR 3.703(E)(2). If the respondent does not live in Michigan, venue for the issuance of a minor PPO is proper in the petitioner's county of residence. MCL 712A.2(h); MCR 3.703(E)(2). If a change of venue is ordered, "after the change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none" and may not "entertain any further proceedings[.]" *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658 (2012) (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration" of the trial court's order changing venue).

When a minor allegedly violates a PPO and is apprehended in a county other than the county in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request that

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[23] See Section 13.2 for additional discussion of jurisdiction over minor PPO proceedings.

[24] "Proceedings to . . . enforce a minor personal protection order still in effect when the respondent is 18 or older[] are governed by [MCR 3.708 (governing adult PPO proceedings)]." MCR 3.708(A)(2).

the minor be returned to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E); see also MCR 3.985(H).

2.6 Automatic Waiver of Family Division Jurisdiction[25]

> "[Under MCL 600.606, t]he circuit court is given jurisdiction over juveniles at least fourteen years of age who commit any of the 'specified juvenile violations,' so that it may hear the automatic waiver cases where the prosecutor charges the juvenile as an adult. . . . Correspondingly, [under MCL 712A.2(a)(1),] the normally exclusive jurisdiction of the [Family Division] over juveniles is limited in cases where a juvenile at least fourteen years of age is charged with any of the 'specified juvenile violations,' so that the [Family Division] only has jurisdiction if the prosecutor chooses to file a petition in the [Family Division] instead of authorizing a complaint and warrant to proceed against the juvenile as an adult." *People v Conat*, 238 Mich App 134, 141 (1999).

MCL 600.606(1) provides that "[t]he circuit court has jurisdiction to hear and determine a specified juvenile violation if committed by a juvenile 14 years of age or older and less than 18 years of age." Although MCL 600.606(1) assigns jurisdiction to the "circuit court" and the Family Division is within the circuit court, automatic waiver cases are heard in the court of general criminal jurisdiction. See MCL 764.1f(1) (providing that the prosecuting attorney may commence an automatic waiver proceeding by "authoriz[ing] the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile"); see also *People v Oslund*, ___ Mich ___, ___ (2024) (noting that "MCL 764.1f(2)(b) defines 'specified juvenile violation' as either first-degree home invasion, MCL 750.110a, or AWIGBH, but only 'if *the juvenile* is armed with a dangerous weapon'");[26] MCL 712A.2(a)(1) (limiting the Family Division's jurisdiction over "a juvenile 14 years of age or older who is charged with a specified juvenile violation" to cases in which "the prosecuting attorney files a petition in the [Family Division] instead of authorizing a complaint and warrant" for filing in the district court); see also MCL 600.1021(1)(e) (specifying that the Family Division has jurisdiction over "[c]ases involving juveniles as provided in [the Juvenile Code, MCL 712A.1 *et seq*.]").

"A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of

[25] See Chapter 16 for a detailed discussion of automatic waiver proceedings.

[26] MCL 764.1f(2)(b)'s "use of the term '*the* juvenile' unambiguously refers to the charged juvenile in question." *People v Oslund*, ___ Mich ___, ___ (2024). "For purposes of automatic waiver, the actions of other individuals cannot be transferred or imputed onto the charged juvenile defendant." *Id*. at ___.

personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013).[27]

2.7 Traditional Waiver of Family Division Jurisdiction[28]

MCL 712A.4(1) sets out the procedures for "traditional" (judicial) waiver of the Family Division's jurisdiction over juveniles accused of committing offenses that if committed by adults would be felonies:

> "If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense."[29]

If the juvenile has previously been under the jurisdiction of the circuit court in a traditional waiver proceeding under MCL 712A.4 or in an automatic waiver proceeding under MCL 600.606, the Family Division *must* waive jurisdiction to the court of general criminal jurisdiction without holding the second-phase hearing. MCL 712A.4(5); MCR 3.950(D)(2).[30]

"A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013).[31]

2.8 Designated Proceedings in the Family Division[32]

A "'[d]esignated proceeding' [is] a proceeding in which the prosecuting attorney has designated, or has requested the court to designate, the case for trial in the family division of the circuit court in the same manner as an adult." MCR 3.903(A)(6). A juvenile "'[t]ried in the same manner as an adult' . . . is afforded all the legal and procedural protections that an

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[27] See Section 2.1 for additional discussion of jurisdiction over juvenile offenders.

[28] See Chapter 14 for a detailed discussion of traditional waiver proceedings.

[29] See Section 3.9 for a discussion of pretrial detention in traditional waiver cases.

[30] See Section 14.8(E) for further discussion of MCL 712A.4(5) and MCR 3.950(D)(2).

[31] See Section 2.1 for additional discussion of jurisdiction over juvenile offenders.

[32] See Chapter 15 for a detailed discussion of designated proceedings. Pretrial detention of juveniles in designated cases is discussed in Section 3.6.

adult would be given if charged with the same offense in a court of general criminal jurisdiction." MCR 3.903(D)(9). See also MCL 712A.2d(7). The court's acceptance of a plea of guilty or nolo contendere or a verdict of guilty results in the entry of a judgment of conviction. *Id*. The conviction has the same effect and creates the same liabilities as if it had been obtained in a court of general criminal jurisdiction. *Id*.

A designated case is either a prosecutor-designated case or a court-designated case. MCR 3.903(D)(3). Only the prosecuting attorney may designate a case or request leave to amend a petition to designate a case in which the petition alleges a specified juvenile violation, and only the prosecuting attorney may request the court to designate a case in which the petition alleges an offense other than a specified juvenile violation. MCR 3.914(D)(1)-(2). Therefore, although the prosecuting attorney initiates both types of designated proceedings, the court decides whether to designate a case where an offense other than a specified juvenile violation is alleged. *Id.* See also MCL 712A.2d(1)-(2).[33]

"A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013).[34]

2.9 Jurisdiction Over Juveniles Accused of Violating the Michigan Vehicle Code[35]

The Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age" who "has violated any municipal ordinance or law of the state or of the United States." MCL 712A.2(a)(1). As used in subchapter 3.900 of the Michigan Court Rules (governing practice and procedure in cases filed under the Juvenile Code), a "[d]elinquency proceeding" is "a proceeding concerning an offense by a juvenile, as defined in MCR 3.903(B)(3)." MCR 3.903(A)(5). MCR 3.903(B)(3), in turn, defines "[o]ffense by a juvenile" as "an act that violates a criminal statute, a criminal ordinance, a *traffic law*, or a provision of MCL 712A.2(a) [(governing violations of law or ordinance, civil infractions, and status offenses)] or [MCL 712A.2](d) [(governing wayward minors)]." (Emphasis supplied.)

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[33] See SCAO Form JC 04a, *Petition (Delinquency Proceedings)*, which may be used to designate a case or request that the court designate a case.

[34] See Section 2.1 for additional discussion of jurisdiction over juvenile offenders.

[35] See Section 2.10 for discussion of jurisdiction over juveniles who have committed civil infractions, including civil infractions under the Michigan Vehicle Code.

2.10 Jurisdiction Over Juveniles Who Have Committed Civil Infractions

"'Civil infraction' means an act or omission that is prohibited by a law and is not a crime under that law or that is prohibited by an ordinance, as defined in [MCL 600.8701], and is not a crime under that ordinance, and for which civil sanctions may be ordered." MCL 600.113(1)(a). See also MCL 712A.1(1)(a), which states that the definition of "[c]ivil infraction" in MCL 600.113 applies to proceedings under the Juvenile Code. A violation of the Michigan Vehicle Code, MCL 257.1 *et seq*., that is designated as a civil infraction is a "[c]ivil infraction" within the meaning of MCL 600.113(1)(a). MCL 600.113(1)(a)(*i*).[36]

The Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age" who "has violated any municipal ordinance or law of the state or of the United States." MCL 712A.2(a)(1).[37] This provision supersedes provisions of the Revised Judicature Act that assign district courts and municipal courts jurisdiction of civil infraction actions, MCL 600.8301(2) and MCL 600.8703(2); see also MCL 257.741(5) (providing that district courts and municipal courts have jurisdiction over minors cited for traffic civil infractions).[38]

The Family Division may agree to waive jurisdiction over any civil infractions under MCL 712A.2e, which states as follows:

> "(1) The [Family Division] may enter into an agreement with any or all district courts or municipal courts within the [Family Division's] geographic jurisdiction to waive jurisdiction over any or all civil infractions alleged to have been committed by juveniles within the geographic jurisdiction of the district court or municipal court. The

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[36] See Section 2.9 for discussion of jurisdiction over juveniles accused of violating the Michigan Vehicle Code.

[37] See also MCR 3.903(B)(3), which defines "[o]ffense by a juvenile" as "an act that violates a criminal statute, a criminal ordinance, a traffic law, or a provision of MCL 712A.2(a) [(governing violations of law or ordinance, *civil infractions*, and status offenses)] or [MCL 712A.2](d) [(governing wayward minors)]." (Emphasis supplied.)

[38] In *Welch v Dist Court*, 215 Mich App 253, 256-257 (1996), the Court applied MCL 257.741(5) and concluded that the district court, rather than the probate court, had jurisdiction over a juvenile who had committed a traffic civil infraction. However, the *Welch* Court relied in part on former MCR 5.903(B)(4), which provided that an "[o]ffense by a juvenile," for purposes of delinquency proceedings in the probate court, included "an act which violates a traffic law *other than an offense designated as a civil infraction[]*" (emphasis supplied). See *Welch*, 215 Mich App at 256-257. Currently, MCR 3.903(B)(3), for purposes of delinquency proceedings in the Family Division, defines "[o]ffense by a juvenile" as including "an act that violates . . . a traffic law," with no exception for civil infractions.

> agreement shall specify for which civil infractions the [Family Division] waives jurisdiction.
>
> (2) For a civil infraction waived under subsection (1) committed by a juvenile on or after the effective date of the agreement, the district court or municipal court has jurisdiction over the juvenile in the same manner as if an adult had committed the civil infraction. The [Family Division] has jurisdiction over juveniles who commit any other civil infraction."

If the Family Division enters into an agreement to waive jurisdiction under MCL 712A.2e, it "has jurisdiction over a juvenile who committed a civil infraction as provided in that section." MCL 712A.2(a)(1).

2.11 Jurisdiction of Contempt Proceedings[39]

A. Authority

The Family Division has "the power to punish for contempt of court under [MCL 600.1701 *et seq*.] any person who willfully violates, neglects, or refuses to obey and perform any order or process the [Family Division] has made or issued to enforce [the Juvenile Code]." MCL 712A.26. See also MCR 3.928(A), which states that "[t]he [Family Division] has the authority to hold persons in contempt of court as provided by MCL 600.1701 and [MCL] 712A.26." Courts have inherent authority to punish contumacious conduct. *Walker v Henderson (In re Contempt of United Stationers Supply Co)*, 239 Mich App 496, 499 (2000). However, the Legislature has authority to prescribe penalties for contempt. See *Cross Co v UAW Local No 155 (AFL-CIO)*, 377 Mich 202, 223 (1966).

The Family Division may also enforce its reimbursement orders[40], MCL 712A.18(2) and MCL 712A.18(3), and orders assessing attorney costs, MCL 712A.17c(8), MCL 712A.18(5), and MCR 3.915(E), through its contempt powers. See, generally, *In re Reiswitz*, 236 Mich App 158, 172 (1999).[41]

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[39] For a detailed discussion of procedural requirements in contempt cases, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

[40] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/4a548b/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

[41] Note, however, that "[a] juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 3.928(D). See MCR 6.425(D)(3) (governing incarceration for nonpayment in adult criminal and contempt cases) for guidance in determining whether a juvenile or parent has the ability to pay court-ordered financial obligations. See Section 19.2 for discussion of MCR 6.425(D)(3).

B. Contempt by Juvenile's Parent or Guardian

MCL 712A.6a requires the parent or guardian of a juvenile who is within the Family Division's jurisdiction under MCL 712A.2(a)(1) (violation of law or ordinance) to attend all hearings held pursuant to the Juvenile Code, unless excused for good cause. MCL 712A.6a adds that "[a] parent or guardian who fails to attend the juvenile's hearing without good cause may be held in contempt and subject to fines."[42] MCL 600.1715 generally allows for a fine of not more than $7,500 or imprisonment for up to 93 days, or both, as punishment for contempt. See also MCR 3.928(A) ("A parent, guardian, or legal custodian of a juvenile who is within the court's jurisdiction and who fails to attend a hearing as required is subject to the contempt power as provided in MCL 712A.6a.").[43]

2.12 Jurisdiction and Authority Over Adults

MCL 712A.6 states:

> "The court has jurisdiction over adults as provided in [the Juvenile Code] and as provided in . . . MCL 600.1060 to [MCL] 600.1082[44] and [MCL] 600.1099b to [MCL] 600.1099m,[45] and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders must be incidental to the jurisdiction of the court over the juvenile or juveniles."

The authority to fashion remedies under MCL 712A.6 extends beyond MCL 712A.18, which provides dispositional alternatives for juveniles found to be within the court's jurisdiction. *In re Macomber*, 436 Mich 386, 389-393, 398-400 (1990); see also *In re Contempt of Dorsey*, 306 Mich App 571, 582-583 (2014). Furthermore, where a "court conclude[s] that [a

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[42] "Failure of a parent or guardian to attend a hearing, however, is not grounds for an adjournment, continuance, or other delay of the proceeding and does not provide a basis for appellate or other relief." MCL 712A.6a.

[43] Note, however, that "[a] juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 3.928(D). See MCR 6.425(D)(3) (governing incarceration for nonpayment in adult criminal and contempt cases) for guidance in determining whether a juvenile or parent has the ability to pay court-ordered financial obligations. See Section 19.2 for discussion of MCR 6.425(D)(3).

[44] MCL 600.1060 to MCL 600.1082 govern drug treatment courts. See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 10, for more information on drug treatment courts.

[45] MCL 600.1099b to MCL 600.1099m govern juvenile mental health courts. See Section 1.8 for more information on juvenile mental health treatment courts.

parent has] interfered with the court's [judicial] function, [he or she may] be punished for contempt." *Id*. at 583 (citation omitted).

An order directed to a parent or other person who is not the juvenile is not binding unless the individual has been given an opportunity for a hearing by the issuance of a summons or notice as provided in MCL 712A.12 and MCL 712A.13. MCL 712A.18(4). The order, bearing the seal of the court, must be served on the parent or other person as required by MCL 712A.13. MCL 712A.18(4).

2.13 Transfer of Jurisdiction to Family Division Because Offender Was Under 18 at Time of Offense

MCL 764.27 provides for the transfer of a pending criminal case, except for an automatic waiver proceeding under MCL 600.606, to the Family Division when it is discovered that the accused is under 18 years of age.

MCL 712A.3 states:

> "(1) For an offense occurring before October 1, 2021, if during the pendency of a criminal charge against an individual in any other court it is ascertained that the individual was under the age of 17 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the individual resides. For an offense occurring on or after October 1, 2021, if during the pendency of a criminal charge against an individual in any other court it is ascertained that the individual was under the age of 18 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the individual resides.
>
> (2) The court making the transfer shall order the individual to be taken promptly to the place of detention designated by the family division of the circuit court or to that court itself or release the juvenile in the custody of some suitable person to appear before the court at a time designated. The court shall then hear and dispose of the case in the same manner as if it had been originally instituted in that court."

Therefore, if it is discovered during the pendency of a criminal charge occurring on or after October 1, 2021, that a juvenile was under 18 years

of age when the offense was committed but 18 years of age or older when charged with the offense, the court of general criminal jurisdiction must transfer the case to the Family Division.[46] MCL 712A.3.

MCL 712A.5 states that the Family Division "does not have jurisdiction over an individual after he or she attains the age of 19 years, except as provided in [MCL 712A.2a]," which governs continuing jurisdiction.[47] Where the juvenile was under 18 years of age at the time of the offense but 18 years old or older at the time of being charged, and the case is transferred back to the Family Division under MCL 712A.3, the Family Division has jurisdiction for the limited purpose of holding a traditional waiver hearing under MCL 712A.4. *In re Seay*, 335 Mich App 715, 721 (2021), citing *People v Schneider*, 119 Mich App 480, 484-487 (1982).[48] If the Family Division declines to waive its jurisdiction, the case must be dismissed. *Seay*, 335 Mich App at 723, citing *Schneider*, 119 Mich App at 487.

"[T]he procedures described in MCL 712A.3 and MCL 712A.4 contemplate scenarios in which a criminal charge has already been filed against a person in the circuit court and it is thereafter determined that the person committed the offense when he was under the age of [18]." *Seay*, 335 Mich App at 723. In *Seay*, "respondent was 24 years old when [the] petition was filed in the family court regarding acts he allegedly committed when he was 15 or 16 years old." *Id*. "At the time of filing the petition, petitioner knew that respondent was under the age of [18] when he committed the alleged offense, and, accordingly, filed the petition [and motion to waive jurisdiction] in the family division." *Id*. at 723-724. "Without holding a hearing, the referee reviewed the petition and recommended that the petition not be authorized and the case be dismissed" finding that "the family division did not have jurisdiction over respondent because he was 24 years old." *Id*. at 724. The *Seay* Court "[did] not take issue with a petitioner filing a petition in the family division against a person [who] has reached the age of 18 regarding acts he committed as a juvenile when it is known before the petition was filed that the person was a juvenile when he committed the acts." *Id*. at 724-725. "Therefore, the family division erred (1) when it concluded that petitioner had to initially file [the] action in the circuit court for the circuit court to then transfer the case to the family division for a waiver hearing,

[46] However, "[a] circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013) (quoting *People v Lown*, 488 Mich 242, 268 (2011), and holding that because "'[a] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction,'" the juvenile defendant, "by entering a guilty plea in the circuit court, and failing to contest the circuit court's jurisdiction, . . . implicitly consented to that court's exercise of personal jurisdiction").

[47] See Section 12.2 for a discussion of continuing jurisdiction over a juvenile.

[48] At the time *Seay* was decided, MCL 712A.3 and MCL 712A.4 applied to juveniles under the age of 17 at the time the crime occurred. Effective October 1, 2021, the age was raised to 18. See 2019 PA 109.

and (2) by not authorizing the petition and dismissing the case without holding a waiver hearing." *Id*. at 725.

2.14 Change of Venue or Transfer of Jurisdiction to County of Residence

A. Original Jurisdiction is in County in Which Offense Occurred

The Family Division has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 18 years of age *who is found within the county*" and who, except for a juvenile in an automatic waiver proceeding, has violated a law or ordinance or has committed a status offense. MCL 712A.2(a)(1)-(4) (emphasis supplied). "As used in MCL 712A.2, a child is 'found within the county' . . . in which the offense committed by the juvenile occurred, or in which the minor is physically present." MCR 3.926(A).

B. Change of Venue

With the exception of traditional waiver hearings, designated proceedings, and minor PPO proceedings,[49] "[t]he court, on motion by a party, may order a case to be heard before a court in another county:

> (1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case; or
>
> (2) when an impartial trial cannot be had where the case is pending." MCR 3.926(D).

The transferring court must bear all costs of the proceeding in the other county and enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. MCR 3.926(D); MCR 3.926(F)(1). "The clerk of the court must prepare the case records for transfer in accordance with the orders entered under [MCR 3.926(F)(1)] and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method." MCR 3.926(F)(2).

"[A]fter [a] change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently,

[49] See Section 2.14(G) for further discussion of the transfer and venue rules applicable to traditional waiver, designated, and minor PPO proceedings.

the transferor court has none" and may not "entertain any further proceedings[.]" *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658 (2012) (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration" of the trial court's order changing venue).

C. Transfer to "County of Residence"

With the exception of traditional waiver hearings, designated proceedings, and minor PPO proceedings,[50] "[i]f a juvenile is brought before the court in a county other than that in which the juvenile resides, . . . the court may enter an order transferring jurisdiction of the matter to the court of the county of residence." MCL 712A.2(d); see also MCR 3.926(B). The following requirements apply to transfers of jurisdiction:

- Transfer must occur "before a hearing," MCL 712A.2(d), and "before trial," MCR 3.926(B).
- The judge of the court in the county of residence must consent to the transfer, unless "the county of residence is a county juvenile agency and satisfactory proof of residence is furnished to the court of the county of residence." MCL 712A.2(d); see also MCR 3.926(B).

"The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court," and "[t]he clerk of the court must prepare the case records for transfer in accordance with the orders entered under [MCR 3.926(F)(1)] and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method." MCR 3.926(F)(1)-(2).

"[A]fter [a] change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none" and may not "entertain any further proceedings[.]" *Frankfurth*, 297 Mich App at 656, 658 (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration" of the trial court's order changing venue).

D. Determining "County of Residence"

MCR 3.926(B)(1)-(3) provide:

[50] See Section 2.14(G) for further discussion of the transfer and venue rules applicable to traditional waiver, designated, and minor PPO proceedings.

> "(1) If both parents reside in the same county, or if the child resides in the county with a parent who has been awarded legal custody, a guardian, a legal custodian, or the child's sole legal parent, that county will be presumed to be the county of residence.
>
> (2) In circumstances other than those enumerated in [MCR 3.926(B)(1)], the court shall consider the following factors in determining the child's county of residence:
>
> > (a) The county of residence of the parent or parents, guardian, or legal custodian.
> >
> > (b) Whether the child has ever lived in the county, and, if so, for how long.
> >
> > (c) Whether either parent has moved to another county since the inception of the case.
> >
> > (d) Whether the child is subject to the prior continuing jurisdiction of another court.
> >
> > (e) Whether a court has entered an order placing the child in the county for the purpose of adoption.
> >
> > (f) Whether the child has expressed an intention to reside in the county.
> >
> > (g) Any other factor the court considers relevant.
>
> (3) If the child has been placed in a county by court order or by placement by a public or private agency, the child shall not be considered a resident of the county in which he or she has been placed, unless the child has been placed for the purpose of adoption."

"'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian'[51] as defined in MCR 3.002(15)." MCR 3.903(A)(14).

E. Bifurcated Proceedings

"If the judge of the transferring court and the judge of the receiving court agree, the case may be bifurcated to permit adjudication in the transferring court and disposition in the receiving court. The case

[51] See Section 2.15 for a brief discussion of transfer of jurisdiction in certain cases involving Indian children.

may be returned to the receiving court immediately after the transferring court enters its order of adjudication." MCR 3.926(E).

In bifurcated cases, the court that enters an order of adjudication must "send any supplemented pleadings and other records to the court entering the disposition in the case." MCR 3.926(F).

F. Costs of Disposition

When disposition is ordered by the Family Division in a county other than the juvenile's county of residence, the court ordering disposition is responsible for any costs incurred in connection with the order unless:

- the court in the county in which the juvenile resides agrees to pay such dispositional costs, or
- the juvenile is made a state ward and the county of residence withholds consent to a transfer of the case. MCR 3.926(C).

G. Special Rules Applicable to Traditional Waiver, Designated, and Minor PPO Proceedings

1. Traditional Waiver Hearings

MCL 712A.4(1) provides that "the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction . . . upon motion of the prosecuting attorney." MCR 3.950(A) further provides that "[o]nly a judge assigned to hear cases in the family division of the circuit court of the county where the offense is alleged to have been committed may waive jurisdiction pursuant to MCL 712A.4."

2. Designated Proceedings

MCR 3.926(G) provides that "[d]esignated cases are to be filed in the county in which the offense is alleged to have occurred." MCL 712A.2(d) further provides that a designated case "may be transferred for venue or for juvenile disposition, but shall not be transferred on grounds of residency."

Accordingly, only the following proceedings in a designated case may be heard outside the county in which the offense occurred:

- A change of venue may be ordered for the purpose of trial. MCR 3.926(G).

- After conviction, the case may be transferred to the juvenile's county of residence for entry of a *juvenile disposition* only. *Id*.

If a change of venue is ordered, "after the change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none[]" and may not "entertain any further proceedings[.]" *Frankfurth*, 297 Mich App at 656, 658 (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration[]" of the trial court's order changing venue).

"Sentencing of a juvenile [convicted in a designated proceeding], including delayed imposition of sentence, may only be done in the county in which the offense occurred." *Id*.[52]

When disposition is ordered by the Family Division in a county other than the juvenile's county of residence, the court ordering disposition is responsible for any costs incurred in connection with the order unless:

- the court in the county in which the juvenile resides agrees to pay such dispositional costs, or

- the juvenile is made a state ward and the county of residence withholds consent to a transfer of the case. MCR 3.926(C).

3. Minor PPO Proceedings

Venue for the issuance of a minor PPO is proper in the county of residence of either the petitioner or respondent. MCL 712A.2(h); MCR 3.703(E)(2). If the respondent does not live in Michigan, venue for the issuance of a minor PPO is proper in the petitioner's county of residence. MCL 712A.2(h); MCR 3.703(E)(2). If a change of venue is ordered, "after the change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none[]" and may not "entertain any further proceedings[.]" *Frankfurth*, 297 Mich App at 656, 658 (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration[]" of the trial court's order changing venue).

[52] See Chapter 15, Part D, for discussion of the court's options following conviction in designated cases.

When a minor allegedly violates a PPO and is apprehended in a county other than the county in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request that the minor be returned to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E); see also MCR 3.985(H).

2.15 Transfer of Jurisdiction in Status Offense and "Wayward Minor" Cases Involving Indian Children[53]

The Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., mandates that state courts adhere to certain minimum procedural requirements before removing an Indian child[54] from his or her home. 25 USC 1902. To this end, the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., sets out requirements and procedures that apply in child custody proceedings[55] involving an Indian child[56] or a child whom the court knows or has reason to know may be an Indian child.

Neither the ICWA nor the MIFPA applies to a placement based upon an act which, if committed by an adult, would constitute a crime. 25 USC 1903(1); MCL 712B.3(b)(*vi*). Thus, the requirements of the ICWA and the MIFPA, as relevant to juvenile offenders, apply only to Indian children who are accused of status offenses (running away from home, incorrigibility, truancy, or status as a so-called "wayward minor"). See MCL 712B.3(b)(*v*) (providing that the term "[c]hild custody proceeding" includes a proceeding in which "[a]n Indian child is charged with a

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[53] The ICWA "requires a state court to place an Indian child with an Indian caretaker, if one is available," and applies "even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there." *Haaland v Brackeen*, 599 US 255, 264 (2023). "This case arises from three separate child custody proceedings governed by ICWA," wherein "a birth mother, foster and adoptive parents, and the State of Texas challenge the Act on multiple constitutional grounds . . . argu[ing] that it exceeds federal authority, infringes state sovereignty, and discriminates on the basis of race." *Id*. at 264, 268. The United States Supreme Court rejected "all of petitioners' challenges to the statute," and affirmed "Congress's constitutional authority to enact ICWA." *Id*. at 264, 296 (upholding the validity of ICWA).

See the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19, for a thorough discussion of the ICWA and of jurisdiction over proceedings involving Indian children.

[54] Under the ICWA, an "Indian child" is "any unmarried person who is under age 18 and is either (a) a member of an Indian tribe, or (b) is [sic] eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4); see also MCL 712B.3(k); MCR 3.002(12), which contain substantially similar language except that they do not require the child to be the biological child of a tribal member. Rather, the child must be eligible for membership "as determined by that Indian tribe."

[55] The ICWA and the MIFPA apply whenever an Indian child is the subject of a *child custody proceeding*. See 25 USC 1903(1); MCL 712B.3(b); 25 CFR 23.2; 25 CFR 23.103(a). In Michigan, the term "child custody proceeding" includes situations where "[a]n Indian child is charged with a status offense[,]" MCL 712B.3(*v*), and "[a]ny action removing an Indian child from his or her parent or Indian custodian, and where the parent or Indian custodian cannot have the Indian child returned upon demand but parental rights have not been terminated, for temporary placement in" an institution or elsewhere, MCL 712B.3(b)(*i*)." See also 25 CFR 103(a)(1)(*iii*) and 25 CFR 23.2, the corresponding ICWA regulations.

status offense in violation of [MCL 712A.2(a)(2)-(4)] or [MCL 712A.2(d)][]").[57]

"An Indian tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of that tribe[]" or who "is a ward of a tribal court[.]" MCL 712B.7(1); see also 25 USC 1911(a); MCR 3.002(6). Moreover, "for an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer [a child custody] proceeding to the Indian tribe's jurisdiction, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, provided that the transfer is subject to declination by the tribal court of the Indian tribe." MCL 712B.7(3). Additionally, in any child custody proceeding involving an Indian child, "the Indian custodian of the child and the Indian child's tribe have a right to intervene at any point[,]" and "[o]fficial tribal representatives have the right to participate in any proceeding that is subject to the [ICWA] and [the MIFPA]." MCL 712B.7(6)-(7). In any such proceeding, if the court knows or has reason to know that a juvenile who is charged with a status offense is an Indian child "and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6)[,]" the petitioner must notify the Indian child's parent, Indian custodian, and tribe of any pending proceedings. MCR 3.920(C)(1); 25 CFR 23.11(a); see also MCL 712B.9(1). Notice must be made by registered mail with return receipt requested. MCR 3.920(C)(1); see also MCL 712B.9(1). Copies of the notices must be sent to the Minneapolis Regional Director of the Bureau of Indian Affairs by registered mail with return receipt requested. See MCL 712B.9(1); MCR 3.920(C)(1); 25 CFR 23.11(a); 25 CFR 23.11(b)(2); see also *In re Morris*, 491 Mich 81, 104 n 14 (2012).

Accordingly, if there is any indication that a juvenile accused of a status offense is, or may be, an Indian child, the court must comply with the jurisdictional and procedural requirements of the ICWA and the MIFPA. For a thorough discussion of these requirements, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19.

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[56] Under the MIFPA, "'Indian child' means an unmarried person who is under the age of 18 and is either . . . (*i*) [a] member of an Indian tribe[or] (*ii*) [e]ligible for membership in an Indian tribe as determined by that Indian tribe." MCL 712B.3(k); see also MCR 3.002(12). Unlike the definition of "'Indian child'" in the ICWA, 25 USC 1903(4), there is no requirement that a child who is not a member of an Indian tribe be "the biological child of a member of an Indian tribe[]" in order to qualify as an "'Indian child'" under the MIFPA or MCR 3.002(12).

[57] The MIFPA and the Michigan Court Rules refer to the "wayward minor" provisions of MCL 712A.2(d) as "status offenses." See MCL 712B.3(b)(*v*); MCR 3.903(F); MCR 3.905(B); MCR 3.905(C); MCR 3.935(B)(5). See Section 2.3 for additional discussion of jurisdiction over status offenders, including wayward minors.

2.16 Procedures When Juvenile Is Subject to Prior or Continuing Jurisdiction of Another Michigan Court

Where a child is subject to a prior or continuing order of any other court of this state, notice must be filed in that court of any order subsequently entered under the Juvenile Code by the Family Division. MCL 712A.3a.[58] The following individuals are entitled to notice via registered mail or personal service:

- the juvenile's parents, guardian, or persons in loco parentis; and
- the prosecuting attorney of the county in which the other court is located. MCL 712A.3a.

"Such notices shall not disclose any allegations or findings of facts set forth in such petitions or orders, nor the actual person or institution to whom custody is changed. Such facts may be disclosed directly to such prosecuting attorney and shall be disclosed on request of the prosecuting attorney or by order of such other court, but shall be considered as confidential information, the disclosure of which will be subject to the same care as in all juvenile matters." MCL 712A.3a.[59]

The manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205. MCR 3.927. A waiver or transfer of jurisdiction is not required for the full and valid exercise of jurisdiction by the subsequent court. MCR 3.205(A). The plaintiff or other initiating party[60] must send written notice of proceedings to:

(a) the clerk or register of the prior court, and

(b) the appropriate official of the prior court.[61] MCR 3.205(B)(2).

The notice must be sent at least 21 days before the date set for hearing, except that if the fact of continuing jurisdiction is not then known, notice must be sent immediately when it becomes known. MCR 3.205(B)(3). The notice requirement is not jurisdictional and does not preclude the subsequent court from entering interim orders before the 21-day period

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[58] See SCAO Form MC 28, *Notice to Prior Court of Proceedings Affecting Minor(s)*.

[59] See Chapter 21 for discussion of confidential records.

[60] Although MCR 3.205(B) states that the plaintiff or other initiating party must send the required notice, as a practical matter, the court often sends the notice. See SCAO Form MC 28, *Notice to Prior Court of Proceedings Affecting Minor(s)*. See also MCR 3.703(D)(2), which requires a court that is petitioned to issue a minor personal protection order (PPO) to comply with MCR 3.205.

[61] The "appropriate official" means the friend of the court, juvenile officer, or prosecuting attorney, depending on the type of proceeding. MCR 3.205(B)(1).

ends if it is in the best interests of the minor. MCR 3.205(B)(4). See also *Krajewski v Krajewski*, 420 Mich 729, 734 (1984) (subsequent court may enter temporary or permanent orders).

"Upon receipt of notice required by [MCR 3.205(B)], the appropriate official of the prior court

> "(a) must provide the subsequent court with copies of all relevant orders then in effect and copies of relevant records and reports, and
>
> (b) may appear in person at proceedings in the subsequent court, as the welfare of the minor and the interests of justice require." MCR 3.205(D)(1).

"Upon request of the prior court, the appropriate official of the subsequent court

> "(a) must notify the appropriate official of the prior court of all proceedings in the subsequent court, and
>
> (b) must send copies of all orders entered in the subsequent court to the attention of the clerk or register and the appropriate official of the prior court." MCR 3.205(D)(2).

"Each provision of a prior order remains in effect until the provision is superseded, changed, or terminated by a subsequent order." MCR 3.205(C)(1). "A subsequent court must give due consideration to prior continuing orders of other courts, and may not enter orders contrary to or inconsistent with such orders, except as provided by law." MCR 3.205(C)(2). See *In re AP*, 283 Mich App 574, 593-594 (2009), where the Court of Appeals concluded that once the juvenile court assumes jurisdiction over a juvenile, its orders supersede any other order affecting the custody of the child under MCR 3.205(C), "even if inconsistent or contradictory." The Court stated that "the juvenile court's orders function to supersede, rather than modify or terminate, the custody orders while the juvenile matter is pending because the juvenile orders are entered pursuant to a distinct statutory scheme that takes precedence over the [Child Custody Act]." *In re AP*, 283 Mich App at 594.

2.17 Interstate Transfer of Juvenile Offenders

A. Extradition

Michigan's Uniform Criminal Extradition Act (UCEA), MCL 780.1 *et seq.*, "applies to juveniles charged with delinquent behavior in another state." *In re Boynton*, 302 Mich App 632, 635-636, 640 (2013) (holding that because MCL 780.2 "indicates . . . applicability . . . to a

'person' . . . without distinction premised on age[,]" the trial court properly permitted the 15-year-old respondent's extradition to the state of Georgia to face accusations of delinquent behavior allegedly committed in that state when he was 12 years old).

Furthermore, "the reason for the absence of [an] individual from the demanding state is irrelevant for purposes of extradition." *In re Boynton*, 302 Mich App at 648. Rather, "'"fugitivity" [under MCL 780.2] is shown when[] . . . [the] defendant is ascertained to be the person wanted in the demanding state and was present in the demanding state at the time the alleged offense occurred.'" *In re Boynton*, 302 Mich App at 647-648 (quoting *In re Simmans*, 54 Mich App 112, 116 (1974), and rejecting the juvenile respondent's contention that he had not "'fled from justice' as set forth in MCL 780.2[] . . . [but instead] left Georgia following a brief vacation to return to his home state of Michigan . . . [as] dictated by his mother[]").[62]

B. Procedures for Handling Cases Under the Interstate Compact for Juveniles

The Interstate Compact for Juveniles, MCL 3.691 *et seq.*, allows for interstate placement and probation and parole supervision of out-of-state juveniles. All compacting states must comply with the substantive rules (ICJ Rules) issued by the Interstate Commission for Juveniles (ICJ).[63] In Michigan, all requests for services in cases involving other states must be made to the Department of Human Services, Bureau of Juvenile Justice, Interstate Compact for Juveniles.

For information on the background of the ICJ, procedures in interstate cases, and liability and immunity considerations for court personnel in interstate cases, consult the following sources:

- ICJ website, available at http://www.juvenilecompact.org/
- ICJ Rules, available at https://www.juvenilecompact.org/legal/rules-step-by-step-table-of-contents
- ICJ Judges' Toolkit, available at https://www.juvenilecompact.org/legal/toolkit-for-judges

[62] The *In re Boynton* Court declined to address the juvenile respondent's contention that "removal from his family" and "extradition at 'the tender age of 15'" would constitute cruel and unusual punishment, concluding that this constitutional claim "must be addressed by the courts of the state of Georgia, not the courts of Michigan." *In re Boynton*, 302 Mich App at 652, 654-655 (noting that "a detainee awaiting extradition[] has not incurred a punishment under [either] the Eighth Amendment[]" or the Michigan Constitution, Const 1963, art 1, § 16).

[63] The ICJ Rules can be accessed at https://www.juvenilecompact.org/legal/rules-step-by-step-table-of-contents.

- ICJ's *Bench Book for Judges & Court Personnel*, available at https://www.juvenilecompact.org/bench-book
- the ICJ Bench Card on Transfer of Supervision, available at https://www.juvenilecompact.org/sites/default/files/ICJ%20Bench%20Card.pdf
- the ICJ Training Materials, available at https://www.juvenilecompact.org/training/training-materials

2.18 Judges and Referees in Juvenile Proceedings

MCL 712A.10, MCR 3.912, and MCR 3.913 set out requirements regarding when a judge must preside over juvenile proceedings and when an attorney referee or a nonattorney referee may be assigned to hear a matter and make recommended findings and conclusions.

A. Judges

Parties have the right to a judge at a hearing on the formal calendar. MCR 3.912(B). The "formal calendar" includes all delinquency proceedings other than a preliminary inquiry, a preliminary hearing, or proceedings on the consent calendar. MCR 3.903(A)(10).

Additionally, under MCR 3.912(A), a judge *must* conduct the following proceedings:

> "(1) a jury trial;
>
> (2) a waiver proceeding under MCR 3.950 [(traditional waiver proceeding)];
>
> (3) the preliminary examination, trial, and sentencing in a designated case;
>
> (4) a proceeding on the issuance, modification, or termination of a minor personal protection order."

Whenever practicable, two or more matters within the Family Division's jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023.

A judge may be disqualified as provided in MCR 2.003. MCR 3.912(D).

B. Referees[64]

MCR 3.913(A)(1) states that "the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than those specified in MCR 3.912(A) and to make recommended findings and conclusions." See also MCL 712A.10(1).

1. Attorney Referees

In general, "only a person licensed to practice law in Michigan may serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing, if the juvenile is before the court under MCL 712A.2(a)(1) [(violations of law or ordinance)]." MCR 3.913(A)(2)(a); see also MCL 712A.10(2).

In a designated case, "[o]nly a referee licensed to practice law in Michigan may preside at a hearing to designate a case or to amend a petition to designate a case and to make recommended findings and conclusions." MCR 3.913(A)(2)(c).

"Only a referee licensed to practice law in Michigan may preside at any . . . hearing [other than a preliminary hearing] for the enforcement of a minor personal protection order and make recommended findings and conclusions." MCR 3.913(A)(2)(d).

2. Nonattorney Referees

In a delinquency case, a nonattorney referee may conduct only the preliminary inquiry or preliminary hearing. MCL 712A.10(2);[65] MCR 3.913(A)(2)(a).

In a minor personal protection order enforcement proceeding, a nonattorney referee may conduct the preliminary hearing. MCR 3.913(A)(2)(d).

3. Scope of Authority

MCL 712A.10 sets out the scope of a referee's authority. *In re AMB*, 248 Mich App 144, 216 (2001). MCL 712A.10(1) provides:

> "Except as otherwise provided in [MCL 712A.10(2)[66]] and [MCL 712A.14, MCL 712A.14a, and MCL 712A.14b],[67] the judge may designate a

[64] See Section 2.19 for discussion of the review of a referee's recommendation.

[65] This limitation does not apply "to a probation officer or county agent who has been designated to act as a referee by the judge before January 1, 1988 and who is acting as a referee as of January 1, 1988." MCL 712A.10(2).

> probation officer or county agent to act as referee in taking the testimony of witnesses and hearing the statements of parties upon the hearing of petitions alleging that a child is within the provisions of [the Juvenile Code], if there is no objection by parties in interest. The probation officer or county agent designed to act as referee shall do all of the following:
>
> > "(a) Take and subscribe the oath of office provided by the constitution.
> >
> > "(b) Administer oaths and examine witnesses.
> >
> > "(c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court's findings and disposition."

"[A] hearing referee's recommendations and proposed order [under MCL 712A.10(1)(c)] *cannot* be accepted without judicial examination[;] '[t]hey are a helpful time-saving crutch and no more[, and] [t]he responsibility for the ultimate decision and the exercise of judicial discretion in reaching it still rests squarely upon the trial judge' and may not be delegated." *In re AMB*, 248 Mich App at 217, quoting *Campbell v Evans*, 358 Mich 128, 131 (1959). "Consequently, when it is apparent that someone other than a judge made the substantive legal decision in a case [in which the referee's authority extends only to making a recommendation and proposed order], the only appropriate appellate response is to reverse." *In re AMB*, 248 Mich App at 217-218 (concluding that a referee acted outside his authority under MCL 712A.10 when he entered an order permitting the withdrawal of an infant's life support).

When a juvenile is taken into custody without a court order under MCL 712A.14(1) for violating a law, ordinance, or PPO and is not released to his or her parent(s), guardian, or custodian, a referee may conduct a preliminary hearing and may sign an order authorizing the filing of a complaint. MCL 712A.14(2).

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[66] MCL 712A.10(2) provides that, in a delinquency case, a nonattorney referee "shall not be designated to act as a referee in any hearing for the child, except the preliminary inquiry or preliminary hearing[,]" with the exception of probation officers and county agents who were designated to act as referees before January 1, 1988, and who were acting as referees as of that date. See Section 2.18(B)(2).

[67] MCL 712A.14(2), MCL 712A.14a(2)-(3), and MCL 712A.14b(1) specifically provide referees with the authority to issue orders under certain circumstances.

Similarly, when a child is taken into protective custody without a court order and is not released, a referee may enter an order for the placement of the child pending a preliminary hearing. MCL 712A.14a(2)-(3).

Additionally, a referee may issue a written ex parte order authorizing the Department of Human Services to immediately take a child into protective custody and place the child pending a preliminary hearing. MCL 712A.14b(1); MCR 3.913(A)(2)(b); MCR 3.963(B)(4).[68]

Referees are bound by the same standards of conduct as judges, including the Michigan Code of Judicial Conduct and the Michigan Rules of Professional Conduct. See MCR 9.201(B)(2); MCR 9.202.

Committee Tip

Some courts may routinely assign new cases to referees and require the filing of a written demand for a hearing before a judge. MCR 3.912(B) provides that "[t]he parties have the right to a judge at a hearing on the formal calendar[,]" and that "[a] party may demand that a judge rather than a referee preside at a nonjury trial by filing a written demand with the court[.]"

2.19 Judicial Review of Referee's Recommended Findings and Conclusions[69]

"Before signing an order based on a referee's recommended findings and conclusions,[70] a judge of the [Family Division] shall review the recommendations if requested by a party in the manner provided by [MCR 3.991](B)." MCR 3.991(A)(1).

---

[68] See the Michigan Judicial Institute's *Child Protective Proceedings*, Chapter 19, for more information on protective custody.

[69] See Section 2.18 for discussion of the authority of referees in juvenile proceedings.

[70] With exceptions and limitations as set out in MCR 3.912 and MCR 3.913, a referee may be assigned by the Family Division to conduct certain hearings and to make recommended findings and conclusions. MCR 3.913(A)(1). See Section 2.18.

A. Advice of Rights

"During a hearing held by a referee, the referee must inform the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B)." MCR 3.913(C)(1).

"At the conclusion of a hearing described in MCR 3.937(A), the referee must provide the juvenile with advice of appellate rights in accordance with MCR 3.937. When providing this advice, the referee must state that the appellate rights do not attach until the judge enters an order described in MCR3.993(A)." MCR 3.913(C)(2).

B. Entry of Order Without Requested Review

"If no . . . request [for review] is filed within the time provided by [MCR 3.991](B)(3), the court may enter an order in accordance with the referee's recommendations." MCR 3.991(A)(2).

Additionally, the judge may review a referee's recommendations sua sponte and enter an appropriate order before the time for requesting a review has expired. MCR 3.991(A)(3). Once the judge enters an order, a request for review may not be filed; instead, "[r]econsideration of the order is by motion for rehearing under MCR 3.992." MCR 3.991(A)(4).[71]

C. Procedural Requirements

MCR 3.991(B) and MCR 3.991(C) contain the procedural requirements for filing and serving a request for review of a referee's recommendations and a response to a request for review:

> "**(B) Form of Request; Time.** A party's request for review of a referee's recommendation must:
>
> "(1) be in writing,
>
> "(2) state the grounds for review,
>
> "(3) be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee's written recommendations, whichever is later, and
>
> "(4) be served on the interested parties by the person requesting review at the time of filing the

[71] See Section 9.14 for a discussion of MCR 3.992.

request for review with the court. A proof of service must be filed.

"**(C) Response.** A party may file a written response within 7 days after the filing of the request for review."

D. Stay of Proceedings and Grant of Bail

"The court may stay any order or grant bail to a detained juvenile, pending its decision on review of the referee's recommendation." MCR 3.991(G).

E. Ruling on Review Request

1. No Hearing Required

The judge may, but is not required to, schedule a hearing before ruling on a request for review of a referee's recommendations. MCR 3.991(D); MCR 3.991(F).

2. Time Requirement

If the juvenile is in placement or detention, the judge must consider the request within 21 days after it is filed, absent good cause for delay. MCR 3.991(D).

3. Review Standard

MCR 3.991(E) sets out the standard the judge must apply when reviewing a referee's recommendations:

> "The judge must enter an order adopting the referee's recommendation unless:
>
> > "(1) the judge would have reached a different result had he or she heard the case; or
> >
> > "(2) the referee committed a clear error of law, which
> >
> > > "(a) likely would have affected the outcome, or
> > >
> > > "(b) cannot otherwise be considered harmless."

4. Remedy

MCR 3.991(F) provides that, following review of a referee's recommendation, the judge may:

- "adopt, modify, or deny the recommendation of the referee, in whole or in part, on the basis of the record and the memorandums prepared," or
- "conduct a hearing[.]"

Chapter 3: Custody and Detention Pending Preliminary Hearing or Arraignment

3.1. Taking Custody of a Juvenile Upon Arrest 3-2
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In this chapter. . .

This chapter discusses:

- the required procedures immediately following the apprehension of a juvenile for a criminal or status offense;
- the custody, notification, and detention requirements before a preliminary hearing in a delinquency case or an arraignment in a criminal case; and
- detention[1] of a juvenile following a preliminary hearing or arraignment.

3.1 Taking Custody of a Juvenile Upon Arrest

Unless the prosecuting attorney has decided to proceed under the automatic waiver statute, MCL 600.606, a police officer who arrests a person under 18 years of age must immediately take him or her before the Family Division of the circuit court of the county where the offense was allegedly committed and file or cause to be filed a delinquency petition. MCL 764.27. However, taking a juvenile to a police station first does not violate MCL 764.27 if the police officer takes the juvenile there for administrative purposes such as to complete booking procedures, or, as required by statute,[2] to collect biometric data, including fingerprints, from the juvenile. *People v Morris*, 57 Mich App 573, 575-576 (1975); *People v Hammond*, 27 Mich App 490, 493-494 (1970); *People v Coleman*, 19 Mich App 250, 253-254 (1969), abrogated on other grounds by *People v McFarlin (Gary)*, 41 Mich App 116 (1972), rev'd on other grounds 389 Mich 557 (1973).[3]

Where the prosecuting attorney has reason to believe that a juvenile between the ages of 14 and 18 has committed a specified juvenile violation, he or she may authorize the filing of a complaint and warrant with a magistrate concerning the juvenile.[4] MCL 764.1f(1). In the absence of an authorization from the prosecuting attorney, the juvenile must be brought to the Family Division or to a designated facility if the court is not open. See MCR 3.934(A)(1); MCR 3.934(B)(2). Pursuant to MCR 3.934(B)(2), each Family Division must designate a person whom an officer may contact to obtain permission to temporarily detain a juvenile when the court is not open:

> "The court must designate a judge, referee, or other person who may be contacted by the officer taking a juvenile into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the juvenile pending preliminary hearing."

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[1] Detention is also discussed in other portions of this benchbook. See Section 6.3(H) (detention following preliminary hearings in delinquency proceedings), Section 10.12 (post-disposition detention pending return to placement), and Section 11.2 (detention pending a probation violation proceeding in delinquency cases). Custody and detention pending hearings in personal protection order (PPO) actions is discussed in Section 13.7 and Section 13.8.

[2] See MCL 28.243(1); MCR 3.923(C).

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

[4] See, however, MCL 764.1a (magistrate may issue a warrant or summons only after finding reasonable cause that the accused committed an offense; a summons must be issued instead of a warrant unless certain circumstances apply).

3.2 Obtaining Custody of a Juvenile Without a Family Division Order

A. Officer's Obligations Immediately After a Juvenile Is Taken Into Custody

A police officer, sheriff, deputy sheriff, state police officer, county agent, or probation officer may, without a court order, take any juvenile into custody if (1) the juvenile is found violating any law or ordinance or (2) there is reasonable cause to believe the juvenile is violating or has violated a personal protection order (PPO) issued under MCL 712A.2(h) or a valid foreign protection order.[5] MCL 712A.14(1). After apprehending the juvenile, the officer or agent must immediately attempt to notify the juvenile's parent(s), guardian, or custodian. *Id.* While awaiting arrival of the parent(s), guardian, or custodian, the juvenile must not be held in a jail or other detention facility unless the juvenile can be isolated so as to prevent any verbal, visual, or physical contact with any adult prisoner. *Id.* See also MCR 3.933(D).

The federal regulations that implement the Juvenile Justice and Delinquency Prevention Act (JJDPA), 34 USC 11101 *et seq.*,[6] provide useful definitions when determining what constitutes "any verbal, visual, or physical contact with any adult prisoner." 28 CFR 31.303(d)(1)(*i*) states in relevant part:

> "The term *contact* includes any physical or sustained sight or sound contact between juvenile offenders in a secure custody status and incarcerated adults, including inmate trustees. A juvenile offender in a secure custody status is one who is physically detained or confined in a locked room or other area set aside or used for the specific purpose of securely detaining persons who are in law enforcement custody. Secure detention or confinement may result either from being placed in such a room or area and/or from being physically secured to a cuffing rail or other stationary object. Sight contact is defined as clear visual contact between incarcerated adults and juveniles within close proximity to each other. Sound contact is defined as direct oral

[5] For discussion of protective custody of children who are at "substantial risk of harm" or are "in surroundings that present an imminent risk of harm[,]" MCL 712A.14a(1), see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 3. For discussion of emergency removal of an Indian child, see the MJI's *Child Protective Proceedings Benchbook*, Chapter 19.

[6] The JJDPA, *inter alia*, makes federal funds available to states that plan for and implement policies ensuring that certain categories of juveniles will not be detained or confined in secure facilities or in facilities in which they would have contact with adult prisoners. See 34 USC 11133(a)(11)-(13).

> communication between incarcerated adults and juvenile offenders."

When a juvenile is apprehended pursuant to MCL 712A.14(1) and the officer "does not warn and release the juvenile, does not refer the juvenile to a diversion program,[7] and does not have authorization from the prosecuting attorney to file a complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f, the officer may:

> (1) issue a citation or ticket to appear at a date and time to be set by the court and release the juvenile;
>
> (2) accept a written promise of the parent, guardian, or legal custodian to bring the juvenile to court, if requested, at a date and time to be set by the court, and release the juvenile to the parent, guardian, or legal custodian; or
>
> (3) take the juvenile into custody and request the prosecutor to file a petition, if:
>
> > (a) the officer has reason to believe that because of the nature of the offense, the interest of the juvenile or the interest of the public would not be protected by release of the juvenile, or
> >
> > (b) a parent, guardian, or legal custodian cannot be located or has refused to take custody of the juvenile." MCR 3.933(A).

If the juvenile is not released, the juvenile and his or her parent(s), guardian, or custodian, if they can be located, must immediately be brought before the court for a preliminary hearing. MCL 712A.14(2). At the conclusion of the preliminary hearing, the court must either authorize a complaint to be filed or release the juvenile to his or her parent(s), guardian, or custodian. *Id.*

B. Officer's Obligations If Juvenile Is Not Released From Custody

The officer taking custody of the juvenile must immediately contact the court if:

> "(1) the officer detains the juvenile,

[7] See Section 4.3 for a detailed explanation of the Juvenile Diversion Act.

> "(2) the officer is unable to reach a parent, guardian, or legal custodian who will appear promptly to accept custody of the juvenile, or
>
> "(3) the parent, guardian, or legal custodian will not [sign a written promise to bring the juvenile to court]." MCR 3.933(C).

Additionally, where the juvenile is not released and the prosecutor has not authorized the filing of a complaint and warrant charging the juvenile as an adult pursuant to the automatic waiver statute, the officer must:

> "(1) forthwith[8] take the juvenile
>
> > "(a) before the court for a preliminary hearing, or
> >
> > "(b) to a place designated by the court pending the scheduling of a preliminary hearing;
>
> "(2) ensure that the petition is prepared and presented to the court;
>
> "(3) notify the parent, guardian, or legal custodian of the detaining of the juvenile and of the need for the presence of the parent, guardian, or legal custodian at the preliminary hearing;
>
> "(4) prepare a custody statement[9] for submission to the court including:
>
> > "(a) the grounds for and the time and location of detention, and
> >
> > "(b) the names of persons notified and the times of notification, or the reason for failure to notify." MCR 3.934(A).

C. Officer's Obligations If Family Division Is Not Open[10]

When a juvenile is apprehended without a court order and the court is not open, the juvenile may be detained pending a preliminary hearing if no parent, guardian, or legal custodian can be located, or if

---

[8] The officer may complete booking procedures and collect biometric data, including fingerprints, from the juvenile. See MCL 28.243; see also Section 3.1; Section 21.10.

[9] See SCAO Form JC 01, *Complaint (Request for Action, Delinquency Proceedings)*.

[10] Under MCR 3.934(B)(2), each Family Division must designate a person whom an officer may contact to obtain permission to temporarily detain a juvenile when the court is not open.

the juvenile or the offense meets the criteria set out in MCR 3.935(D)(1).[11] MCR 3.934(B)(1).

Committee Tip:

"Court intake workers," referees, or detention personnel often make the initial detention determination. Courts may wish to promulgate a local administrative order meeting the requirements of MCR 3.934(B) and MCR 3.935(D)(1). A copy of the administrative order may then be given to each law enforcement agency in the court's geographic jurisdiction.

3.3 Obtaining Custody of a Juvenile With a Family Division Order

The Family Division "may issue an order[12] authorizing a peace officer or other person designated by the court to apprehend a juvenile who is absent without leave from an institution or facility to which he or she was committed under [MCL 712A.18], has violated probation, has failed to appear for a hearing on a petition charging a violation of [MCL 712A.2], is alleged to have violated a personal protection order issued under [MCL 712A.2(h)], or is alleged to have violated a valid foreign protection order." MCL 712A.2c.[13] The order must "set forth specifically the identity of the juvenile" and the location "where there is probable cause to believe the juvenile is to be found." *Id.* "A person who interferes with the lawful attempt to execute an order issued under [MCL 712A.2c] 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." *Id.*[14]

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[11] See Section 3.4 for discussion of conditions for detention of juveniles under MCR 3.935(D)(1). Detention requires that "the results of the detention screening tool have been considered pursuant to MCR 3.907" and include circumstances such as when "release would endanger the public safety[]" or when "there is a substantial likelihood that if the juvenile is released . . . [he or she] will fail to appear at the next court proceeding[.]" MCR 3.935(D)(1)(a); MCR 3.935(D)(1)(c).

[12] See SCAO Form JC 05a, *Order to Apprehend and Detain (Delinquency Proceedings/Minor Personal Protection)*.

[13] For discussion of protective custody of children who are at "substantial risk of harm" or are "in surroundings that present an imminent risk of harm[,]" MCL 712A.14a(1), see the Michigan Judicial Institute's (MJI) *Child Protective Proceedings Benchbook*, Chapter 3. For discussion of emergency removal of an Indian child, see the MJI's *Child Protective Proceedings Benchbook*, Chapter 19.

[14] See also MCL 722.151, which prohibits "aid[ing] or abet[ting] a child . . . to violate an order of [the Family Court] or . . . conceal[ing] or harbor[ing] juvenile runaways who have taken flight from the custody of the court, their parents or legal guardian."

See also MCR 3.933(B), which allows the court to issue an order to apprehend a juvenile upon a showing of probable cause that he or she has committed an offense:

> "When a petition is presented to the court, and probable cause exists to believe that a juvenile has committed an offense, the court may issue an order to apprehend the juvenile. The order may include authorization to
>
> (1) enter specified premises as required to bring the juvenile before the court, and
>
> (2) detain the juvenile pending preliminary hearing.
>
> However, a juvenile may not be detained in a secure facility pending hearing unless the court has considered the results of a detention screening tool conducted on the juvenile under MCR 3.907."

Probable cause to issue an arrest warrant exists if the facts and circumstances are "sufficient to warrant a prudent [person] in believing that the [accused] had committed or was committing an offense." *Beck v Ohio*, 379 US 89, 91 (1964).

3.4 Conditions for Detention of Juvenile

Following the filing of a complaint or petition,[15] the court may release the child into the custody of a parent, guardian, or custodian, or it may detain the juvenile in a designated facility.[16] MCL 712A.15(1). Detention is permissible under the "[c]onditions for [d]etention" set out in MCR 3.935(D)(1),[17] which provides:

> "(1) *Conditions for Detention*. A juvenile may be ordered detained or continued in detention if the court finds[18] probable cause to believe the juvenile committed the offense, the results of the detention screening tool have been considered pursuant to MCR 3.907, and that one or more of the following circumstances are present:

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[15] MCL 712A.15(1) defines "petition" as including a petition, supplemental petition, petition for revocation of probation, supplemental petition alleging a personal protection order (PPO) violation, or a petition or supplemental petition alleging a violation of a court order under MCL 712A.2(a)(2)-(4).

[16] See Sections 3.5 (juvenile delinquency), 3.6 (status offenders), 3.7 (designated cases), 3.8 (automatic wiaver cases), and 3.9 (traditional waiver cases) for discussion of permissible places of detention for various categories of juveniles.

[17] Additionally, when determining whether to release or detain a juvenile following preliminary hearing, the Family Division must consider the factors set out in MCR 3.935(C)(1). See Section 6.3(G) for discussion of these factors.

> (a) the offense alleged is so serious that release would endanger the public safety;
>
> (b) the juvenile is charged with an offense that would be a felony if committed by an adult and will likely commit another offense pending trial, if released, and
>
> > (i) another petition is pending against the juvenile,
> >
> > (ii) the juvenile is on probation, or
> >
> > (iii) the juvenile has a prior adjudication, but is not under the court's jurisdiction at the time of apprehension;
>
> (c) there is a substantial likelihood that if the juvenile is released to the parent, guardian, or legal custodian, with or without conditions, the juvenile will fail to appear at the next court proceeding;
>
> (d) the home conditions of the juvenile make detention necessary;
>
> (e) the juvenile has run away from home;[19]
>
> (f) the juvenile has failed to remain in a detention facility or nonsecure facility or placement in violation of a valid court order; or
>
> (g) pretrial detention is otherwise specifically authorized by law." MCR 3.935(D)(1).

See also MCL 712A.15(2), which authorizes pretrial detention. Several provisions in MCL 712A.15(2) have been incorporated into MCR 3.935(D)(1). Additionally, subject to MCL 712A.15(3), MCL 712A.15(2) allows for detention pending a hearing for juveniles:

> "(b) . . . who have a record of unexcused failures to appear at juvenile court proceedings[, or]
>
> * * *

[18] MCR 3.934(B)(1) also provides for the temporary detention, pending preliminary hearing, of a juvenile who is apprehended without a court order when the court is not open, "if the offense or the juvenile meets a circumstance set forth in MCR 3.935(D)(1)[]" (or "if no parent, guardian, or legal custodian can be located[]"). In such a case, "a judge, referee, or other [designated] person" must be contacted for permission to detain the juvenile. MCR 3.934(B)(2). See Section 3.1 and Section 3.2(C) for discussion of temporary detention when the court is not open.

[19] But see Section 3.6 for discussion of limitations on the detention of status offenders.

> (e) . . . who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation."

An individual or agency designated by the court must use a detention screening tool before a juvenile may be detained in a secure facility pending hearing. MCL 712A.15(3). The court must "consult the results of the detention screening tool and follow" applicable court rules before detaining a juvenile. *Id*. "The court shall share the results of the detention screening tool with all parties before a juvenile's detention hearing. The state court administrative office, under the supervision and direction of the supreme court and in collaboration with local courts, shall determine the appropriate detention screening tool." *Id*.

"Any statement, admission, confession, or incriminating evidence obtained from a juvenile in the course of a screening under [MCL 712A.15] is not admissible as evidence in an adjudicatory hearing in which the juvenile is accused, is not subject to subpoena, and may not be used in any other court proceeding or for any other purpose." MCL 712A.15(3).

The juvenile may contest the sufficiency of the evidence supporting a probable cause finding under MCR 3.935(D)(1). MCR 3.935(D)(3). The Michigan Rules of Evidence do not apply, except those with respect to privileges. *Id*.

A juvenile may waive the probable cause determination required by MCR 3.935(D)(1), but only if he or she is represented by an attorney. MCR 3.935(D)(2).

See *Schall v Martin*, 467 US 253, 255-257 (1984), upholding the constitutionality of a state's "preventive detention" statute, which allowed for pretrial detention of a juvenile accused of delinquency if there was a serious risk of the juvenile committing another crime before the next court hearing.

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[20]

[20] See Section 10.11 for additional information on MCR 3.937.

3.5 Places of Detention for Alleged Juvenile Delinquents[21]

Following the filing of a complaint or petition,[22] the court may release the child into the custody of a parent, guardian, or custodian, or it "may order the juvenile, pending the hearing, detained in a facility as the court designates."[23] MCL 712A.15(1).[24]

For purposes of delinquency proceedings, MCR 3.903(B)(1) broadly defines "[d]etention" to mean "court-ordered removal of a juvenile from the custody of a parent, guardian, or legal custodian, pending trial, disposition, commitment, or further order." This definition allows for placement in a nonsecure facility or foster home.[25] As a general rule, a juvenile "must be placed in the least restrictive environment[26] that will meet the needs of the juvenile and the public, and that will conform to the requirements of MCL 712A.15 and [MCL] 712A.16." MCR 3.935(D)(4).

Generally, a juvenile who is less than 18 years of age who is taken into custody or detained "must not be confined in a police station, prison, jail, lock-up, or reformatory or transported with, or compelled or permitted to associate or mingle with, criminal or dissolute persons." MCL 712A.16(1); see also MCL 764.27a(1). Except as provided for status offenders,[27] "the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process." MCL 712A.16(1); see also MCL 764.27a(2) (applicable to automatic waiver and designated cases). MCL 764.27a(2) imposes the

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[21] A juvenile in a designated proceeding under MCL 712A.2d is subject to the detention rules applicable to delinquency cases until after the Family Division has made a probable cause finding at the preliminary examination. See Section 3.7. Additionally, juveniles charged under the traditional waiver statute, MCL 712A.4, are subject to the detention rules applicable to delinquency cases while under the jurisdiction of the Family Division. See Section 3.9.

[22] MCL 712A.15(1) defines "petition" as including a petition, supplemental petition, petition for revocation of probation, supplemental petition alleging a personal protection order (PPO) violation, or a petition or supplemental petition alleging a violation of a court order under MCL 712A.2(a)(2)-(4).

[23] See Section 3.4 for discussion of the circumstances under which a juvenile may be detained.

[24] See also MCL 712A.2(i), which provides, in relevant part:

"In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018. As used in this subdivision, 'party' means 1 of the following:

(*i*) In a delinquency proceeding, the petitioner and juvenile."

[25] See MCL 712A.16(2), authorizing the boarding of juveniles in foster care homes, "child caring institution[s]," or, if the juveniles are at least 17 years of age and are kept separate from adult criminals, county jails.

additional restriction that juveniles confined in a jail or other place of detention for adults must be placed in a room or ward out of sight and sound of adults.[28]

MCL 750.139(1)[29] provides that a child under 18 years of age "while under arrest, confinement, or conviction for a crime must not be":

- placed in an apartment or cell of a prison or place of confinement with 1 or more adults under arrest, confinement, or conviction for a crime;
- permitted to remain in any court room during the trial of adults; or
- transported with adults charged with or convicted of a crime.

Any person who violates MCL 750.139 is guilty of a misdemeanor. MCL 750.139(4).

MCL 712A.16(2)(c) provides that the court may place a juvenile over the age of 17 in a county jail if the juvenile is kept "in a room or ward separate and apart from adult criminals . . . ."

Additionally, MCR 3.928(C) provides:

> "A juvenile under court jurisdiction who is convicted of criminal contempt of court, and who was at least 18 years of age when the contempt was committed, may be sentenced to up to 93 days in the county jail as a disposition for the contempt. Juveniles sentenced under this subrule need not be lodged separately and apart from adult prisoners. Younger juveniles found in contempt of court are subject to a juvenile disposition under these rules."

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[26] "'Least restrictive environment' means a supervised community placement, preferably a placement with the juvenile's parent, guardian, relative, or a facility or conditions of treatment that is a residential or institutional placement only utilized as a last resort based on the best interest of the juvenile or for reasons of public safety." MCL 712A.1(1)(j).

[27] See Section 3.6 for discussion of detention of status offenders.

[28] See Section 3.2(A) for discussion of "sight" and "sound" contact.

[29] These provisions do "not apply to prisoners being transported to or from, or confined in a youth correctional facility operated by the department of corrections or a private vendor under . . . MCL 791.220g." MCL 750.139(2).

3.6 Places of Detention for Alleged Status Offenders[30]

If a juvenile is taken into custody for a status offense listed in MCL 712A.2(a)(2)-(4)[31] and detained in a secure facility,[32] "the petitioner shall ensure that an appropriately trained, licensed, or certified mental health or substance abuse professional interviews the juvenile in person within 24 hours to assess the immediate mental health and substance abuse needs of the juvenile. The assessment may alternatively be done upon filing the petition, before an order for placement in a secure facility. Within 48 hours of the placement in the secure facility, the petitioner shall submit the assessment to the court and the court shall conduct a hearing to determine both of the following:

> (a) If there is reasonable cause to believe that the juvenile violated the court order.
>
> (b) The appropriate placement of the juvenile pending the disposition of the alleged violation, including if the juvenile should be placed in a secure facility." MCL 712A.15(4).

Committee Tip:

Use of secure detention for a status offender who has repeatedly violated court orders may be necessary for the juvenile's safety and well-being. However, a court should also consider the emotional impact of being placed in secure detention and its financial cost.

MCL 712A.15(6) prohibits a juvenile taken into custody for a status offense under MCL 712A.2(a)(2)-(4)[33] from being detained in "a cell or other secure area of a secure facility designed to incarcerate adults unless either of the following applies:

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[30] See Section 2.3 for discussion of status offenses. See Section 2.15 for a brief discussion of additional requirements that apply when an Indian child is accused of a status offense.

[31] Although the "17-year-old wayward minor" provisions of MCL 712A.2(d)(1)-(5) are generally considered to be "status offenses" (see Section 2.3 and MCR 3.903[F]), MCL 712A.15(4) does not apply to wayward minors.

[32] Secure facility "means any public or private licensed child caring institution identified by the [Department of Health and Human Services] as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

[33] MCL 712A.15(6) also applies to juveniles under age 18 who are under Family Division jurisdiction based upon a divorce proceeding as provided in MCL 712A.2(c).

> (a) The juvenile is under the jurisdiction of the court under [MCL 712A.2(a)(1) (violation of law or ordinance)] for an offense which, if committed by an adult, would be a felony.
>
> (b) Until September 30, 2021, the juvenile is not less than 17 years of age and is under the jurisdiction of the court under a supplemental petition under [MCL 712A.2(h) (personal protection order [PPO] actions)[34]]. Beginning October 1, 2021, the juvenile is not less than 18 years of age and is under the jurisdiction of the court under a supplemental petition under [MCL 712A.2(h)]."[35]

3.7 Places of Detention for Juveniles Whose Felony Cases Have Been Designated for Criminal Trial in Family Division[36]

A juvenile under 18 years of age who is under the jurisdiction of the Family Division may be held in the county jail pending trial if the case has been designated for criminal trial by the court pursuant to MCL 712A.2d.[37] MCL 712A.2(g); MCL 764.27a(3). The court must determine that there is probable cause that the alleged offense was committed and that the juvenile committed the alleged offense. MCL 712A.2(g). This occurs at the preliminary examination held by a Family Division judge. See MCR 3.903(D)(5). Prior approval of the county sheriff is required, and the juvenile must be held physically separate from adults. MCL 764.27a(3). See also MCR 3.953(G), which provides:

> "If the court has designated the case and finds probable cause to believe that a felony or an offense for which an adult could be imprisoned for more than one year has been committed and probable cause to believe that the juvenile committed the offense, the judge may confine the juvenile in the county jail pending trial. If the juvenile is under 18 years of age, the juvenile may be confined in jail only if the juvenile

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[34] Proceedings to enforce personal protection orders (PPOs) against minor respondents are discussed in Chapter 13.

[35] The Juvenile Justice and Delinquency Prevention Act (JJDPA), 34 USC 11101 *et seq*., makes federal funds available to states that, *inter alia*, plan for and implement policies ensuring that certain categories of juveniles will not be detained or confined in secure facilities or in facilities in which they would have contact with adult prisoners. See 34 USC 11133(a)(11)-(13).

[36] See Chapter 15 for a detailed discussion of designated proceedings.

[37] A juvenile in a designated proceeding is subject to the detention rules applicable to delinquency cases until after the Family Division has made a probable cause finding at the preliminary examination. See Section 3.5.

> can be separated by sight and sound[38] from adult prisoners and if the sheriff has approved the confinement."

Upon motion of a juvenile under 18 years of age who is subject to confinement in the county jail, the court may, upon good cause shown, order that person to be confined as otherwise provided by law. MCL 764.27a(4).

3.8 Places of Detention for Juveniles Charged Under the Automatic Waiver Statute[39]

MCR 6.907(B) provides:

> "If the prosecuting attorney has authorized the filing of a complaint and warrant charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, a juvenile may, following apprehension, be detained pending arraignment:
>
> > "(1) in a juvenile facility operated by the county;[40]
> >
> > "(2) in a regional juvenile detention facility operated by the state; or
> >
> > "(3) in a facility operated by the family division of the circuit court with the consent of the family division or an order of a [circuit court, other than the family division]."

The Family Division must comply if a court of general criminal jurisdiction in the same county orders the juvenile placed, pending trial, in a Family Division-operated detention home for juveniles. MCL 712A.2(f).

"If no juvenile facility is reasonably available and if it is apparent that the juvenile may not otherwise be safely detained, the magistrate may, without a hearing, authorize that the juvenile be lodged pending arraignment in a facility used to incarcerate adults. The juvenile must be kept separate from adult prisoners as required by law." MCR 6.907(B).[41]

After a juvenile's arraignment, he or she must either be released or detained pursuant to the rules in MCR 6.909(B):

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[38] See Section 3.2(A) for discussion of "sight" and "sound" contact.

[39] See Chapter 16 for a detailed discussion of automatic waiver proceedings.

[40] See MCL 712A.16(2), which authorizes counties to establish detention facilities.

[41] See Section 3.2(A) for discussion of "sight" and "sound" contact.

> "(1) *Juvenile Facility.* Except as provided in [MCR 6.909](B)(2) and in MCR 6.907(B) [(governing temporary detention pending arraignment)], a juvenile charged with a crime and not released must be placed in a juvenile facility while awaiting trial and, if necessary, sentencing, rather than being placed in a jail or similar facility designed and used to incarcerate adult prisoners.
>
> "(2) *Jailing of Juveniles; Restricted.* On motion of a prosecuting attorney or a superintendent of a juvenile facility in which the juvenile is detained, the magistrate or court may order the juvenile confined in a jail or similar facility designed and used to incarcerate adult prisoners upon a showing that
>
> > "(a) the juvenile's habits or conduct are considered a menace to other juveniles; or
> >
> > "(b) the juvenile may not otherwise be safely detained in a juvenile facility.
>
> "(3) *Family Division Operated Facility.* The juvenile shall not be placed in an institution operated by the family division of circuit court except with the consent of the family division or on order of a [circuit court, other than the family division].
>
> "(4) *Separate Custody of Juvenile.* The juvenile in custody or detention must be maintained separately from the adult prisoners or adult accused as required by MCL 764.27a."

A juvenile under 18 years of age who is under the jurisdiction of the circuit court for committing a felony may be confined in a county jail pending trial. MCL 764.27a(3). Prior approval of the county sheriff is required, and the juvenile must be held physically separate from adults. *Id.* In addition, the court, upon motion of a juvenile under 18 years of age who is subject to confinement, may, upon good cause shown, order that person to be confined as otherwise provided by law. MCL 764.27a(4).

3.9 Places of Detention for Juveniles Charged Under the Traditional Waiver Statute[42]

Neither MCL 712A.4 nor MCR 3.950 provide distinct rules for detention of juveniles before waiver; therefore, the rules applicable to juvenile delinquency cases apply.[43] See MCR 3.901(B)(3) (MCR 3.931–MCR 3.950 apply only to delinquency proceedings; both the pretrial detention rule, MCR 3.935, and the traditional waiver rule, MCR 3.950, are included in

[42] See Chapter 14 for a detailed discussion of traditional waiver proceedings.

[43] See Section 3.5 for discussion of the detention rules applicable in delinquency proceedings.

these provisions). MCR 3.907 applies to delinquency proceedings and designated proceedings. MCR 3.901(B)(2).

However, following the grant of a waiver motion in a traditional waiver proceeding, the juvenile is transferred to the adult criminal justice system and is subject to the same procedures used for adult criminal defendants. Juveniles waived under the traditional waiver statute are required to be kept separate and apart from adult prisoners, as required by MCL 764.27a. MCR 3.950(E)(2).

3.10 Required Procedures for Placement of Indian Children in Status Offense Cases[44]

The Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*.,[45] generally require state courts to adhere to certain minimum procedural requirements before removing an Indian child[46] from his or her home. 25 USC 1902; MCL 712B.7(2); MCL 712B.9. Except for cases of emergency removal, an Indian child must not be removed from the home, or remain removed from the home pending further proceedings, unless there is clear and convincing evidence, including the testimony of at least one qualified expert witness,[47] that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 USC 1912(e); MCL 712B.15(2).

For a detailed discussion of placement of Indian children, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19.

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[44] The ICWA "requires a state court to place an Indian child with an Indian caretaker, if one is available," and applies "even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there." *Haaland v Brackeen*, 599 US 255, 264 (2023). "This case arises from three separate child custody proceedings governed by ICWA," wherein "a birth mother, foster and adoptive parents, and the State of Texas challenge the Act on multiple constitutional grounds . . . argu[ing] that it exceeds federal authority, infringes state sovereignty, and discriminates on the basis of race." *Id*. at 264, 268. The United States Supreme Court rejected "all of petitioners' challenges to the statute," and affirmed "Congress's constitutional authority to enact ICWA." *Id*. at 264, 296 (upholding the validity of ICWA).

For a detailed discussion of placement of Indian children, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapter 19. See Section 2.15 for a brief discussion of jurisdictional and procedural rules applicable to Indian children charged with status offenses.

[45] 2012 PA 565, effective January 2, 2013.

[46] Under the MIFPA, "'Indian child' means an unmarried person who is under the age of 18 and is either . . . (*i*) [a] member of an Indian tribe[or] (*ii*) [e]ligible for membership in an Indian tribe as determined by that Indian tribe." MCL 712B.3(k). See also MCR 3.002(12); 25 USC 1903(4).

[47] Under the MIFPA, the qualified expert witness must have "knowledge of the child rearing practices of the Indian child's tribe[.]" MCL 712B.15(2).

Chapter 4: Diversion and Consent Calendar Procedures

4.1. Family Division Options When a Complaint or Petition Is Filed 4-2
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In this chapter. . .

This chapter discusses two informal procedures that a law enforcement agency or the Family Division may use when a juvenile is apprehended for an offense or a complaint or petition is presented to the court but custody is not requested: diversion and the consent calendar. The procedures discussed in this chapter do not involve removal of a juvenile from parental custody. A law enforcement officer or the Family Division may divert a juvenile from formal court procedures and refer him or her to a public or private agency. In addition, with the consent of the juvenile and his or her parent(s), guardian, or legal custodian, the Family Division may place a case on its consent calendar. Use of these informal procedures is subject to restrictions imposed by the Crime Victim's Rights Act and the Juvenile Diversion Act.[1]

[1] The Family Division may also take a plea under advisement in a juvenile delinquency case. This procedure is discussed in Section 8.7.

4.1 Family Division Options When a Complaint or Petition Is Filed

Under the Juvenile Code and related court rules, the Family Division of Circuit Court has several procedural options when a petition or complaint is filed in a delinquency proceeding.

A. Procedural Options Following Preliminary Inquiry (Detention Not Requested)

"When a petition is not accompanied by a request for detention of the juvenile, the court may conduct a preliminary inquiry."[2] MCR 3.932(A). Additionally, the Family Division may conduct a preliminary inquiry based on information submitted by any "person" (for example, a school official, a police officer, or a juvenile's parent) that the juvenile has committed a status offense.[3] See MCL 712A.11(1).[4] However, "if at any time before disposition the court determines that a case should not proceed on the formal calendar but that the protective and supportive action by the court will serve the best interests of the juvenile and the public[,]" the court may transfer the matter to the consent calendar under MCL 712A.2f. MCL 712A.11(1); see also MCR 3.932(C)(1); MCR 3.932(D).

Before a case is placed on the consent calendar, the court must consider the results of the risk screening tool and mental health screening tool conducted on the juvenile pursuant to MCR 3.907. MCR 3.932(C)(2)(b). However, "[t]he court must not consider restitution when determining if the case should be placed on the consent calendar under MCL 712A.2f." MCR 3.932(C)(2)(a).

Subject to procedural requirements imposed under the Crime Victim's Rights Act (CVRA),[5] MCL 780.751 *et seq.*, the Family Division, at the preliminary inquiry, after completion and consideration of the results of the risk screening tool and mental health screening tool pursuant to MCR 3.907, the court may choose one of the following procedural avenues that will best serve the interests of the juvenile and the public:

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[2] If the juvenile is in custody or if detention is requested, the court must conduct a preliminary hearing under MCR 3.935 rather than a preliminary inquiry under MCR 3.932. See Chapter 6 for discussion of preliminary inquiries and preliminary hearings.

[3] See Section 2.3 for discussion of status offenses.

[4] However, only a prosecuting attorney may file a petition with the court when the juvenile is alleged to have violated a statute or ordinance. MCL 712A.11(2).

[5] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a discussion of notice requirements under the CVRA when removing a case from the adjudicative process.

- deny authorization of the petition;
- refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.*;[6]
- direct that the juvenile and his or her parent, guardian, or legal custodian be notified to appear so that the matter can be handled through further informal inquiry;
- proceed on the consent calendar[7] under MCL 712A.2f; or
- authorize the filing of the petition, and proceed on the formal calendar under MCR 3.932(D).[8]

If the court elects to remove the case from the adjudicative process, it must comply with the procedures set forth in the CVRA. MCR 3.932(B), citing MCL 780.786b. "[A] case involving the alleged commission of an offense, as defined in [MCL 780.781], by a juvenile shall not be diverted, placed on the consent calendar, or made subject to any other prepetition or preadjudication procedure that removes the case from the adjudicative process unless the court gives written notice to the prosecuting attorney of the court's intent to remove the case from the adjudicative process and allows the prosecuting attorney the opportunity to address the court on that issue before the case is removed from the adjudicative process." MCL 780.786b(1). Before removing a case from the adjudicative process or before finalizing an informal disposition, any victim involved in the case is entitled to notice of the possible removal from adjudication, an opportunity to address the court at the removal hearing, and an opportunity to consult with the prosecuting attorney before the disposition is finalized. MCL 780.786b(1)-(2).[9] Although the court must notify the prosecutor under MCL 780.786b(1), it does not require prosecutorial consent before the court can remove the case. See *In re Diehl*, 329 Mich App 671, 693-694 (2019) (because the statute authorizes trial courts "to remove a case from the adjudication process *preadjudication*, so long as the trial court complies with certain procedural requirements," removal was proper where the petitions had not been adjudicated and the trial court provided written notice to the prosecution).

[6] See Section 4.3 for discussion of the Juvenile Diversion Act.

[7] See Section 4.4 for discussion of the consent calendar.

[8] See Section 4.5 for discussion of the formal calendar.

[9] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for more information regarding a victim's rights prior to the use of informal procedures.

B. Procedural Options Following Preliminary Hearing

"The preliminary hearing must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays, as defined by MCR 8.110(D)(2), or the juvenile must be released." MCR 3.935(A)(1).[10]

Subject to procedural requirements under the CVRA, MCR 3.935(B)(3) requires the Family Division, after reading the allegations in the petition and considering the results of a juvenile's risk screening tool and mental health screening tool, to choose one of the following procedural avenues:

- dismiss the petition;
- refer the matter to alternative services under the Juvenile Diversion Act;
- proceed on the consent calendar under MCL 712A.2f; or
- continue with the preliminary hearing.

4.2 Screening Tools and Risks and Needs Assessments

A. Diversion Screening Tools

Effective October 1, 2024, a risk screening tool and a mental health screening tool must be conducted on a minor before making a diversion or consent calendar decision, unless (1) a minor is accused or charged with a specified juvenile violation or (2) a minor is currently under the supervision of a court or the department of health and human services. MCL 722.823; MCL 712A.2f; MCR 3.907. "The court must conduct and use screening tools and risk and needs assessments in accordance with applicable law and the guidelines established by the State Court Administrative Office [SCAO]." MCR 3.907(A). Both a risk screening tool and a mental health screening tool must be research based, nationally validated for use with minors, and comply with the SCAO guidelines. MCL 722.823(6). A law enforcement official or court intake worker must use the results of a risk screening tool and a mental health screening tool, as well as consider the best interests of public safety and the minor, to inform a decision to divert a minor. MCL 722.823(5). "Any statements a juvenile makes as part of a screening tool or risk and needs assessment under [MCR 3.907] must not be admitted into evidence

[10] If a petition is not accompanied by a request for detention of the juvenile, the Family Division may conduct an informal preliminary inquiry under MCR 3.932 rather than a preliminary hearing under MCR 3.935. See Chapter 6 for discussion of preliminary inquiries and preliminary hearings.

against the juvenile at any adjudication hearing." MCR 3.907(F). See also MCL 722.829(3).

B. Risk Screening Tool

"Except as otherwise provided in [MCL 722.823(4)], before a diversion decision is made for a minor, a risk screening tool . . . may be conducted on the minor." MCR 3.907(B); see also MCL 722.823(4). "A court or court intake worker must use a validated risk screening tool adopted by their county." MCR 3.907(B). The risk screening tool must be "conducted by a designated individual or agency that is trained in those screening tools." MCL 722.823(5)(a); MCR 3.907(E). "The court or court intake worker, as applicable, must consider the results, along with the results of the mental health screening tool and the best interests of the juvenile and public when deciding whether to:

> (1) refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq*.; or
>
> (2) proceed on the consent calendar as provided in MCR 3.932(C) or place the matter on the formal calendar as provided in MCR 3.932(D)." MCR 3.907(B).

The risk screening tools that meet the criteria set forth in the relevant statutes and are approved by the SCAO are listed in the *Juvenile Justice Screening and Assessment Tools Guidelines*.

C. Mental Health Screening Tool

"Except as otherwise provided in MCL 722.823(4), before a diversion decision is made for a minor, a mental health screening tool may be conducted on the minor." MCR 3.907(C). "A court or court intake worker must utilize a validated mental health screening tool adopted by their county." *Id*. "The court or court intake worker, as applicable, must consider the results, along with the risk screening tool and the best interests of the juvenile and public when deciding whether to:

> (1) refer the matter to a public or private agency providing available services pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq*.; or
>
> (2) proceed on the consent calendar as provided in MCR 3.932(C) or place the matter on the formal calendar as provided in MCR 3.932(D)." MCR 3.907(B).

The mental health screening tools that meet the criteria set forth in the relevant statutes and are approved by the SCAO are listed in the *Juvenile Justice Screening and Assessment Tools Guidelines*.

D. Detention Screening Tool

MCL 712A.15(3) requires that before detaining a juvenile in a secure facility pending hearing, the court must consult the results of the detention screening tool and follow any rules regarding its use that are promulgated by the Michigan Supreme Court. See also MCR 3.907(D). The law further requires the SCAO, under the Supreme Court's supervision and direction and in collaboration with local courts, to determine the appropriate detention screening tool. MCL 712A.15(3). Additionally, MCR 3.933, MCR 3.935, and MCR 3.944 require the court to consult the results of the detention screening tool before detaining a juvenile in a secure facility. A new detention screening tool must be conducted prior to each placement in a secure facility. MCR 3.907(D). "The court must share the results of the detention screening tool with all parties at least 7 days before a detention hearing as provided in MCR 3.922(B)(4)." MCR 3.907(D). See also MCL 712A.15(3).

The detention screening tool that meets the criteria set forth in the relevant statutes and is approved by the SCAO is listed in the *Juvenile Justice Screening and Assessment Tools Guidelines*.

E. Risk and Needs Assessment

1. Individual's/Agency's Use of Results

A risks and needs assessment must be conducted by a designated, trained individual or agency on each juvenile prior to dispositional recommendation. MCL 712A.18(9); MCR 3.907(E). Local jurisdictions can select a risk and needs assessment tool, as long as the tool is research-based, nationally validated, and complies with SCAO guidelines. The risk and needs assessment tools that meet the criteria set forth in the relevant statutes and are approved by the SCAO are listed in the *Juvenile Justice Screening and Assessment Tools Guidelines*. "The individual or agency conducting an assessment under this subrule must use the results of the assessment to inform a dispositional recommendation that must be filed with the court." MCR 3.907(E)(1). See also MCL 712A.18(9)(b). In making the most appropriate dispositional recommendation, an individual or agency must consider all of the following:

> "(a) The least restrictive setting possible.

(b) Public safety.

(c) Victim interests.

(d) Rehabilitation of the juvenile.

(e) Improved juvenile outcomes, including, but not limited to, educational advancement." MCR 3.907(E)(1). See also MCL 712A.18(9)(b)(*i*)-(*v*).

2. Reporting

"The results of the risk and needs assessment along with a written dispositional recommendation must be filed with the court and provided to the juvenile, juvenile's attorney, and prosecuting attorney no less than 7 days before the dispositional hearing as provided in MCR 3.922(B)(4)." MCR 3.907(E)(2). See also MCL 712A.18(9)(a). "The written recommendation must include all of the following:"

"(a) Overall risk score.

(b) Type of supervision.

(c) Level of supervision.

(d) Length of supervision.

(e) Specific terms and conditions, including, but not limited to, frequency of reviews and requirements for early termination of supervision." MCR 3.907(E)(2).

3. Court's Consideration of Results

"The court must consider the results of the assessment when making a dispositional decision regarding a juvenile, including, but not limited to, whether to place a juvenile:

(a) under supervision, including the length, level, and conditions of supervision;

(b) on probation; or

(c) in out-of-home placement." MCR 3.907(E)(3). See also MCL 712A.18(10)(a)-(c).

4. Reassessment

"The court must order that a new risk and needs assessment for the juvenile be conducted and used as provided in [MCR 3.907(E)] if any of the following conditions occur:

> (a) Six months have passed since the juvenile's last risk and needs assessment.
>
> (b) The juvenile has experienced a major life event.
>
> (c) There is a major change in the juvenile's proceedings." MCR 3.907(E)(4)(a)-(c). See also MCL 712A.18(11)(a)-(c).

4.3 Requirements of the Juvenile Diversion Act

The Juvenile Diversion Act, MCL 722.821 *et seq.*, defines "diversion" as follows:

> "'Divert' or 'diversion' means the placement that occurs when a law enforcement agency makes a formally recorded investigation or apprehension for an act by a minor that if a petition were filed with the court would bring that minor within [MCL 712A.2(a) (governing Family Division jurisdiction over violations of law or ordinance and certain status offenses)], and instead of petitioning the court or authorizing a petition, either of the following occurs:
>
> > "(*i*) The minor is released into the custody of the minor's parent, guardian, or custodian and the investigation is discontinued.
> >
> > (*ii*) The minor and the minor's parent, guardian, or custodian agree to work with a person or public or private organization or agency that will assist the minor and the minor's family in resolving the problem that initiated the investigation." MCL 722.822(b).

The Family Division may "establish or assist in developing a program or programs within the county to prevent delinquency and provide services to act upon reports submitted to the court" relative to juveniles who do not require formal court jurisdiction but otherwise fall within the jurisdictional requirements of MCL 712A.2(a) (violations of law or ordinance and certain status offenses). MCL 712A.2(e). Such services can be used only if they are voluntarily accepted by the juvenile and his or her parents, guardian, or custodian. *Id.*

A. Offenses Precluding the Use of Diversion

Pursuant to MCL 722.822(e) and MCL 722.823(3), juveniles accused of or charged with any of the following "specified juvenile violations"[11] must not be diverted:

- first-degree arson, MCL 750.72;
- second-degree arson, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- stealing from bank, safe, vault, or other depository, MCL 750.531;
- assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation, MCL 750.84, if the juvenile is armed with a dangerous weapon;
- breaking and entering a dwelling with intent to commit a felony, larceny, or assault, entering a dwelling without permission with intent to commit a felony, larceny, or assault, or breaking and entering a dwelling or entering a dwelling without permission and committing a felony, larceny, or assault at any time while entering, present in, or exiting the dwelling, MCL 750.110a(2), if the juvenile is armed with a dangerous weapon;
- escape or attempted escape from a high-security or medium-security juvenile facility operated by the department or a county juvenile agency or a high-security facility operated by a private agency under

[11] Specified juvenile violations are listed in MCL 712A.2(a)(1)(A)-(I).

contract with the department or a county juvenile agency, MCL 750.186a;

- manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver a controlled substance, prescription form, or counterfeit prescription form, MCL 333.7401(2)(a)(*i*);
- unlawful possession of a controlled substance, MCL 333.7403(2)(a)(*i*);
- attempt, conspiracy, or solicitation to commit a specified juvenile violation described above, MCL 712A.2(a)(1)(E)-(G);
- a lesser included offense of a violation described in MCL 712A.2(a)(1)(A)-(G) if the individual is charged with a violation described in MCL 712A.2(a)(1)(A)-(G), MCL 712A.2(a)(1)(H);
- another violation arising out of the same transaction as a violation described in MCL 712A.2(a)(1)(A)-(G) if the individual is charged with a violation described in MCL 712A.2(a)(1)(A)-(G), MCL 712A.2(I);
- felonious assault in a weapons free school zone, MCL 750.82(2);
- manslaughter, MCL 750.321;
- mayhem, MCL 750.397;
- second-degree criminal sexual conduct, MCL 750.520c.

B. Factors to Determine Whether to Divert a Juvenile

Before a minor may be diverted, all of the following factors must be evaluated:

> "(a) The nature of the alleged offense.
>
> (b) The minor's age.
>
> (c) The nature of the problem that led to the alleged offense.
>
> (d) The minor's character and conduct.
>
> (e) The minor's behavior in school, family, and group settings.

> (f) Any prior diversion decisions made concerning the minor and the nature of the minor's compliance with the diversion agreement." MCL 722.824.

C. Diversion Conference

If the decision is made to divert a minor by referring the minor to a person or private or public organization or agency, a conference must first be held with the minor and the minor's parent, guardian, or custodian to consider alternatives to the filing of a petition with the court or to the authorization of a petition. MCL 722.825(1). The law enforcement official or intake worker must notify the minor and the minor's parent, guardian, or custodian of the proposed conference and all of the following:

> "(a) That participation in the conference or resulting referral plan is voluntary.
>
> (b) That an attorney may accompany the minor and the minor's parent, guardian, or custodian at the conference.
>
> (c) The alternative referral programs available and the criteria utilized to determine whether to file a petition with the court or to dispose of the petition with a referral.
>
> (d) That if diversion is agreed to and the minor complies with the terms of the diversion agreement and the referral plan, a petition cannot be filed with the court, or if a petition has been filed, the petition cannot be authorized." MCL 722.825(1).

MCL 722.825(2) provides:

> "The conference to consider alternatives to the filing of a petition with the court or to consider alternatives to the authorization of a petition must not be held until after the questioning, if any, of the minor has been completed or after an investigation has been made concerning the alleged offense. Mention of, or promises concerning, diversion must not be made by a law enforcement official or court intake worker in the presence of the minor or the minor's parent, guardian, or custodian during any questioning of the minor. Information divulged by the minor during the conference or after the diversion is agreed to, but before a petition is filed with the court or has been authorized, must not be used against the minor."

D. Diversion Agreement

If a diversion agreement is reached and it imposes conditions on the minor and will prevent a petition from being filed with the court or will prevent a petition from being authorized, the terms of the agreement "must be set forth in writing, dated, and signed by the law enforcement official or court intake worker, the minor, and the minor's parent, guardian, or custodian." MCL 722.825(3). The minor must complete the terms of the diversion agreement within three months, "unless the law enforcement official or court intake worker determines that a longer period is needed for the minor to complete a specific treatment program and documents this determination as required under [MCL 722.826]." MCL 722.825(3). "The diversion agreement must not include a term requiring the reimbursement of costs related to diversion services." *Id*.

If an agreement is not reached at the diversion conference, "a petition may be filed with the court as provided by law and a petition may be authorized as provided by law." MCL 722.825(4). If a petition is to be filed, it must be filed no later than 30 days after the diversion conference. *Id.*

E. Revocation of Diversion Agreement

If the minor complies with the terms of the diversion agreement and the referral plan, a petition cannot be filed with the court, or if a petition has been filed, the petition cannot be authorized by the court. MCL 722.825(1)(d). However, "[i]f the minor fails to comply with the terms of the diversion agreement and the referral plan, the law enforcement official or the court intake worker may revoke the diversion agreement. If the diversion agreement is revoked, a petition may be filed with the court as provided by law and a petition may be authorized as provided by law." MCL 722.825(5).

F. Required Information

Whenever a law enforcement official or court intake worker diverts a minor, the following information must be filed with the Family Division in the county in which the minor resides or is found:[12]

> "(a) The minor's name, address, and date of birth.
>
> (b) The act or offense for which the minor was apprehended.

[12] See Section 21.4 and Section 21.7(B) for discussion of the confidentiality and destruction of diversion records.

> (c) The date and place of the act or offense for which the minor was apprehended.
>
> (d) The diversion decision made, whether referred or released.
>
> (e) The nature of the minor's compliance with the diversion agreement.
>
> (f) The time period to complete the terms of the diversion agreement and, if the period exceeds 3 months, the determination that a longer period is necessary for the minor to complete a specific treatment program.
>
> (g) If the diversion is under [MCL 722.823(1)(b)], the results of the minor's risk screening tool and mental health screening tool." MCL 722.826(1).

If a diversion agreement is revoked under MCL 722.825(5), the law enforcement official or court intake worker must "file the fact of and reasons for the revocation" with the same court. MCL 722.826(2).

4.4 Consent Calendar

A. Placement on or Transfer to Consent Calendar

"Subject to [MCL 712A.2f(2)], if the court determines that formal jurisdiction should not be acquired over a juvenile, the court may proceed in an informal manner referred to as a consent calendar." MCL 712A.2f(1); see also MCR 3.932(C)(1).

A case must not be placed on the consent calendar unless all of the following apply:

- "The juvenile and the parent, guardian, or legal custodian and the prosecutor agree to have the case placed on the consent calendar." MCL 712A.2f(2)(a); see also MCR 3.932(C)(2)(a).
- "The court must not consider restitution when determining if the case should be placed on the consent calendar under MCL 712A.2f." MCL 712A.2f(1); MCR 3.932(C)(2)(a).
- "The court considers the results of the risk screening tool and mental health screening tool conducted on the juvenile by a designated individual or agency that is trained in those screening tools." MCL 712A.2f(2)(b); see also MCR 3.932(C)(2)(b).

- "The court determines that the case should proceed on the consent calendar in compliance with [MCL 712A.11(1)]." MCL 712A.2f(2)(c).

"A case transferred to the consent calendar shall be transferred before disposition but may occur any time after receiving a petition, citation, or appearance ticket." MCR 3.932(C)(1); see also MCL 712A.2f(5).[13] See also MCL 712A.11(1), which provides, in relevant part:

> "The court may proceed on the consent calendar under [MCL 712A.2f] if at any time before disposition the court determines that a case should not proceed on the formal calendar but that the protective and supportive action by the court will serve the best interests of the juvenile and the public."

"If the court authorizes the petition and the juvenile is alleged to have committed an offense that requires the juvenile to have biometric data collected according to law, the court shall ensure the juvenile has biometric data collected before placing the case on [the] consent calendar under [MCR 3.932(C)(1)]." MCR 3.932(C)(3); see also MCR 3.936(B). "Except as otherwise required by law, a juvenile shall not have biometric data collected unless the court has authorized the petition." MCR 3.932(C)(3).

Upon transfer of a case to the consent calendar, the clerk of the court must make the case nonpublic. MCR 3.932(C)(1).

"The court shall not enter an order of disposition in a case while it is on the consent calendar." MCL 712A.2f(10); MCR 3.932(C)(7).

B. Waiver of Juvenile's Rights

If the Family Division, the juvenile, the juvenile's parent, guardian, or legal custodian, and the prosecutor agree to place the case on the consent calendar, the juvenile waives certain rights, including, but not limited to:

- the right to the assistance of an attorney;
- the right to trial by judge or jury;
- the presentation of proof beyond a reasonable doubt; and
- the privilege against self-incrimination (and the right to remain silent). See MCR 3.915(A), MCR 3.935(B)(4)(a)-

[13] See SCAO Form JC 15, *Order Transferring Petition to Consent Calendar*.

> (c), and MCR 3.942(C) (setting out rights a juvenile has when his or her case is placed on the formal calendar).

If the case is transferred to the formal calendar, however, the court must inform the juvenile of his or her right to an attorney, of his or her right to trial by judge or jury, and that any statement made by the juvenile may be used against him or her. See *In re Chapel*, 134 Mich App 308, 312-313 (1984) (full panoply of rights under court rules vests when case is placed on formal calendar).

C. Victims' Rights

If the case involves the alleged commission of an *offense* as defined in the Crime Victim's Rights Act (CVRA), MCL 780.781(1)(g), the case may be placed on the consent calendar only upon compliance with the procedures set forth in MCL 780.786b[14] and with the consent of the juvenile, the prosecutor, and the parent, guardian, or legal custodian. MCL 712A.2f(5); MCR 3.932(C)(2)(a). Additionally, a case involving an offense as defined in MCL 780.781 "may only be removed from the adjudicative process upon compliance with the procedures set forth in [the CVRA]." MCR 3.932(B), citing MCL 780.786b.

After a case is placed on the consent calendar, the prosecutor must provide the victim with notice as required by article 2 of the CVRA, MCL 780.781 to 780.802.[15] MCL 712A.2f(6); MCR 3.932(C)(4).

D. Consent Calendar Conference

MCR 3.932(C)(5) provides:

> "After placing a matter on the consent calendar, the court must conduct a consent calendar case conference with the juvenile, the juvenile's attorney, if any, and the juvenile's parent, guardian, or legal custodian. The prosecutor and victim may, but need not, be present. At the conference, the court must discuss the allegations with the juvenile and issue a written consent calendar case plan[16] in accordance with MCL 712A.2f(9). The

[14] MCL 780.786b requires the court to provide written notice to the prosecuting attorney of the court's intent to proceed on the consent calendar; requires the prosecutor to provide notice to the victim of the time and place for the hearing; and provides that the prosecuting attorney and the victim have the right to address the court. See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a discussion of notice requirements under the CVRA when removing a case from the adjudicative process.

[15] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for a discussion of notice requirements under the CVRA when removing a case from the adjudicative process.

[16] See Section 4.4(E) for discussion of the required consent calendar case plan.

> period for a juvenile to complete the terms of a consent calendar case plan must not exceed 6 months, unless the court determines that a longer period is needed for the juvenile to complete a specific treatment program and includes this determination as part of the consent calendar case record."

See also MCL 712A.2f(9).

E. Case Plan and Costs

MCL 712A.2f(9) requires the court to issue a written consent calendar case plan "[i]f it appears to the court that the juvenile has engaged in conduct that would subject the juvenile to the jurisdiction of the court[.]" The following requirements apply to the written case plan:

> "(a) The plan must include a requirement that the juvenile pay restitution under the [Crime Victim's Rights Act (CVRA), MCL 780.751—MCL 780.834]. The court shall not order the juvenile or the juvenile's parent, guardian, or legal custodian to pay for fees or costs associated with consent calendar services.
>
> (b) A consent calendar case plan must not contain a provision removing the juvenile from the custody of the juvenile's parent, guardian, or legal custodian.
>
> (c) The period for a juvenile to complete the terms of a consent calender case plan must not exceed 6 months, unless the court determines that a longer period is needed for the juvenile to complete a specific treatment program and includes this determination as part of the consent calendar case record.
>
> (d) The consent calendar case plan is not an order of the court, but must be included as a part of the case record.
>
> (e) Violation of the terms of the consent calendar case plan may result in the court's returning the case to the formal calendar for further proceedings consistent with [MCL 712A.2f(12)]." MCL 712A.2f(9)(a)-(e).

See also MCR 3.932(C)(6), which provides:

> "The case plan is not an order of the court, but shall be included as part of the case record. If the court determines the juvenile has violated the terms of the case plan, it may transfer the case to the formal calendar in accordance with [MCR 3.932(C)(9)]."

F. Successful Completion of Case Plan

Upon a judicial determination that the juvenile has completed the terms of the consent calendar case plan, the court must report the successful completion of the consent calendar to the juvenile and the Michigan State Police (MSP). MCL 712A.2f(14); MCR 3.932(C)(10). The report to the MSP must be in a form prescribed by the MSP. MCR 3.932(C)(10).

"Upon the juvenile's successful completion of the consent calendar case plan, the court shall close the case and shall destroy all records of the proceeding in accordance with the records management policies and procedures of the state court administrative office, established in accordance with supreme court rules." MCL 712A.2f(11); see also MCR 3.932(C)(11) (providing that "[t]he case records shall only be destroyed in accordance with the approved record retention and disposal schedule established by the State Court Administrative Office[]"). The MSP must maintain a nonpublic record of the case. MCL 712A.2f(14).[17]

G. Transfer to Formal Calendar

MCL 712A.2f(12) provides:

> "If it appears to the court at any time that proceeding on the consent calendar is not in the best interest of either the juvenile or the public, the court shall proceed as follows:
>
> > (a) If the court did not authorize the original petition, the court may, without hearing, transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition to determine whether the petition should be authorized.
> >
> > (b) If the court authorized the original petition, the court may transfer the case from the consent calendar to the formal calendar on the charges contained in the original petition only after a hearing. After transfer to the formal calendar, the court shall proceed with the case from where it left off before being placed on the consent calendar."

See also MCR 3.932(C)(9).

[17] See Section 4.4(H) for additional discussion of consent calendar case records. For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

If a hearing is required under MCL 712A.2f(12)(b), the court must conduct the hearing on the record. MCR 3.932(C)(9)(b). At the hearing, the court must:

> "(*i*) Advise the juvenile that any statements made during the consent calendar proceedings cannot be used against the juvenile at a trial on the same charge.[18]
>
> (*ii*) Allow the juvenile and the juvenile's attorney, if any, the opportunity to address the court and state on the record why the case should not be transferred to the formal calendar." MCR 3.932(C)(9)(b)(*i*)-(*ii*).

H. Case Records and Reporting Requirements

1. Nonpublic Record and Confidential File

MCL 712A.2f(7) requires that consent calendar case records be maintained in a nonpublic manner:

> "(a) Access to consent calendar case records must be provided to the juvenile, the juvenile's parents, guardian, or legal custodian, the guardian ad litem, counsel for the juvenile, the [Department of Health and Human Services (DHHS)] if related to an investigation of neglect and abuse, law enforcement personnel, prosecutor, and other courts. However, consent calendar case records must not be disclosed to federal agencies or military recruiters. As used in this subdivision, 'case records' includes the pleadings, motions, authorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, register of actions, consent calendar case plan, risk screening tool and mental health screening tool results, and court orders related to the case placed on the consent calendar.
>
> (b) The contents of the confidential file must continue to be maintained confidentially. As used in this subdivision, 'confidential file' means that term as defined in MCR 3.903.
>
> (c) A risk screening tool and a mental health screening tool conducted as part of a proceeding

[18] See MCL 712A.2f(13) ("Statements made by the juvenile during the proceeding on the consent calendar must not be used against the juvenile at a trial on the formal calendar on the same charge.").

> under [MCL 712A.2f] and any information obtained from a juvenile in the course of those screenings or provided by the juvenile in order to participate in a consent calendar case plan, including, but not limited to, any admission, confession, or incriminating evidence, are not admissible into evidence in any adjudicatory hearing in which the juvenile is accused and are not subject to subpoena or any court process for use in any other proceeding or for any other purpose." MCL 712A.2f(7)(a)-(c).

See also MCR 3.932(C)(1) (requiring the clerk of the court, upon transfer of a case to the consent calendar, to make the case nonpublic); MCR 3.932(C)(8) (providing that consent calendar case records are nonpublic, and that access to them is governed by MCL 712A.2f(7)).

2. Michigan State Police Reporting and Nonpublic Record[19]

If the court determines that the juvenile has successfully completed the consent calendar case plan, the court must report the successful completion to the Michigan State Police (MSP) and to the juvenile. MCL 712A.2f(14); MCR 3.932(C)(10). The MSP must maintain a nonpublic record of the case. MCL 712A.2f(14). MCL 712A.2f(14) further provides for limited access to the nonpublic record:

> "This record is open to the courts of this state, another state, or the United States, the department of corrections, law enforcement personnel, and prosecutors for use only in the performance of their duties or to determine whether an employee of the court, department, law enforcement agency, or prosecutor's office has violated conditions of employment or whether an applicant meets criteria for employment with the court, department, law enforcement agency, or prosecutor's office."

3. Destruction of Records

"Upon the juvenile's successful completion of the consent calendar case plan, the court shall close the case and shall

[19] See SCAO Memorandum, *Public Act 185 of 2016: Codification of Consent Calendar Procedures*, September 15, 2016.

destroy all records of the proceeding in accordance with the records management policies and procedures of the state court administrative office, established in accordance with supreme court rules." MCL 712A.2f(11). See also MCR 3.932(C)(11) (providing that "[t]he case records shall only be destroyed in accordance with the approved record retention and disposal schedule established by the State Court Administrative Office[]").[20]

I. Juvenile Traffic Offenses[21]

A court is not prohibited under MCR 3.925 (retention and destruction of court records; setting aside adjudications) or MCL 712A.18e(2) (setting aside adjudication) from placing a case involving a juvenile traffic offense, which would be a criminal offense if committed by an adult, on the consent calendar. See *In re Neubeck*, 223 Mich App 568, 572-573 (1997).[22] When setting aside a juvenile adjudication, the court must not remove or expunge the adjudication from the juvenile's driving record. MCL 712A.18e(17); MCL 712A.18t(10).

4.5 Formal Calendar

MCR 3.903(A)(10) defines "[f]ormal calendar" as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency . . . proceeding."

"The court may authorize a petition to be filed and docketed on the formal calendar if it appears to the court that formal court action is in the best interest of the juvenile and the public." MCR 3.932(D). The court shall not authorize a delinquency petition, however, "unless the prosecuting attorney has approved submitting the petition to the court." MCR 3.932(D); see also MCL 712A.11(2). The juvenile must be advised of his or her right to counsel, right to trial by judge or jury, right to the presentation of proof beyond a reasonable doubt, and privilege against self-incrimination when the court is proceeding on the formal calendar.

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[20] See also MCL 600.1428; MCR 8.119(K). Recordkeeping requirements for cases on the consent calendar are discussed in Section 21.7. For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

[21] For more information on juvenile traffic offenses, see the Michigan Judicial Institute's *Traffic Benchbook*.

[22] *In re Neubeck,* 223 Mich App at 572-573, discussed the interaction between former court rules MCR 5.925 (now MCR 3.925) and MCR 5.932 (now MCR 3.932). MCR 3.925 has been subsequently amended so that the language quoted in *In re Neubeck,* 223 Mich App at 572-573, no longer exists.

See MCL 712A.17c(1); MCR 3.915(A)(1); MCR 3.935(B)(4)(a)-(c); MCR 3.942(C).

"[I]f at any time before disposition the court determines that a case should not proceed on the formal calendar but that the protective and supportive action by the court will serve the best interests of the juvenile and the public[,]" the court may transfer the matter to the consent calendar under MCL 712A.2f. MCL 712A.11(1); see also MCR 3.932(D).

Chapter 5: Service of Process in Delinquency Proceedings

5.1. Persons Entitled to Notice of Hearing in Delinquency Proceedings 5-2
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In this chapter. . .

This chapter discusses:

- the general requirements for serving notices of hearing in juvenile delinquency proceedings; and
- the general requirements for issuing and serving summonses in juvenile delinquency proceedings.

5.1 Persons Entitled to Notice of Hearing in Delinquency Proceedings

A. Generally

The court must notify all of the following people of each hearing in a delinquency proceeding:

- the juvenile,
- the juvenile's custodial parent(s), guardian, or legal custodian,
- the juvenile's noncustodial parent[1] if he or she has requested notice at a hearing or in writing,
- the juvenile's guardian ad litem, lawyer-guardian ad litem, or attorney (whether appointed or retained),
- the prosecuting attorney, and
- if the juvenile is charged with a status offense and the court knows or has reason to know the juvenile is an Indian child:[2] the juvenile's parent, Indian custodian, and tribe; additionally, copies of the notices must be sent to the Minneapolis Regional Director of the Bureau of Indian Affairs. See MCL 712B.9(1); MCR 3.921(A)(1)(a)-(g); 25 CFR 23.11(a); 25 CFR 23.11(b)(2).

B. General Definitions

"Parent" means a juvenile's mother, father,[3] or both, and "also includes the term 'parent' as defined in MCR 3.002(20)."[4] MCR 3.903(A)(18).

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[1] For additional discussion of noncustodial parents, see Section (D).

[2] See Section 5.2(B) for discussion of notice requirements in status offense cases involving Indian children. Status offenses are set out in MCL 712A.2(a)(2)-(4) and MCL 712A.2(d). See Section 2.3 for discussion of jurisdiction over status offenders. See also Section 2.15 and Section 3.10 for brief discussion of special requirements that apply if a status offender is an Indian child.

[3] See Section (E) for the definition of "father."

[4] MCR 3.002(20) defines "[p]arent" for purposes of applying the Juvenile Code to an Indian child. See also MCL 712B.3(s) (for purposes of the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq.*, "'[p]arent' means any biological parent or parents of an Indian child or any person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. Parent does not include the putative father if paternity has not been acknowledged or established[]"); 25 CFR 23.2 ("*Parent* or *parents* means any biological parent or parents of an Indian child, or any Indian who has lawfully adopted an Indian child, including adoptions under Tribal law or custom. It does not include an unwed biological father where paternity has not been acknowledged or established."). See Section 5.2(B) for discussion of notice requirements in status offense cases involving Indian children.

"'Guardian' means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or [MCL] 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c." MCR 3.903(A)(11).

"'Juvenile Guardian' means a person appointed guardian of a child by a Michigan court pursuant to MCL 712A.19a or MCL 712A.19c. A juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code." MCR 3.903(A)(13).

"'Legal Custodian' means an adult who has been given legal custody of a minor by order of a circuit court in Michigan or a comparable court of another state or who possesses a valid power of attorney given pursuant to MCL 700.5103 or a comparable statute of another state. It also includes the term 'Indian custodian' as defined in MCR 3.002(15)." MCR 3.903(A)(14); see also MCL 712B.3(n).

C. Petitioner

The petitioner must be notified of the first hearing on the petition. MCR 3.921(A)(2). Additionally, if the petitioner is the prosecuting attorney, the court must notify him or her of each hearing. See MCR 3.921(A)(1)(f).

D. Noncustodial Parent

A noncustodial parent whose parental rights have not been terminated must be notified of the first hearing on the formal calendar, unless that parent's whereabouts are unknown. MCR 3.921(A)(3). If he or she requests notice at a hearing or in writing, the court must notify him or her of each hearing. MCR 3.921(A)(1)(c).

E. Fathers and Putative Fathers

For purposes of delinquency proceedings, a juvenile's "[f]ather" is:

> "(a) A man married to the [juvenile's] mother at any time from [the juvenile's] conception to . . . birth, unless a court has determined, after notice and a hearing, that the [juvenile] was conceived or born during the marriage, but is not the issue of the marriage;
>
> (b) A man who legally adopts the [juvenile];

> (c) A man who by order of filiation or by judgment of paternity is judicially determined to be the father of the [juvenile];
>
> (d) A man judicially determined to have parental rights; or
>
> (e) A man whose paternity is established by the completion and filing of an acknowledgment of parentage in accordance with the provisions of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., or a previously applicable procedure. For an acknowledgment under the Acknowledgment of Parentage Act, the man and mother must each sign the acknowledgment of parentage before a notary public appointed in this state. The acknowledgment shall be filed at either the time of birth or another time during the [juvenile's] lifetime with the state registrar." MCR 3.903(A)(7)(a)-(e).[5]

The court may determine at any time during delinquency proceedings that a juvenile has no legal father. MCR 3.921(D). At its discretion and upon a determination that a child has no legal father, the court may take the necessary steps to determine the juvenile's putative father under MCR 3.921(D). For more information on notice requirements in cases involving a putative father, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapters 5 and 6.

5.2 Notice of Hearing Timing and Requirements

A. Generally

Generally, a notice of hearing must be given in writing or on the record at least seven days before the hearing unless another rule provides otherwise. MCR 3.920(D)(1). See, for example, MCR 3.920(D)(2)(a), which requires notice of a preliminary hearing to be given to the juvenile and to the juvenile's parent as soon as the hearing is scheduled if the juvenile is detained.[6]

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[5] Effective April 2, 2025, 2024 PA 29 retitled the Revocation of Paternity Act, MCL 722.1431 *et seq*., the Revocation of Parentage Act. The Revocation of Parentage Act allows "[t]he mother, the acknowledged parent, an alleged father, or a prosecuting attorney [to] file an action for revocation of an acknowledgment of parentage[,]" MCL 722.1437(1), and sets out additional procedures for revoking parentage. For additional discussion of fathers and the Revocation of Parentage Act, see the Michigan Judicial Institute's *Child Protective Proceedings Benchbook*, Chapters 5 and 6.

[6] See Section 6.3(E) for discussion of preliminary hearing notice requirements.

"When a party fails to appear in response to a notice of hearing, the court may order the party's appearance by summons or subpoena." MCR 3.920(D)(4).

B. Indian Child

If the court knows or has reason to know that a juvenile who is charged with a status offense is an Indian child "and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6)[,]"[7] the petitioner must notify the Indian child's parent, Indian custodian, and tribe of any pending proceedings on a petition filed under MCR 3.931 (initiating delinquency proceedings). MCR 3.920(C)(1); 25 CFR 23.11(a); see also MCL 712B.9(1). Notice must be made by registered mail with return receipt requested. MCR 3.920(C)(1); MCL 712B.9(1); see also 25 CFR 23.11(a) (permitting service by registered or certified mail with return receipt requested). Copies of the notices must be sent to the Minneapolis Regional Director of the Bureau of Indian Affairs by registered mail with return receipt requested. See MCL 712B.9(1); MCR 3.920(C)(1); 25 CFR 23.11(a); 25 CFR 23.11(b)(2)[8]; see also *In re Morris*, 491 Mich 81, 104 n 14 (2012).

C. Subsequent Notices After First Appearance in Family Division

"After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party as provided in [MCR 3.920](D), except that a summons[9] must be served for trial or termination hearing as provided in [MCR 3.920](B)." MCR 3.920(G).

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[7] Status offenses are set out in MCL 712A.2(a)(2)-(4) and MCL 712A.2(d). See Section 2.15 for a brief discussion of jurisdiction over status offense cases involving Indian children.

[8] Under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., these regulations apply in "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.]" 25 USC 1903(1)(i); see also MCL 712B.3(b). See Section 2.15 for a brief discussion of the ICWA and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*.

[9] See Section 5.4 for discussion of the issuance and service of summons.

5.3 Waiver of Defects in Notice, Notice of Hearing, or Service of Process

A. Waiver of Defects by Appearance and Participation in Hearing

MCR 3.920(H) provides:

> "The appearance and participation of a party at a hearing is a waiver by that party of defects in service with respect to that hearing unless objections regarding the specific defect are placed on the record. If a party appears or participates without an attorney, the court shall advise the party that the appearance and participation waives notice defects and of the party's right to seek an attorney."

B. Voluntary Waiver of Notice of Hearing or Service of Process in Writing

A party may voluntarily waive notice of hearing or service of process by submitting a waiver in writing.[10] MCR 3.920(F). If a party waives service of a summons that is required by MCR 3.920(B), the party must be advised as to:

- the nature of the hearing;
- the right to counsel; and
- the right to trial by judge or jury. MCR 3.920(B)(3)(a)-(b); MCR 3.920(F).

5.4 Issuance and Service of Summons

If a court does not dismiss the petition, it must issue a summons "requiring the person or persons who have the custody or control of the child, or with whom the child may be, to appear personally and bring the child before the court at a time and place stated . . . ." MCL 712A.12. If the person summoned is not the juvenile's parent or guardian, then the parents or guardian, or both, must also be notified of the petition and of the hearing, by personal service except as otherwise provided. *Id.* A summons may also be issued to "any other person whose presence, in the opinion of the judge, is necessary." *Id.*

[10] See SCAO Form JC 23, *Waiver of Summons/Notice of Hearing*.

See also MCR 3.920(B)(2)(a), which states that the court must direct that a summons be issued to a juvenile and his or her custodial parent(s), guardian, or legal custodian when the juvenile is scheduled to go to trial. A noncustodial parent is entitled to notice as provided in MCR 3.920(D) (notice of hearing). MCR 3.920(B)(2)(a). See also MCR 3.920(B)(2)(c), requiring, in a minor personal protection order (PPO) enforcement proceeding,[11] that summonses be served on the minor respondent and on his or her parent(s), guardian, or legal custodian, unless their whereabouts remain unknown after a diligent inquiry.[12]

The statutory requirements for issuance and service of summonses to parents with custody, or notice of the petition and the time and place of a hearing to a noncustodial parent, are jurisdictional. *In re Brown,* 149 Mich App 529, 534-542 (1986). This means that if the requirements are not fulfilled, an appellate court may declare all proceedings in a case void. *Id.* at 536, 542. Additionally, a party's presence at the hearing does not cure a jurisdictional error. *Id.* at 541. See, however, *In re Andeson,* 155 Mich App 615, 618-619 (1986) (where a putative father was properly served with a summons before the adjudicative hearing, the hearing was adjourned, and the putative father was later mailed a notice of hearing but failed to appear, parental termination proceedings were not void, because "[a]djournment of a proceeding until a later date is not the equivalent of creating a new hearing or a review hearing that would require personal service of a summons or notice[]").

A. Contents of Summons[13]

A summons must direct the person to whom it is addressed to appear in court at a time and place designated by the court and it must also:

- identify the nature of the hearing;
- explain the right to an attorney and the right to trial by judge or jury; and
- have a copy of the petition attached to it. MCR 3.920(B)(3)(a)-(b); MCR 3.920(B)(3)(d).[14]

"The confidential case inventory required by MCR 3.931(A) . . . shall not be served on any party." MCR 3.920(B)(3)(d).

[11] See Chapter 13 for discussion of notice requirements in PPO enforcement proceedings.

[12] MCR 3.920(B)(2)(b) governs service of summons in child protective proceedings.

[13] See SCAO Form JC 20, *Summons: Order to Appear (Delinquency Proceedings) / (Personal Protection Proceedings)*, which may be used to meet these requirements.

[14] MCR 3.920(B)(3)(c) is applicable only to child protective proceedings.

B. Manner of Service of Summons

Where practicable, service of a summons should be made by personal service. MCL 712A.13. However, if the judge finds that personal service is impracticable, he or she may order service by registered mail or publication, or both. *Id.* See also MCR 3.920(B)(4), which states:

> "(4) *Manner of Serving Summons*.
>
> > "(a) Except as provided in [MCR 3.920](B)(4)(b), a summons required under [MCR 3.920](B)(2)[15] must be served by delivering the summons to the party personally.
> >
> > "(b) If the court finds, on the basis of testimony or a motion and affidavit, that personal service of the summons is impracticable or cannot be achieved, the court may by ex parte order direct that it be served in any manner reasonably calculated to give notice of the proceedings and an opportunity to be heard, including publication.
> >
> > "(c) If personal service of a summons is not required, the court may direct that it be served in a manner reasonably calculated to provide notice."

Violations of statutory notice provisions constitute jurisdictional defects, while violations of court rule requirements do not. *In re SZ*, 262 Mich App 560, 567 (2004); *In re Mayfield*, 198 Mich App 226, 230-231 (1993). Accordingly, where the court complies with the service requirements of MCL 712A.13 (allowing substituted service "if the judge *is satisfied* [that personal service] is impracticable" [emphasis supplied]), the court may exercise jurisdiction on the basis of substituted service even if it fails to comply with the additional requirements of MCR 3.920(B)(4)(b) (allowing substituted service "[i]f the court finds, *on the basis of testimony or a motion and affidavit*, that personal service of the summons is impracticable or cannot be achieved[]" [emphasis supplied]). *In re SZ*, 262 Mich App at 565-569. In *In re SZ*, 262 Mich App at 564, the respondent claimed that the trial court improperly allowed service by publication when it did so without an affidavit or testimony and, therefore, that the court lacked jurisdiction over her. The Court of Appeals concluded that MCL 712A.13, not MCR 3.920, controls the determination of whether a court has established jurisdiction over a respondent:

[15] MCR 3.920(B)(2) governs service of summons in delinquency proceedings (for trial), child protective proceedings, and minor PPO enforcement proceedings.

> "MCL 712A.13 reflects our Legislature's policy considerations concerning the necessary requirements for obtaining jurisdiction over a parent or guardian of a juvenile. Because the issue of service is a jurisdictional one, the statutory provision governs. The plain language of the statute contains no specific requirements concerning what types of evidence a court must consider in determining whether substituted service is indicated, or the form in which the evidence must be received. By its silence, MCL 712A.13 permits a court to evaluate evidence other than testimony or a motion and affidavit when determining whether notice can be made by substituted service. . . . [T]he . . . court rule requirements . . . found in MCR 3.920(B)(4)(b) are restrictions affecting jurisdiction in matters that are usually time-sensitive and for which the Legislature's policy is to seek prompt resolution for the sake of the juvenile involved, and as such conflict with MCL 712A.13. Therefore, the statute prevails." *In re SZ*, 262 Mich App at 568.[16]

C. Timing Requirements for Service of Summons

At a minimum, the following timing requirements must be met to confer jurisdiction on the court:

- personal service must be effected at least 72 hours before the date of a hearing;
- registered mail must be mailed at least five days before the date of hearing if the recipient is in-state and 14 days before the hearing if out-of-state; and
- publication must be made once in some newspaper printed and circulated in the county in which the court is located at least one week before the time fixed in the summons or notice for the hearing. MCL 712A.13.

However, MCR 3.920(B)(5) provides additional, heightened timing requirements for service of a summons:

- a summons must be personally served at least seven days before trial or three days before any other hearing;
- if the summons is served by registered mail, it must be sent at least 14 days before trial or 10 days before any other hearing when the party to be served resides in

[16] See SCAO Form JC 46, *Motion for Alternate Service* and SCAO Form JC 47, *Order for Alternate Service*.

Michigan, and at least 21 days before trial and 17 days before hearing if the party resides outside of Michigan; and

- if service is by publication, the published notice, which need not include the petition itself, must appear at least once in a newspaper in the county where the party resides if known, and if not, in the county where the action is pending, 14 days before trial or 7 days before a hearing.

Failure to meet the requirements of MCL 712A.13 may constitute a jurisdictional defect rendering the proceedings void. *In re Mayfield*, 198 Mich App at 231-232.

D. Subsequent Notices After a Failure to Appear

"When persons whose whereabouts are unknown fail to appear in response to notice by publication or otherwise, the court need not give further notice by publication of subsequent hearings [in delinquency proceedings]." MCR 3.921(E).

5.5 Requirements for Valid Orders Directed to a Parent or Other Person

An order directed to a parent or other person who is not the juvenile is not binding (1) unless the parent or other person has been given an opportunity for a hearing pursuant to the issuance and service of a summons or notice as provided in MCL 712A.12 and MCL 712A.13, and (2) until the parent or other person is served with a copy of the order as provided in MCL 712A.13. MCL 712A.18(4).

5.6 Subpoenas

MCR 3.920(E) provides:

"(1) The attorney for a party or the court on its own motion may cause a subpoena to be served upon a person whose testimony or appearance is desired.

"(2) It is not necessary to tender advance fees to the person served a subpoena in order to compel attendance.

"(3) Except as otherwise stated in this subrule, service of a subpoena is governed by MCR 2.506."

5.7 Proof of Service

MCR 3.920(I) provides for proof of service of a summons and other papers:

> "(1) *Summons.* Proof of service of a summons must be made in the manner provided in MCR 2.104(A).
>
> (2) *Other Papers.* Proof of service of other papers permitted or required to be served under these rules must be made in the manner provided in MCR 2.107(D).
>
> (3) *Publication.* If the manner of service used involves publication, proof of service must be made in the manner provided in MCR 2.106(G)(1), and [MCR 2.106](G)(3) if the publication is accompanied by a mailing.
>
> (4) *Content.* The proof of service must identify the papers served. A proof of service for papers served on a foster parent, preadoptive parent, or relative caregiver shall be maintained in the confidential social file as identified in MCR 3.903(A)(3)(b)(vii).
>
> (5) *Failure to File.* Failure to file proof of service does not affect the validity of the service."[17]

[17] See SCAO Form JC 12a and SCAO Form JC 12b, *Proof of Service/Nonservice*. These forms "[are] not to be used for proof of service of a summons or for publication[.]"

Chapter 6: Petitions, Preliminary Inquiries, and Preliminary Hearings in Juvenile Delinquency Cases

6.1. Petitions to Commence Proceedings in the Family Division 6-2
6.2 Preliminary Inquiries 6-8
6.3 Preliminary Hearings 6-9

In this chapter. . .

This chapter discusses:

- petition requirements in juvenile delinquency cases
- preliminary inquiries
- preliminary hearing requirements in juvenile delinquency cases, including the appointment of counsel, participation of a prosecuting attorney, notice requirements, bail, and placements following the preliminary hearing

6.1 Petitions to Commence Proceedings in the Family Division

A. General Petition Requirements and Delinquency Jurisdiction

"Any request for court action against a juvenile must be by written petition." MCR 3.931(A). A petition is "a complaint or other written allegation, verified in the manner provided in MCR 1.109(D)(3), . . . that a juvenile has committed an offense." MCR 3.903(A)(20). A petition may be verified by an oath or affirmation of a party or other person having knowledge of the facts stated, or by a signed and dated declaration. See MCR 1.109(D)(3). "MCR 8.119(D)(1) specifically requires that all petitions *filed* under the juvenile code contain a separate petition number, not just those petitions that are *authorized*." *In re Diehl*, 329 Mich App 671, 702 (2019).

Only the prosecuting attorney may submit a petition requesting the court to take jurisdiction of a juvenile under MCL 712A.2(a)(1) for having committed a violation of law or ordinance. MCL 712A.11(2); MCR 3.914(B)(1). However, any person may provide information to the court indicating that a juvenile has committed a status offense. See MCL 712A.11(1).

As used in the Juvenile Code, the term *juvenile* generally refers to a person who is less than 18 years of age. See MCL 712A.1(1)(i); MCL 712A.2(a).[1] The term *juvenile* additionally includes "a person 18 years of age or older . . . over whom the [Family Division] has continuing jurisdiction[.]" MCL 712A.2a(9).[2] See also MCR 3.903(B)(2) (when used in delinquency proceedings, *juvenile* generally means "a minor alleged or found to be within the jurisdiction of the [Family Division] for having committed an offense"); MCR 3.903(A)(16) (when used in subchapter 3.900 of the Michigan Court Rules, "'[m]inor' means a person under the age of 18, and may include a person of age 18 or older over whom the [Family Division] has continuing jurisdiction pursuant to MCL 712A.2a").[3] "If the juvenile attains his or her eighteenth birthday after the filing of the petition, the court's

[1] Prior to October 1, 2021, the term *juvenile* generally referred to a person less than 17 years of age. MCL 712A.1(1)(i). See also 2019 PA 113, amending MCL 712A.2(a) effective October 1, 2021.

[2] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

[3] See Section 12.2 for a discussion of continuing jurisdiction over a juvenile.

jurisdiction shall continue beyond the juvenile's eighteenth birthday and the court may hear and dispose of the petition under [the Juvenile Code]." MCL 712A.11(4).

The petition allows a court to determine if a statutory basis for jurisdiction exists and provides the juvenile notice of the charges against him or her. See generally MCL 712A.11(2)-(3); MCR 3.914(B)(1); MCR 3.931(A); MCR 3.931(B)(3)-(5). "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *In re Gault*, 387 US 1, 33 (1967) (citation omitted).

B. Required Contents of Petitions

A petition must be verified, must set forth plainly the facts that bring the juvenile within the Juvenile Code, and may be upon information and belief. MCL 712A.11(3).[4] The petition must contain certain information, if known, or if not known to the petitioner, be stated as unknown. MCL 712A.11(4); MCR 3.931(B). In addition to specified case information,[5] MCR 3.931(B) requires a petition to contain the following information:

> "(1) the juvenile's name, address, and date of birth, if known;
>
> (2) the names and addresses, if known, of
>
> > (a) the juvenile's mother and father,
> >
> > (b) the guardian, legal custodian, or person having custody of the juvenile, if other than a mother or father,
> >
> > (c) the nearest known relative of the juvenile, if no parent, guardian, or legal custodian can be found, [and]
> >
> > (d) the juvenile's membership or eligibility for membership in an Indian tribe, if any, and the identity of the tribe[;]
>
> (3) sufficient allegations that, if true, would constitute an offense by the juvenile;

[4] See also subchapter 1.100 of the Michigan Court Rules, which governs the general form of pleadings and papers filed in delinquency cases. MCR 3.901(A)(1).

[5] "At a minimum, specified case information shall include the name, an address for service, an e-mail address, and a telephone number of every party[.]" MCR 1.109(D)(2).

> (4) a citation to the section of the Juvenile Code relied upon for jurisdiction;
>
> (5) a citation to the federal, state, or local law or ordinance allegedly violated by the juvenile;
>
> (6) the court action requested; and
>
> (7) if applicable, the notice required by MCL 257.732(8), and the juvenile's Michigan driver's license number."[6]

The petition must include a statement indicating whether a family division matter involving members of the same family is or was pending. MCR 1.109(D)(2)(b).[7] "When any pending or resolved family division or tribal court case exists that involves family members of the person(s) named in the petition filed under [MCR 3.931(B)], the petitioner must complete and file a case inventory [on a form approved by the State Court Administrative Office] listing those cases, if known."[8] MCR 3.931(A). "The case inventory is confidential, not subject to service requirements, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court." *Id*. "The confidential case inventory required by MCR 3.931(A) . . . shall not be served on any party." MCR 3.920(B)(3)(d).

C. Authorizing a Petition to be Filed

Before the court may acquire formal jurisdiction of a case, the court must authorize a petition to be filed. MCL 712A.11(1); MCL 712A.11(2). A "'[p]etition authorized to be filed' refers to written permission given by the court to proceed with placement on the formal calendar. Until a petition is authorized, it remains on the informal calendar."[9] MCR 3.903(A)(21). "A petition is deemed 'filed' when it is delivered to, and accepted by, the clerk of the court." MCR 3.903(A)(9).

D. Required Notice When a Juvenile Is Charged With a Felony in Which a Motor Vehicle Was Used

MCR 3.931(B)(7) requires a petition to contain the notice provision contained in MCL 257.732(8), if applicable. MCL 257.732(8) provides:

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[6] See Section (D) and Section 21.13(B) for discussion of the notice required by MCL 257.732(8).

[7] See Section (E) for discussion of MCR 1.109(D)(2)(b).

[8] See Section 2.16 for the required procedures when a juvenile is subject to the prior continuing jurisdiction of another court.

[9] See Section 21.2 for information on access to family division records and confidential files.

> "If a juvenile is accused of an act, the nature of which constitutes a felony in which a motor vehicle was used,[10] other than a felony specified in [MCL 257.732(4)][11] or [MCL 257.319],[12] the prosecuting attorney or family division of circuit court shall include the following statement on the petition filed in the court:
>
> > "'You are accused of an act the nature of which constitutes a felony in which a motor vehicle was used. If the accusation is found to be true and the judge or referee finds that the nature of the act constitutes a felony in which a motor vehicle was used, as defined in . . . MCL 257.319, your driver's license shall be suspended by the secretary of state.'"

E. Required Information About Other Court Matters Involving Members of the Same Family

A petition must identify whether a Family Division matter or tribal court case involving members of the same family is or was pending and contain the information required by MCR 1.109(D)(2)(b) and MCR 3.931(A).

MCR 1.109(D)(2)(b) requires the petition to contain one of the following statements, if known:

> "(*i*) There are no pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition, or
>
> "(*ii*) There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or

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[10] "[F]elony in which a motor vehicle was used" is defined as a felony during the commission of which the juvenile operated a motor vehicle, and while operating the vehicle presented real or potential harm to persons or property, if the vehicle was (1) "used as an instrument of the felony"; (2) "used to transport a victim of the felony"; (3) "used to flee the scene of the felony"; or (4) "necessary for the commission of the felony." MCL 257.319(2)(c); MCL 257.732(6).

[11] MCL 257.732(4) requires the court clerk to forward an abstract of the court record upon an individual's conviction (or, for certain offenses, a finding of admission or responsibility) involving any of several enumerated offenses. See Section 21.13(B) for a list of these offenses.

[12] MCL 257.319 requires the Secretary of State to suspend a person's driver's license upon receipt of a record of the person's conviction of any of several enumerated offenses.

> petition. I have filed a completed case inventory listing those cases." See also MCR 3.931(A).

"The case inventory must be on a form approved by the State Court Administrative Office"; the inventory "is confidential, not subject to service requirements, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court." MCR 3.931(A). "The confidential case inventory required by MCR 3.931(A) . . . shall not be served on any party." MCR 3.920(B)(3)(d).

Whenever practicable, two or more matters within the Family Division's jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023(1).

If a juvenile is subject to a prior or continuing order of any other court of this state, notice must be filed in the other court of any order subsequently entered under the Juvenile Code. MCL 712A.3a. MCR 3.927 provides that the manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205.[13]

F. Amending a Petition

1. Generally

"A petition . . . may be amended at any stage of the proceedings as the ends of justice require." MCL 712A.11(6).

2. Amending a Petition to Designate Case

If a petition submitted by the prosecuting attorney did not include a designation of the case (or, if an offense other than a specified juvenile violation is alleged, a request that the court designate the case) for trial as an adult,[14] amendment of the petition is permitted as set out in MCR 3.951(A)(3) and MCR 3.951(B)(3).

MCR 3.951(A)(3)(a)-(b) sets out the following requirements for amending a petition to designate a case for criminal trial when a specified juvenile violation is alleged:

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[13] See Section 2.16 for a detailed discussion of MCR 3.205.

[14] See Section 15.1 for discussion of the initiation of prosecutor-designated and court-designated proceedings.

> "(a) The prosecuting attorney may, by right, amend the petition to designate the case during the preliminary hearing.[15]
>
> (b) The prosecuting attorney may request leave of the court to amend the petition to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to designate the case as the interests of justice require."

MCR 3.951(B)(3)(a)-(b) sets out requirements for amending a petition to request designation of a case for criminal trial when an offense other than a specified juvenile violation is alleged:

> "(a) The prosecuting attorney may, by right, amend the petition to request the court to designate the case during the preliminary hearing.
>
> "(b) The prosecuting attorney may request leave of the court to amend the petition to request the court to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to request the court to designate the case as the interests of justice require."

"[A] referee licensed to practice law in Michigan may preside at a hearing . . . to amend a petition to designate a case and to make recommended findings and conclusions." MCR 3.913(A)(2)(c).[16]

G. Alternatives to Filing a Petition—Citation and Appearance Tickets

1. Generally

A citation or appearance ticket may be used to initiate proceedings "if the charges against the juvenile are limited to violations of the Michigan Vehicle Code, or of a provision of an

[15] However, see MCL 712A.2d(1), which provides that "[a]n amended petition making a designation under [MCL 712A.2d for trial as an adult for a specified juvenile violation] must be filed *only by leave* of the court." (Emphasis added.)

[16] See Chapter 20 for discussion of referees' recommendations.

ordinance substantially corresponding to any provision of that law, as provided by MCL 712A.2b." MCR 3.931(C)(1).

If a citation or appearance ticket is used to initiate delinquency proceedings, it must be treated by the court as if it were a petition. MCR 3.931(C)(2). However, "it may not serve as a basis for pretrial detention." *Id.*

2. Traffic Citations

MCL 712A.2b(a) states that "[n]o petition shall be required, but the court may act upon a copy of the written notice to appear given the accused juvenile as required by [MCL 257.728]."

MCL 257.728(1), which governs warrantless arrests for traffic misdemeanors, requires the arresting officer to provide the alleged offender with "a written citation to appear in court[.]" A citation is "a complaint or notice upon which a police officer shall record an occurrence involving 1 or more vehicle law violations by the person cited[,]" MCL 257.727c(1), and copies of the citation are provided to the court and to the offender, MCL 257.727c(1)(a)-(d). The arresting officer may release the juvenile upon issuing a "citation or ticket to appear at a date and time to be set by the court[.]" MCR 3.933(A)(1).

6.2 Preliminary Inquiries[17]

A "[p]reliminary inquiry" is an "informal review by the court to determine appropriate action on a petition." MCR 3.903(A)(23). "When a petition is not accompanied by a request for detention[18] of the juvenile, the court may conduct a preliminary inquiry." MCR 3.932(A). Additionally, the Family Division may conduct a preliminary inquiry based on information submitted by any "person" (for example, a school official, a police officer, or a juvenile's parent) that the juvenile has committed a status offense.[19] See MCL 712A.11(1).[20]

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[17] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[18] If detention is requested, the court must conduct a preliminary hearing. See Section (A) and Section 6.3(A).

[19] See Section 2.3 for discussion of status offenses.

[20] However, only a prosecuting attorney may file a petition with the court when the juvenile is alleged to have violated a statute or ordinance. MCL 712A.11(2).

At a preliminary inquiry, the court examines the best interest of the juvenile and the public to determine whether further action is required and whether the case should be treated informally or formally. See MCR 3.932(A). Subject to procedural requirements imposed under the Crime Victim's Rights Act (CVRA),[21] and after completion and consideration of the results of the risk screening tool and mental health screening tool pursuant to MCR 3.907, the Family Division may choose to deny the petition; divert the matter under the Juvenile Diversion Act[22]; order further informal inquiry; proceed on the consent calendar[23]; or authorize a petition to be filed and docketed on the formal calendar.[24]

Committee Tip:

A wide variety of practices exist among courts as to the use of preliminary inquiries. Some courts utilize preliminary inquiries exclusively for less serious criminal offenses where no formal court jurisdiction will be requested or for cases in which the juvenile does not contest the charges. Additionally, some courts do not accept complaints from citizens.

The court may assign a referee to conduct a preliminary inquiry. MCR 3.913(A)(1). Referees who conduct preliminary inquiries are not required to be licensed attorneys. See MCL 712A.10(2); MCR 3.913(A)(2)(a).

"Except in cases involving offenses enumerated in the Crime Victim's Rights Act, MCL 780.781(1)(g), the preliminary inquiry need not be conducted on the record." MCR 3.932(A).

6.3 Preliminary Hearings[25]

At the preliminary hearing, after considering the results of a juvenile's risk screening tool and mental health screening tool, the court

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[21] MCL 780.751 *et seq*. See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for discussion of notice requirements under the CVRA when removing a case from the adjudicative process.

[22] MCL 722.821 *et seq*. See Section 4.3 for discussion of the Juvenile Diversion Act.

[23] See Section 4.4 for discussion of the consent calendar.

[24] See Section 4.5 for discussion of the formal calendar.

[25] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

mustreview the petition to determine whether it should be dismissed, referred for alternate services, placed on the consent docket, or continue to a preliminary hearing. MCR 3.935(B)(3).[26]

The court may assign a referee to conduct a preliminary hearing and to make recommended findings and conclusions. MCR 3.913(A)(1). Referees who conduct preliminary hearings do not need to be licensed attorneys. MCL 712A.10(2); MCR 3.913(A)(2)(a).

A. Timing

A preliminary hearing[27] in a juvenile delinquency case is functionally similar to an arraignment in a criminal case. *In re Wilson*, 113 Mich App 113, 122 (1982). A preliminary hearing "must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays, as defined by MCR 8.110(D)(2), or the juvenile must be released." MCR 3.935(A)(1).

The court may adjourn the preliminary hearing for up to 14 days:

> "(a) to secure the attendance of the juvenile's parent, guardian, or legal custodian or of a witness, or
>
> "(b) for other good cause shown." MCR 3.935(A)(2).

B. Special Adjournments

The Family Division must, upon request of the prosecuting attorney, adjourn the preliminary hearing when a juvenile is accused of committing a specified juvenile violation while the juvenile was between 14 and 18 years of age. MCR 3.935(A)(3).[28] MCR 3.935(A)(3)(a) states:

> "On a request of a prosecuting attorney who has approved the submission of a petition with the court, conditioned on the opportunity to withdraw it within 5 days if the prosecuting attorney authorizes the filing of a complaint and warrant with a magistrate, the court shall comply with subrules (i) through (iii).
>
> > (i) The court shall adjourn the preliminary hearing for up to 5 days to give the prosecuting attorney the opportunity to determine whether to authorize

[26] If detention of the juvenile is not requested, the court may conduct a preliminary inquiry rather than a preliminary hearing. See Section 4.1(A) and Section 6.2 for discussion of preliminary inquiries.

[27] See Section 4.1(B) for additional discussion of preliminary hearings.

[28] Specified juvenile violations are listed in Section 16.3.

> the filing of a criminal complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f, instead of unconditionally approving the filing of a petition with the court.
>
> (ii) The court, during the special adjournment under subrule 3(a), must defer a decision regarding whether to authorize the filing of the petition.
>
> (iii) The court, during the special adjournment under subrule 3(a), must release the juvenile pursuant to MCR 3.935(E) or detain the juvenile pursuant to MCR 3.935(D)[29]."

If the prosecuting attorney does not authorize the filing of a complaint and warrant during the special adjournment, "approval of the petition by the prosecuting attorney shall no longer be deemed conditional and the court shall proceed with the preliminary hearing and decide whether to authorize the petition to be filed." MCR 3.935(A)(3)(b).

The prosecuting attorney's use of the special adjournment procedure does not preclude the prosecuting attorney from filing a motion for traditional waiver under MCR 3.950.[30] MCR 3.935(A)(3)(c). Presumably, the rule does not preclude the prosecuting attorney from amending the petition to designate the case under MCR 3.951(A)(3)(a), either.[31]

If the prosecuting attorney decides during the special adjournment to file a complaint and warrant in district court, an arraignment must be held within 24 hours after the authorization, "provided the juvenile is being detained in a juvenile facility." MCR 6.907(A)(2). Following the arraignment, the district court must set a date for the juvenile's preliminary examination within the next 14 days. MCR 6.907(C)(2). The period consumed by the special adjournment, up to three days, must be deducted from the 14 days allowed for conducting the preliminary examination following arraignment. *Id*.[32]

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[29] See Section 6.3(H) and Section 6.3(I) for discussion of conditions for detention or release.

[30] See Chapter 14 for discussion of traditional waiver proceedings.

[31] See Chapter 15 for discussion of designated proceedings.

[32] See Chapter 15, Part B, and Chapter 16, Part B, for additional discussion of arraignments and preliminary examinations in designated and automatic waiver proceedings, respectively.

C. A Juvenile's Right to Counsel

1. Constitutional and Statutory Rights to Counsel

Juveniles "have a Sixth Amendment right to counsel in all adjudicatory proceedings." *People v McGilmer*, 95 Mich App 577, 579-580 (1980) (citation omitted). Put differently, the Sixth Amendment right to counsel attaches at a criminal defendant's initial appearance before a judicial officer where the defendant is notified of the charge and the defendant's liberty is subject to restriction. *Rothgery v Gillespie Co*, 554 US 191, 198 (2008). Accordingly, the Sixth Amendment right to counsel commences at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," regardless of the prosecution's involvement in, or awareness off, the proceeding. *Id*. at 198 (quotation marks and citation omitted).

The constitutional right to counsel in delinquency proceedings extends to proceedings that occur after adjudication if "the juvenile may face commitment to an institution." *Walls v Director of Institutional Svcs*, 84 Mich App 355, 359 (1978). A juvenile also has a federal constitutional right to counsel during the first ("adjudicative") phase of a traditional waiver hearing.[33] *Kent v United States*, 383 US 541, 553-554, 561-562 (1966); *People v Hana*, 443 Mich 202, 219, 225-226 (1993).

In addition to constitutional requirements, MCL 712A.17c(2) states that the court must appoint an attorney for a juvenile in a proceeding under MCL 712A.2(a) (violations of law or ordinance and certain status offenses) or MCL 712A.2(d) (status offenses involving "wayward minors") if one or more of the following circumstances is present:

> "(a) The child's parent refuses or fails to appear and participate in the proceedings.
>
> (b) The child's parent is the complainant or victim.
>
> (c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.
>
> (d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and

[33] See Section 14.15(A) for discussion of the right to the effective assistance of counsel in traditional waiver proceedings.

> the child does not waive his or her right to an attorney.
>
> (e) The court determines that the best interests of the child or the public require appointment."

MCR 3.915(A)(2)(a)-(e) contain substantially similar criteria for the appointment of counsel.

"MCR 3.915[(A)](2)(e) requires that a court appoint an attorney for a juvenile in a delinquency proceeding if the court determines that the best interests of the juvenile or the public require appointment." *In re EE*, 346 Mich App 332, 352 (2023) (quotation marks and citation omitted; observing that the trial court's "failure to consider the children's best interests compounded its other errors").

In addition to the status offenses listed in MCL 712A.2(a), and status offenses involving wayward minors under MCL 712A.2(d), "[c]hildren prosecuted for [the status offense of] truancy have a right to counsel conferred by [MCL 712A.17c] and [MCR 3.915(A)(2)]." *In re EE*, 346 Mich App at 337.

Appointment of counsel at a preliminary hearing may be necessary if the juvenile is not accompanied by a parent, guardian, or legal custodian. See MCR 3.935(B)(1) ("[t]he preliminary hearing may be conducted without a parent, guardian, or legal custodian present, provided a guardian ad litem or attorney appears with the juvenile[]"). Additionally, a juvenile may waive the probable cause phase of a detention determination at a preliminary hearing[34] only if the juvenile is represented by an attorney. MCR 3.935(D)(2).

Committee Tip:

Appointment of counsel before a preliminary hearing avoids adjourning the preliminary hearing to appoint an attorney and allows the attorney to facilitate an informal disposition of the case.

An attorney appointed by the court must serve until discharged by the court. MCL 712A.17c(9); MCR 3.915(D)(2). "An attorney

[34] See Section 6.3(G) and Section 6.3(H) for discussion of detention of a juvenile following a preliminary hearing.

retained by a party may withdraw only on order of the court." MCR 3.915(D)(1).

2. Advice of Right to Counsel

The Due Process Clause of the Fourteenth Amendment requires the parents and child to be notified of the child's right to be represented by retained or appointed counsel, if they are unable to afford counsel, in proceedings to determine delinquency which may result in commitment to an institution in which a juvenile's freedom is curtailed. *In re Gault,* 387 US 1, 41 (1967).

MCL 712A.17c(1) provides:

> "In a proceeding under [MCL 712A.2(a) (violations of law or ordinance and certain status offenses)] or [MCL 712A.2(d) (status offenses involving "wayward minors")] or a proceeding regarding a supplemental petition alleging a violation of a personal protection order under [MCL 712A.2(h)], the court shall advise the child that he or she has a right to an attorney at each stage of the proceeding."

MCR 3.915(A)(1) requires the court to advise a juvenile, if he or she is not represented by counsel, of his or her right to an attorney "at each stage of the proceedings on the formal calendar, including trial, plea of admission, and disposition." MCR 3.935(B)(4) specifically requires the court to advise a juvenile of his or her right to an attorney pursuant to MCR 3.915(A)(1) if it plans to conduct a preliminary hearing.

3. Requirements for a Valid Waiver of Counsel

MCL 712A.17c(3) and MCR 3.915(A)(3) set out the required procedures for a juvenile to waive his or her right to counsel. MCL 712A.17c(3) states:

> "Except as otherwise provided in this subsection, in a proceeding under [MCL 712A.2(a) or MCL 712A.2(d) (violations of law or ordinance and status offenses)], the child may waive his or her right to an attorney. The waiver by a child shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child's parent or guardian ad litem objects or if the appointment is made under

> [MCL 712A.17c(2)(e) ("[t]he court determines that the best interests of the child or the public require appointment[]")]."

MCR 3.915(A)(3) states:

> "*Waiver of Attorney.* The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on [MCR 3.915(A)(2)(e) (best interest of public or juvenile require appointment)]. The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made."[35]

Right to self-representation. Before accepting a juvenile's request for self-representation (a request to proceed pro se), a judge must find that the three requirements set forth in *People v Anderson*, 398 Mich 361 (1976), have been met. *In re EE*, 346 Mich App 332, 350 (2023). See also MCR 3.915 and MCL 712A.17c. First, "the request [for self-representation] must be unequivocal." *EE*, 346 Mich App at 350 (quotation marks and citation omitted) (noting that even "hypothetically assum[ing] that [the children] unequivocally requested self-representation, the trial court never inquired regarding whether they understood this choice, or were forced into it by their father"). Second, assertion of the right to self-representation must be made "knowingly, intelligently and voluntarily." *Id*. at 350 (quotation marks and citation omitted). Third, a juvenile's self-representation "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id*. at 351 (quotation marks and citation omitted) See also *People v King*, 512 Mich 1, 16 (2023).

"Although a court may not force a lawyer upon a defendant, it may grant a defendant's self-representation request only after ensuring the defendant knowingly, voluntarily, and intelligently waived the right to counsel." *People v Helmer*, ___ Mich App ___, ___ (2026) (quotation marks and citation omitted). A valid request for self-representation requires "the trial court [to] make three findings under [*People v Anderson*, 398 Mich 361, 367-368 (1976)]: (1) the defendant's request to represent himself is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers

[35] See SCAO Form JC 06, *Waiver of Attorney or Request for Appointment of Attorney*.

and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Helmer*, ___ Mich App at ___ (quotation marks and citation omitted). Additionally, before permitting an initial waiver of the right to counsel, MCR 6.005(D) requires the trial court to: "(1) advis[e] the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offer[] the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer." *Helmer*, ___ Mich App at ___, citing *People v King*, 512 Mich 1, 12 (2023).[36] In *Helmer*, defendant "lit his ex-girlfriend on fire using gasoline," causing her to suffer extensive and permanent injuries. *Helmer*, ___ Mich App at ___. "Defendant represented himself at trial." *Id*. at ___. On appeal, defendant asserted that "the trial court did not follow the procedures set forth in [*Anderson*], and MCR 6.005(D), which ensure a defendant knowingly, intelligently, and voluntarily waives his constitutional right to counsel as guaranteed by the Sixth Amendment." *Helmer*, ___ Mich App at ___ (quotation marks omitted). Specifically, "defendant contend[ed] on appeal that his waiver of counsel was not knowing, intelligent, or voluntary because he was not told that self-representation was a bad idea, and that the court made no express finding that he fully understood, recognized and agreed to abide by the waiver of counsel procedures." *Id.* at ___ (quotation marks and ellipsis omitted). However, the record showed that the trial court engaged in a colloquy with defendant that, "at the very least, *substantially* complied with the requirements set forth in *Anderson* and MCR 6.005(D). *Helmer*, ___ Mich App at ___.

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4, for discussion of waiver of counsel.

4. Reimbursement of Attorney Costs

MCL 712A.17c(8) allows a court to enter an order assessing attorney costs.[37] That provision states as follows:

> "If an attorney . . . is appointed for a party under [the Juvenile Code], after a determination of ability to pay[,] the court may enter an order assessing

[36] Waiver of counsel for adult defendants is governed by MCR 6.005(D). A juvenile defendant may waive the right to the assistance of counsel according to the requirements of MCR 6.905(C).

[37] See Section 18.4 for a detailed discussion of reimbursement of attorney fees.

> attorney costs against the party or the person responsible for that party's support, or against the money allocated from marriage license fees for family counseling services under . . . MCL 551.103. An order assessing attorney costs may be enforced through contempt proceedings."

See also MCR 3.915(E), which is substantially similar to MCL 712A.17c(8), and MCL 712A.18(5) (reimbursement as part of order of disposition).[38]

5. Appointment of a Guardian Ad Litem

"The court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it." MCR 3.916(A). See also MCL 712A.17c(10) (a court may appoint a guardian ad litem to assist it in determining a child's best interests). For rules governing the appearance and rights of guardians ad litem, and the responsibility for the costs of guardians ad litem, see MCR 3.916(B)-(D).

D. Appearance of a Prosecuting Attorney

Only the prosecuting attorney may file a petition requesting the court to take jurisdiction of a juvenile allegedly within MCL 712A.2(a)(1) (violations of law or ordinance), MCL 712A.11(2); MCR 3.914(B)(1), and the prosecuting attorney must appear for the people if the proceeding requires a hearing and the taking of testimony, MCL 712A.17(4); MCR 3.914(A); MCR 3.914(B)(2). If the court requests, the prosecutor must review a petition for legal sufficiency and appear for the people at any delinquency hearing. MCR 3.914(A); see also MCL 712A.17(4).

E. Notice Requirements for Preliminary Hearings

Notice of a preliminary hearing must be given to the juvenile and his or her parent as soon as the hearing is scheduled, and the notice may be in person, in writing, on the record, or by telephone. MCR 3.920(D)(2)(a).[39] "If the court knows or has reason to know an Indian child is . . . charged with a status offense in violation of MCL 712A.2(a)(2)-(4) or [MCL 712A.2](d) and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6)[,]" notice of a preliminary hearing must be given to the Indian child's parent or

[38] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/4a548b/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

[39] See Section (D) for discussion of notice requirements for noncustodial parents.

Indian custodian and to the tribe as provided in MCR 3.920(D). MCR 3.920(C).[40]

F. Procedures at Preliminary Hearings

1. Videoconferencing Technology

MCR 3.904(A)(1) provides that courts may use videoconferencing technology when conducting preliminary hearings[41] under MCR 3.935(A)(1).

See Section 1.4 for discussion of videoconferencing technology.

2. Presence of Parent, Guardian, or Legal Custodian

The presence of a parent, guardian, or legal custodian at the preliminary hearing is not required as long as a guardian ad litem or attorney appears with the juvenile. MCR 3.935(B)(1).

3. Reading the Allegations in the Petition

"The court shall read the allegations in the petition." MCR 3.935(B)(2).

Committee Tip:

Although the rule does not authorize waiver of the reading of the allegations as often occurs in criminal proceedings, the reading is often waived by counsel for the juvenile.

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4. Deciding Whether to Continue With the Hearing

After reading the allegations and considering the results of a juvenile's risk screening tool and mental health screening tool, the court must determine whether (1) the petition should be

[40] See Section 2.15 for a brief discussion of jurisdiction and transfer of jurisdiction in proceedings involving Indian children.

[41] Courts may use videoconferencing technology when conducting "preliminary examinations under MCR 3.953 and MCR 3.985, dispositional hearings, and postdispositional progress reviews." MCR 3.904(A)(1). Additionally, subject to the provisions in MCR 3.904, videoconferencing technology may be used in any delinquency, designated, or personal protection violation proceedings under subchapter 3.900 of the Michigan Court Rules, to take testimony from an expert witness or a person at another location. See MCR 3.904(A)(2).

dismissed, (2) the matter should be diverted, (3) the matter should be heard on the consent calendar, or (4) the court should continue with the preliminary hearing. MCR 3.935(B)(3).[42]

If the court determines that it will remove the case from the adjudicative process (i.e., dismiss the petition, divert the case, or place the case on the consent calendar), the court must comply with the requirements of the Crime Victim's Rights Act (CVRA).[43] MCR 3.932(B); see also MCL 712A.2f(5).

If the preliminary hearing is to continue, the court must advise the juvenile, in plain language and on the record, of:

> "(a) the right to an attorney pursuant to MCR 3.915(A)(1);[44]
>
> (b) the right to trial by judge or jury on the allegations in the petition and that a referee may be assigned to hear the case unless demand for a jury or judge is filed pursuant to MCR 3.911 or [MCR] 3.912;[45] and
>
> (c) the privilege against self-incrimination and that any statement by the juvenile may be used against the juvenile." MCR 3.935(B)(4)(a)-(c).

If the juvenile is charged with a status offense, the court must ask whether the juvenile or a parent is a member of an Indian tribe. MCR 3.935(B)(5). "If the court knows or has reason to know the child is an Indian child, the court must determine the identity of the tribe and comply with MCR 3.905 before proceeding with the hearing." MCR 3.935(B)(5).[46]

5. Opportunity to Deny or Plead to the Allegations

"The juvenile must be allowed an opportunity to deny or otherwise plead to the allegations." MCR 3.935(B)(6).[47]

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[42] See Section 4.3 (discussing diversion) and Section 4.4 (discussing the consent calendar).

[43] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for discussion of notice requirements under the CVRA when removing a case from the adjudicative process.

[44] See Section 6.3(C) for discussion of a juvenile's right to an attorney at the preliminary hearing.

[45] See Section 2.18 for discussion of judges and referees.

[46] See Section 2.15 for a brief discussion of proceedings involving Indian children.

[47] See Chapter 8 (discussing pleas of admission and nolo contendere).

6. Authorizing the Filing of the Petition

When a judge or referee gives written permission to proceed with placement on the formal calendar, the petition is "authorized to be filed." MCR 3.903(A)(21). "Until a petition is authorized, it remains on the informal calendar."[48] *Id*.

Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition. MCR 3.935(B)(7). "The court may authorize a petition to be filed and docketed on the formal calendar if it appears to the court that formal court action is in the best interest of the juvenile and the public." MCR 3.932(D).

If the court authorizes the filing of the petition, the court must:

> "(a) determine if biometric data[49] must be taken as provided by MCL 712A.11(5) and MCR 3.936; and
>
> (b) determine if the juvenile should be released, with or without conditions, or detained, as provided in [MCR 3.935(C)-(F)]." MCR 3.935(B)(7).[50]

G. Decision Whether to Release or Detain Juvenile

MCL 712A.2(i) provides, in relevant part:

> "In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018. As used in this subdivision, 'party' means 1 of the following:
>
> (*i*) In a delinquency proceeding, the petitioner and juvenile."

---

[48] See Section 21.2 for information on access to family division records and confidential files.

[49] MCL 712A.11(5) provides that "[w]hen a petition is authorized, the court shall examine the court file to determine if a juvenile has had his or her biometric data collected as required under . . . MCL 28.243." "Biometric data" includes fingerprint and palm print images, "[d]igital images recorded during the arrest or booking process," and "descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b). See Section 21.10 for discussion of requirements concerning the collection of biometric data.

[50] See Section 6.3(G) (decision whether to release or detain juvenile), Section 6.3(H) (conditions for detention), and Section 6.3(I) (conditional release pending preliminary hearing) for discussion of MCR 3.935(C)-(F).

MCR 3.935(C)(1) lists factors that the court must consider to determine whether a juvenile is to be released, with or without conditions, or detained:

> "(a) the juvenile's family ties and relationships,
>
> (b) the juvenile's prior delinquency record,
>
> (c) the juvenile's record of appearance or nonappearance at court proceedings,
>
> (d) the violent nature of the alleged offense,
>
> (e) the juvenile's prior history of committing acts that resulted in bodily injury to others,
>
> (f) the juvenile's character and mental condition,
>
> (g) the court's ability to supervise the juvenile if placed with a parent or relative, and
>
> (h) any other factor indicating the juvenile's ties to the community, the risk of nonappearance, and the danger to the juvenile or the public if the juvenile is released."

The court must explain its decision either on the record or in a written memorandum. MCR 3.935(C)(2). However, the court need not make findings on each of the factors listed in MCR 3.935(C)(1). MCR 3.935(C)(2). A "juvenile may be detained pending the completion of the preliminary hearing if the conditions for detention under [MCR 3.935(D)[51]] are established." MCR 3.935(B)(8).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[52]

H. Conditions for Detention

Under MCR 3.935(D)(1), a juvenile may be ordered detained or continued in detention if probable cause exists to believe that the juvenile committed the offense, the results of the detention screening tool have been considered pursuant to MCR 3.907, and one or more of the following circumstances are present:

> "(a) the offense alleged is so serious that release would endanger the public safety;

[51] See Section 6.3(H) for discussion of conditions for detention under MCR 3.935(D).

[52] See Section 10.11 for additional information on MCR 3.937.

> (b) the juvenile is charged with an offense that would be a felony if committed by an adult and will likely commit another offense pending trial, if released, and
>
> > (i) another petition is pending against the juvenile,
> >
> > (ii) the juvenile is on probation, or
> >
> > (iii) the juvenile has a prior adjudication, but is not under the court's jurisdiction at the time of apprehension;
>
> (c) there is a substantial likelihood that if the juvenile is released to the parent, guardian, or legal custodian, with or without conditions, the juvenile will fail to appear at the next court proceeding;
>
> (d) the home conditions of the juvenile make detention necessary;
>
> (e) the juvenile has run away from home;[53]
>
> (f) the juvenile has failed to remain in a detention facility or nonsecure facility or placement in violation of a valid court order; or
>
> (g) pretrial detention is otherwise specifically authorized by law."

See also MCL 712A.15(2), which authorizes pretrial detention and additionally provides that the following children may be detained pending a hearing:[54]

> "(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.
>
> * * *
>
> (e) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation.

[53] But see MCL 712A.15(2) as amended by 2021 PA 389, effective April 4, 2021 (removing a similar provision regarding detaining a juvenile who has run away from home). Section 3.6 for limitations on detention of status offenders.

[54] Several of the provisions in MCL 712A.15(2) have been incorporated into MCR 3.935(D)(1), but MCL 712A.15(2)(b) and MCL 712A.15(2)(e) have not been incorporated into the court rule.

(f) Those who have allegedly violated a court order under [MCL 712A.2(a)(2)-(4).]" MCL 712A.15(2)(b); MCL 712A.15(2)(e); MCL 712A.15(2)(f).

See *Schall v Martin*, 467 US 253, 256-257 (1984) (upholding the constitutionality of a state's "preventive detention" statute, which allowed for pretrial detention if there was a serious risk of the juvenile committing another crime before the next court hearing).[55]

Committee Tip:

"Court intake workers," referees, or detention personnel often make the initial detention determination. Courts may wish to promulgate a local administrative order meeting the requirements of MCR 3.934(B)(2). A copy of the administrative order may then be given to each law enforcement agency in the court's geographic jurisdiction.

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1. Probable Cause

"The juvenile may contest the sufficiency of evidence by cross-examination of witnesses, presentation of defense witnesses, or by other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses. The Michigan Rules of Evidence do not apply, other than those with respect to privileges." MCR 3.935(D)(3).

"A juvenile may waive the probable cause determination required by [MCR 3.935(D)(1)] only if the juvenile is represented by an attorney." MCR 3.935(D)(2).

2. Use of Probable Cause Finding in Automatic Waiver Proceedings

In an automatic waiver case, the magistrate must transfer the case "back" to the Family Division if, at the conclusion of the preliminary examination, the magistrate finds that no probable

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[55] See also MCL 712A.2(i), which provides, in relevant part:

"In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018. As used in this subdivision, 'party' means 1 of the following:

(*i*) In a delinquency proceeding, the petitioner and juvenile."

cause exists to believe that a specified juvenile violation occurred or that no probable cause exists to believe that the juvenile committed the specified juvenile violation, but that some other offense occurred, and probable cause exists to believe that the juvenile committed that other offense. MCL 766.14(2); MCR 6.911(B).

The Family Division must hear and dispose of a case transferred pursuant to MCL 766.14 in the same manner as if the case had commenced in the Family Division. MCR 3.939(A). "A petition that has been approved by the prosecuting attorney must be submitted to the court." *Id.* The Family Division "may use the probable cause finding of the magistrate made at the preliminary examination to satisfy the probable cause requirement of MCR 3.935(D)(1)." MCR 3.939(B).

3. Use of Probable Cause Finding in Traditional Waiver Proceedings

The court need not conduct the first phase of a traditional waiver hearing if the court has found the requisite probable cause during the pretrial detention determination at a preliminary hearing under MCR 3.935(D)(1), provided that at the earlier hearing only legally admissible evidence was used to establish probable cause that the offense was committed and probable cause that the juvenile committed the offense. MCR 3.950(D)(1)(c)(*i*).

I. Conditional Release of a Juvenile Pending Resumption of a Preliminary Hearing, Further Order, or Trial

MCR 3.935(E)(1) states:

> "(1) The court may release a juvenile to a parent pending the resumption of the preliminary hearing, pending trial, or until further order without conditions, or, if the court determines that release with conditions is necessary to reasonably ensure the appearance of the juvenile as required or to reasonably ensure the safety of the public, the court may, in its discretion, order that the release of the juvenile be on the condition or combination of conditions that the court determines to be appropriate, including, but not limited to:
>
> > "(a) that the juvenile will not commit any offense while released,

"(b) that the juvenile will not use alcohol or any controlled substance or tobacco product,

"(c) that the juvenile will participate in a substance abuse assessment, testing, or treatment program,

"(d) that the juvenile will participate in a treatment program for a physical or mental condition,

"(e) that the juvenile will comply with restrictions on personal associations or place of residence,

"(f) that the juvenile will comply with a specified curfew,

"(g) that the juvenile will maintain appropriate behavior and attendance at an educational program, and

"(h) that the juvenile's driver's license or passport will be surrendered."[56]

1. Violations of Conditions of Release

If a juvenile allegedly violates a condition of release and the court has consulted the results of the detention screening tool as provided under MCR 3.907, the court may order the juvenile to be apprehended and detained immediately. MCR 3.935(E)(2). After providing the juvenile with an opportunity to be heard regarding the alleged violation, the court may modify the juvenile's conditions of release or revoke the juvenile's release. *Id.*

2. Bail

a. Right to Post Bail

"In addition to any other conditions of release, the court may require a parent, guardian, or legal custodian to post bail." MCR 3.935(F). A parent, guardian, or custodian has a right to give bond or other security for a juvenile's appearance at trial. MCL 712A.17(3).

[56] See also MCL 712A.2(i), which provides, in relevant part:

"In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018. As used in this subdivision, 'party' means 1 of the following:

(*i*) In a delinquency proceeding, the petitioner and juvenile."

b. Cash or Surety Bond

MCR 3.935(F)(1) gives a parent, guardian, or legal custodian the option of posting a surety bond or cash bail:

> "The court may require a parent, guardian, or legal custodian to post a surety bond or cash in the full amount of the bail, at the option of the parent, guardian, or legal custodian. A surety bond must be written by a person or company licensed to write surety bonds in Michigan. Except as otherwise provided by this rule, MCR 3.604 applies to bonds posted under this rule."

Unless the court requires a surety bond or full cash bail as provided in MCR 3.935(F)(1), the court must advise the parent, guardian, or legal custodian that he or she can satisfy the monetary requirement of bail by:

> "(a) posting either cash or a surety bond in the full amount of bail set by the court or a surety bond written by a person or company licensed to write surety bonds in Michigan, or
>
> "(b) depositing with the register, clerk, or cashier of the court currency equal to 10 percent of the bail, but at least $10." MCR 3.935(F)(2).

c. Revocation or Modification of Bail

"The court may modify or revoke the bail for good cause after providing the parties notice and an opportunity to be heard." MCR 3.935(F)(3).

d. Return or Forfeiture of Money Bail

MCR 3.935(F)(4)-(5) discuss the return or forfeiture of money bail:

> "(4) *Return of Bail.* If the conditions of bail are met, the court must discharge any surety.
>
> > "(a) If disposition imposes restitution, the bail money posted by the parent must first be applied to the amount of restitution, and the balance, if any, returned.

> "(b) If the juvenile is discharged from all obligations in the case, the court shall return the cash posted, or return 90 percent and retain 10 percent if the amount posted represented 10 percent of the bail.
>
> "(5) *Forfeiture.* If the conditions of bail are not met, the court may issue a writ for the apprehension of the juvenile and enter an order declaring the bail money, if any, forfeited.
>
> "(a) The court must immediately mail notice of the forfeiture order to the parent at the last known address and to any surety.
>
> "(b) If the juvenile does not appear and surrender to the court within 28 days from the forfeiture date, or does not within the period satisfy the court that the juvenile is not at fault, the court may enter judgment against the parent and surety, if any, for the entire amount of the bail."

J. Permitted Placements Following Preliminary Hearing

As a general rule, a juvenile "must be placed in the least restrictive environment[57] that will meet the needs of the juvenile and the public, and that will conform to the statutory requirements of MCL 712A.15 and [MCL] 712A.16." MCR 3.935(D)(4).

If a complaint is authorized following a preliminary hearing, a juvenile may be placed in any of the following "pending investigation and hearing":

> "(a) In the home of the child's parent, guardian, or custodian.
>
> (b) If a child is within the court's jurisdiction under [MCL 712A.2(a) (criminal and status offenses)], in a

[57] "'Least restrictive environment' means a supervised community placement, preferably a placement with the juvenile's parent, guardian, relative, or a facility or conditions of treatment that is a residential or institutional placement only utilized as a last resort based on the best interest of the juvenile or for reasons of public safety." MCL 712A.1(1)(j).

> suitable foster care home subject to the court's supervision. . . .
>
> (c) In a child care institution or child placing agency licensed by the department to receive for care children within the jurisdiction of the court.
>
> (d) In a suitable place of detention." MCL 712A.14(3).[58]

See Section 3.5 and Section 3.6 for in-depth discussion of places of detention for alleged delinquents and status offenders.[59] See Section 3.10 for a brief discussion of detention of Indian children.

[58] See also MCL 712A.2(i), which provides, in relevant part:

"In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018. As used in this subdivision, 'party' means 1 of the following:

(*i*) In a delinquency proceeding, the petitioner and juvenile."

[59] See also Section 3.7 (discussing places of detention for juveniles in designated cases), Section 3.8 (discussing places of detention for juveniles in automatic waiver proceedings), and Section 3.9 (discussing places of detention for juveniles in traditional waiver proceedings).

Chapter 7: Pretrial Proceedings in Delinquency Cases

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In this chapter. . .

This chapter contains information on common pretrial issues in juvenile delinquency cases, including motion practice, determining the admissibility of evidence gathered by police, jury trial demands, and procedures to protect witnesses. The following issues are discussed:

- The information and evidence that the parties must provide one another before trial, and the information and evidence that the parties may obtain after filing a motion.

- The technical rules for filing written motions in a delinquency case, and when a court is required to conduct an evidentiary hearing.
- The constitutional, statutory, and court rule requirements for the admissibility of identification testimony, juvenile confessions, and evidence seized by police.
- Juvenile competency requirements.
- The requirements necessary to raise an alibi or insanity defense.
- Right to jury trial and trial by judge.
- Closing delinquency proceedings, ordering special protections for a witness, and venue issues.

7.1 Use of Restraints on a Juvenile

"Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

7.2 Pretrial Conferences

The court may direct the parties to appear at a pretrial conference to settle all pretrial matters. MCR 3.922(E). Except as otherwise provided in or unless inconsistent with the rules of subchapter 3.900, the scope and effect of a pretrial conference are governed by MCR 2.401. MCR 3.922(E).

A pretrial conference may be held at any time after the commencement of the action. MCR 2.401(A). The court must give reasonable notice of the scheduling of a conference. *Id.*

7.3 Discovery and Disclosures

A. As of Right (No Discovery Request Required)

"The following materials are discoverable as of right in all proceedings and shall be produced no less than 21 days before trial, even without a discovery request:

(a) all written or recorded statements and notes of statements made by the juvenile or respondent that are in possession or control of petitioner or a law enforcement agency, including oral statements if they have been reduced to writing;

(b) all written or recorded statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including, but not limited to, police reports, allegations of neglect and/or abuse included on a complaint submitted to Child Protective Services, and Child Protective Services investigation reports, except that the identity of the reporting person shall be protected in accordance with MCL 722.625;

(c) the names of all prospective witnesses;

(d) a list of all prospective exhibits;

(e) a list of all physical or tangible objects that are prospective evidence that are in the possession or control of petitioner or a law enforcement agency;

(f) the results of all scientific, medical, psychiatric, psychological, or other expert tests, experiments, or evaluations, including the reports or findings of all experts, that are relevant to the subject matter of the petition;

(g) the results of any lineups or showups, including written reports or lineup sheets;

(h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories;

(i) any written, video, or recorded statement that pertains to the case and made by a witness whom the party may call at trial;

(j) the curriculum vitae of an expert the party may call at trial and either a report prepared by the expert containing, or a written description of, the substance of the proposed testimony of the expert, the expert's opinion, and the underlying bases of that opinion; and

(k) any criminal record that the party may use at trial to impeach a witness." MCR 3.922(A)(1).

"[I]n addition to disclosures required by provisions of law and as required or allowed by [MCR 3.922(A)(1)-(3)], a party shall provide all other parties the following, which are discoverable as of right and, even without a discovery request, shall be produced no less than 21 days before trial:

> (a) a description or list of criminal convictions, known to the respondent's attorney or prosecuting attorney, of any witness whom the party may call at trial;
>
> (b) any exculpatory information or evidence known to the prosecuting attorney;
>
> (c) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case even if that person is not a prospective witness at trial; and
>
> (d) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case." MCR 3.922(B)(1).

Notwithstanding any provisions of MCR 3.922, "there is no right to have disclosed or to discover information or evidence that is protected by constitution, statute, or privilege, including information or evidence protected by a respondent's right against self-incrimination, except as provided in [MCR 3.922(B)(3)]." MCR 3.922(B)(2). See Section 7.3(D) for more information on discovering protected and privileged information.

Hearings regarding disposition, review, designation, violation of order or probation, and detention. "At delinquency dispositions, reviews, designation hearings, hearings on alleged violation of court orders or probation, and detention hearings, the following must be provided to the respondent, respondent's counsel, and the prosecuting attorney no less than 7 days before the hearing:

> (a) detention screening results, risks and needs assessments results, other assessments, and evaluations to be considered by the court during the hearing;
>
> (b) documents including but not limited to police reports, witnesses statements, reports prepared by probation officers, reports prepared by intake officers, and reports prepared by placement/detention staff to be considered by the court during the hearing; and
>
> (c) predisposition reports and documentation regarding recommendations in the report including but not

limited to documents regarding restitution." MCR 3.922(B)(4).

B. By Motion

"On motion of a party, the court may permit discovery of any other materials and evidence, including untimely requested materials and evidence that would have been discoverable of right under [MCR 3.922](A)(1) if timely requested. Absent manifest injustice, no motion for discovery will be granted unless the moving party has requested and has not been provided the materials or evidence sought through an order of discovery."[1] MCR 3.922(A)(2).

C. Depositions

"Depositions may only be taken as authorized by the court." MCR 3.922(A)(3).

D. Protected and Privileged Information

"[N]otwithstanding any other provision of [MCR 3.922], there is no right to have disclosed or to discover information or evidence that is protected by constitution, statute, or privilege, including information or evidence protected by respondent's right against self-incrimination, except as provided in [MCR 3.922(B)(3)]." MCR 3.922(B)(2).

Under MCR 3.922(B)(3), "if respondent demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the court shall conduct an in camera inspection of the records." MCR 3.922(B)(3). If the court is satisfied that the records reveal evidence necessary to the defense, "the court shall direct that such evidence . . . be made available to respondent's counsel." MCR 3.922(B)(3)(b). "If the privilege is absolute, and the privilege holder refuses to waive the privilege" to permit an in camera inspection, or disclosure if so ordered, "the court shall suppress or strike the privilege holder's testimony." MCR 3.922(B)(3)(a)-(b). Notwithstanding its determination, the court must make findings sufficient to facilitate meaningful appellate review. MCR 3.922(B)(3)(c).

[1] See also MCR 3.923(A)(3), which allows the court to serve process on additional witnesses and order production of additional evidence. This rule is discussed in Section 9.11.

1. Excision

"When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal." MCR 3.922(B)(3)(f).

2. Sealing the Record

"The court shall seal and preserve the records for review in the event of an appeal:

> (*i*) by the respondent, on an interlocutory basis or following conviction, if the court determines the records should not be made available to the defense or
>
> (*ii*) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense." MCR 3.922(B)(3)(d).

E. Custody of Records

"Records disclosed under this subrule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide." MCR 3.922(B)(3)(e).

F. Sanctions

Failure to comply with MCR 3.922(A)(1), MCR 3.922(A)(2), MCR 3.922(B)(1), or MCR 3.922(B)(4) may result in sanctions keeping with those assessable under MCR 2.313. MCR 3.922(A)(4); MCR 3.922(B)(5).

7.4 Motion Practice

Motion practice in delinquency cases is governed by MCR 2.119. MCR 3.922(D).

A. Time Requirements

Unless a different period is set by the court rules or by the trial court (for good cause), a written motion, notice of the hearing on the motion, and any supporting brief or affidavits must be served as follows:

- at least nine days before the time set for hearing if served by first-class mail.
- at least seven days before the time set for hearing if served by delivery under MCR 2.107(C)(1) (delivery to an attorney), MCR 2.107(C)(2) (delivery to a party),[2] or MCR 1.109(G)(6)(a) (electronic service). MCR 2.119(C)(1).

Unless a different period is set by the court rules or by the trial court (for good cause), any response to a motion (including a brief or affidavits) required or permitted by the court rules must be served as follows:

- at least five days before the hearing if served by first-class mail.
- at least three days before the hearing if served by delivery under MCR 2.107(C)(1) (delivery to an attorney), MCR 2.107(C)(2) (delivery to a party),[3] or MCR 1.109(G)(6)(a) (electronic service). MCR 2.119(C)(2).

The court may set different times for serving a motion or a response. MCR 2.119(C)(3). "[I]ts authorization must be endorsed in writing on the face of the notice of hearing or made by separate order." *Id.*

Unless the court sets a different time, a motion must be filed at least seven days before the hearing, and any response to a motion required or permitted by the court rules must be filed at least three days before the hearing. MCR 2.119(C)(4).

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[2] "Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

[3] "Notwithstanding any other provision of [MCR 2.107], until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-Filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of [MCR 2.107(C)(4)]." MCR 2.107(G).

B. Required Form of Written Motions[4]

Unless a motion is made during a hearing or trial, it must be in writing, state with particularity the grounds and authority on which it is based, state the relief or order sought, and be signed by the attorney or party as set out in MCR 1.109(D)(3) and MCR 1.109(E). MCR 2.119(A)(1).

Committee Tip

Note that only an attorney or party may sign a motion. MCR 1.109(E); MCR 2.119(A)(1). Thus, motions should not be submitted by probation officers or others who are not attorneys of record or parties in a case.

"A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C)[5] regarding citation of unpublished Court of Appeals opinions." MCR 2.119(A)(2). However, a trial court need not deny a motion if it is filed without a brief, if the motion itself contains citations to legal authority supporting its proposition. *Woods v SLB Prop Mgmt, LLC*, 277 Mich App 622, 625-626 (2008). "Except as permitted by the court or as otherwise provided in [the Michigan Court Rules], no reply briefs, additional briefs, or supplemental briefs may be filed." MCR 2.119(A)(2)(b).

Unless the court permits otherwise, the combined length of a motion (or response) and brief may not exceed 20 pages double spaced (exclusive of exhibits and attachments). MCR 2.119(A)(2)(a). Permission to file a motion and brief in excess of the 20-page limit should be requested sufficiently in advance of the hearing on the motion to allow the opposing party adequate opportunity for analysis and response. See *People v Leonard*, 224 Mich App 569, 578-579 (1997).

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[4] Many jurisdictions have local court rules governing the form of motions.

[5] MCR 7.215(C)(1) provides:

> "An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party must explain the reason for citing it and how it is relevant to the issues presented. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears."

The motion and notice of the hearing may be combined into one document. MCR 2.119(A)(3).

C. Affidavits

Unless specifically required by rule or statute, a pretrial motion need not be verified or accompanied by an affidavit. MCR 1.109(D)(3). Although an affidavit is not required, if one is included with a motion, MCR 2.119(B) sets out its required form. *Porter v Porter*, 285 Mich App 450, 461 (2009). Under MCR 2.119(B)(1), an affidavit filed in support of or in opposition to a motion must:

> "(a) be made on personal knowledge;
>
> (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit."

In addition, an affidavit must:

- be verified by oath or affirmation, MCR 1.109(D)(1)(f) and MCR 1.109(D)(3)(a);
- include sworn or certified copies of any documents it refers to, unless the documents (1) have already been filed; (2) are public record in the county in which the action is pending; (3) are in the adverse party's possession, and the affidavit or motion states this fact; or (4) it would be unreasonable or impracticable to attach them, and the affidavit or motion states this fact, MCR 2.119(B)(2); and
- be served on the opposing party within the same timeframe as written motions, MCR 2.119(C)(1).[6]

D. Evidentiary Hearings

An evidentiary hearing must be conducted whenever a defendant challenges the admissibility of evidence on constitutional grounds. *People v Reynolds (Anthony)*, 93 Mich App 516, 519 (1979). However, where a defendant fails to substantiate the claim that the evidence is inadmissible on constitutional grounds or it is apparent that the defendant's allegations do not rise to the level of a constitutional

[6] See Section 7.4(A) for discussion of time requirements for written motions.

violation, no evidentiary hearing is required. *People v Johnson (James)*, 202 Mich App 281, 285 (1993). A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217 (2008).

At an evidentiary hearing, burdens of proof and presumptions become issues. The phrase "burden of proof" encompasses both the burden of production and the burden of persuasion. *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 178-179 (1987).[7]

In determining whether the proffered evidence is admissible under the technical requirements of the rules of evidence, the trial court applies a preponderance of the evidence test. *Bourjaily v United States*, 483 US 171, 175-176 (1987). Whether the technical requirements of the rules of evidence have been met for the admissibility of evidence must be resolved by the trial court. See MRE 103(a).

While the court rules do not require the trial court to make findings of fact with respect to pretrial motions, "it is always preferable for purposes of appellate review that a trial court explain its reasoning and state its findings of fact with respect to pretrial motions[.]" *People v Shields*, 200 Mich App 554, 558 (1993); MCR 2.517(A)(4).

The parties have the right to a judge at an evidentiary hearing. See MCR 3.912(B) (parties have the right to a judge at a hearing on the formal calendar, which includes evidentiary hearings).

E. Motions for Rehearing or Reconsideration[8]

1. Requirements

A motion for reconsideration or rehearing must be filed and served 21 days after entry of an order deciding the motion, unless a more specific court rule exists and states otherwise. MCR 2.119(F)(1).

Responses and oral arguments are not permitted unless directed by the court. MCR 2.119(F)(2). "Any response by parties must be in writing and filed with the court and served on the opposing parties within 7 days after notice of the motion." MCR 3.992(C).

"The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

[7] See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 1, for discussion of burdens of proof.

[8] See Section 9.14 for further discussion of motions for rehearing or new trial.

"'[R]ehearing [or reconsideration] will not be ordered on the ground merely that a change of members of the bench has either taken place, or is about to occur.'" *People v White (Kadeem)*, 493 Mich 962, 962 (2013) (quoting *Peoples v Evening News Ass'n*, 51 Mich 11, 21 (1883).

2. Decision

"The purpose of MCR 2.119(F) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties. The time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously." *Bers v Bers*, 161 Mich App 457, 462 (1987) (internal citation omitted).

Generally, a motion for rehearing or reconsideration that presents the same issue ruled on by the court, either expressly or by reasonable implication, will not be granted. MCR 2.119(F)(3). However, "[MCR 2.119(F)(3)] does not categorically prevent a trial court from revisiting an issue even when [a] motion for reconsideration presents the same issue already ruled on; in fact, it allows considerable discretion to correct mistakes." *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754 (2014), citing *In re Moukalled Estate*, 269 Mich App 708, 714 (2006); see also *People v Walters (Jayne)*, 266 Mich App 341, 350 (2005) (adherence to the palpable error provision contained in MCR 2.119(F)(3) is not required; rather, the provision merely offers guidance to a court by suggesting when it may be appropriate to grant a party's motion for reconsideration).

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Kokx v Bylenga*, 241 Mich App 655, 658-659 (2000). "[MCR 2.119(F)] allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx*, 241 Mich App at 659. The court also has discretion to limit its reconsideration to the issue it believes warrants further consideration. *Id.*

A motion for reconsideration or rehearing may not be entertained by a court after entry of an order changing venue to another court, unless the order specifies an effective date. *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658, 661-662 (2012) (holding that "once a transfer of venue is made, the transferee court has full jurisdiction over the action [under MCL

> 600.1651] and, therefore, the transferor court has none[; a]ny motion for rehearing or reconsideration would have to be heard by whichever court has jurisdiction over the action at the time the motion is brought, which, after entry of an order changing venue, would be the transferee court[]").[9]

7.5 Change of Venue

In delinquency cases, venue is proper in the county in which the offense occurred or in which the juvenile is physically present. MCL 712A.2(a); MCR 3.926(A). Change of venue may be ordered in two circumstances:

> "(1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case; or
>
> (2) when an impartial trial cannot be had where the case is pending." MCR 3.926(D).

"All costs of the proceeding in another county are to be borne by the court ordering the change of venue." MCR 3.926(D).

"[A]fter [a] change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none[]" and may not "entertain any further proceedings[.]" *Frankfurth*, 297 Mich App at 656, 658 (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration[]" of the trial court's order changing venue).

7.6 Identification Procedures[10]

A. Biometric Data

> "A juvenile must have biometric data collected when required by law." MCR 3.932(C). In addition, "[t]he court may permit the collection of biometric data or photographing, or both, of a minor concerning whom a petition has been filed." MCR 3.932(C). "'Biometric data' means all of the following:

[9] The *Frankfurth* Court noted that "the better practice might be to make orders changing venue effective as of some reasonable time thereafter[.]" *Frankfurth*, 297 Mich App at 662.

[10] For additional discussion of identification procedures such as photo lineups, voice identification, and in-court identification, as well as admissibility issues, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9.

> "(*i*) Fingerprint images recorded in a manner prescribed by the [Department of State Police ("department")].
>
> (*ii*) Palm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the department.
>
> (*iii*) Digital images recorded during the arrest or booking process, including a full-face capture, left and right profile, and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by the department.
>
> (*iv*) All descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

A juvenile's biometric data must be collected upon arrest for a felony; a misdemeanor or juvenile offense for which the maximum possible penalty exceeds 92 days' imprisonment, a $1,000 fine, or both; or a misdemeanor or juvenile offense that is authorized for DNA collection under MCL 28.176(1)(b).[11] MCL 28.243(1). When authorizing a petition, and before entering an order of disposition or placing the case on the consent calendar, a court must examine the court file and determine whether the juvenile's biometric data has been collected and forwarded to the Department of State Police as required by MCL 28.243. See MCL 712A.11(5); MCL 712A.18(8); MCR 3.932(C)(3); MCR 3.936(B). If the court finds that the juvenile's biometric data or fingerprints have not been taken and forwarded as required by MCL 28.243 or the Sex Offenders Registration Act (SORA), it must do either of the following:

> "(a) Order the juvenile to submit himself or herself to the police agency that arrested or obtained the warrant for the juvenile's arrest so the juvenile's biometric data can be collected and forwarded and the juvenile's fingerprints can be taken and forwarded.
>
> (b) Order the juvenile committed to the sheriff's custody for collecting and forwarding the juvenile's biometric data and taking and forwarding the juvenile's fingerprints." MCL 712A.18(8). See also MCL 712A.11(5); MCR 3.936(B).

[11] MCL 28.176(1) requires the Department of State Police to permanently retain DNA identification profiles obtained from samples in the manner prescribed under the DNA Identification Profiling System Act, MCL 28.171 *et seq*., from offenders convicted or found responsible of certain enumerated offenses. See Section 21.17.

"Biometric data and photographs must be placed in the confidential files, capable of being located and destroyed on court order." MCR 3.923(C).[12]

B. Court-Ordered Lineups or Showups

If a complaint or petition is filed with the Family Division against a juvenile alleging a criminal violation, the court may, at the request of the prosecutor, order the juvenile to appear at a place and time designated by the court for identification by another person, including a corporeal lineup. MCL 712A.32(1); MCR 3.923(D). If the court orders the juvenile to appear for such an identification proceeding, the court must notify the juvenile and the juvenile's parent, guardian, or legal custodian of the following:

- the juvenile has the right to consult with an attorney and have an attorney present during the identification proceeding, and
- if the juvenile and the juvenile's parent, guardian, or legal custodian cannot afford an attorney, the court will appoint an attorney for the juvenile if requested on the record or in writing by the juvenile or the juvenile's parent, guardian, or legal custodian. MCR 3.923(D); see also MCL 712A.32(2).

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9, for information on motions to suppress identification of a defendant.

C. Constitutional Requirements

1. Right to Counsel

"Defendants who face incarceration are guaranteed the right to counsel at all critical stages of the criminal process by the Sixth Amendment, which applies to the states through the Due Process Clause of the Fourteenth Amendment." *People v Willing*, 267 Mich App 208, 219 (2005). "The right attaches and represents a critical stage in the proceedings only after adversarial legal proceedings have been initiated against a defendant by way of indictment, information, formal charge, preliminary hearing, or arraignment." *People v Marsack*, 231 Mich App 364, 376-377 (1998).

[12] See Section 21.11 for discussion of destruction of a juvenile's biometric data and arrest card.

"[T]he right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings." *People v Hickman*, 470 Mich 602, 603 (2004). In *Hickman,* 470 Mich at 610, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. However, a defendant may still challenge an identification conducted before the initiation of adversarial judicial proceedings on due process grounds because due process "'protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures.'" *Id.* at 607, quoting *Moore v Illinois*, 434 US 220, 227 (1977).

There is no right to counsel at precustodial investigatory photographic lineups. *People v Kurylczyk*, 443 Mich 289, 302 (1993). Rather, "[i]n the case of photographic identifications, the right of counsel attaches with custody." *Id.* at 302. But see *Hickman*, 470 Mich at 609 n 4, declining to "address whether a defendant has a right to an attorney *after* the initiation of adversarial judicial proceedings during a photographic showup."

The defendant was not entitled to a corporeal lineup with counsel rather than a photographic lineup where he was in custody for another offense at the time of the lineup; under *Hickman*, 470 Mich at 607, "a defendant's right to counsel 'attaches only to . . . [an] identification[] conducted at or after the initiation of adversarial judicial criminal proceedings[,]'" and adversarial proceedings for the subject offense had not yet been initiated when the photographic lineup occurred. *People v Perry (Rodney)*, 316 Mich App 589, 596-598 (2016) (extending the reasoning of *Hickman*, 470 Mich at 603-604, 607-609—which addressed a *corporeal* identification—to a *photographic* lineup).

There is no right to have counsel present at a postlineup interview of a witness. *People v Sawyer*, 222 Mich App 1, 3-4 (1997).

2. Burden of Proof

If counsel was present at a lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286 (1996). If counsel was not present at the lineup, the prosecution bears the burden of showing that the lineup was not impermissibly suggestive. *People v Young (Donnie)*, 21 Mich App 684, 693-694 (1970).

The prosecution has the burden of proving by clear and convincing evidence that the defendant waived his or her right to counsel at the lineup. *People v Daniels*, 39 Mich App 94, 96-97 (1972).

3. Evaluating the Lineup's Suggestiveness

A lineup may be so suggestive and conducive to irreparable misidentification that an accused is denied due process of law. *Stovall v Denno*, 388 US 293, 301-302 (1967), overruled in part on other grounds by *Griffith v Kentucky*, 479 US 314, 327-328 (1987). "[D]ue process concerns arise . . . when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v New Hampshire*, 565 US 228, 238-239 (2012). When the police use such a procedure, "the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Perry*, 565 US at 239, quoting *Neil v Biggers*, 409 US 188, 201 (1972). "Exclusion of evidence of an identification is required when (1) the identification procedure was suggestive, (2) the suggestive nature of the procedure was unnecessary, and (3) the identification was unreliable." *People v Sammons*, 505 Mich 31, 41 (2020).

A court must consider the totality of the circumstances to determine whether an identification procedure is fair. *People v Kurylczyk*, 443 Mich 289, 311-312 (1993). Nonexhaustive factors the court should consider when determining whether an unnecessarily suggestive identification is reliable include: "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of his prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Sammons*, 505 Mich at 50-51 (quotation marks and citation omitted).

"[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry*, 565 US at 248. Rather, "[w]hen no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.* at 233-234, 240, 248 (where an eyewitness,

in response to a police officer's request for a more specific description of the perpetrator of a theft, pointed out her window at the defendant, who was standing near another officer, the trial court did not err in denying the defendant's motion to suppress the identification without first conducting a preliminary assessment of its reliability; no such inquiry was required because "law enforcement officials did not arrange the suggestive circumstances surrounding [the] identification").

- **Physical Differences of Lineup Participants**

"'Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.'" *People v Craft*, 325 Mich App 598, 610 (2018), quoting *People v Hornsby*, 251 Mich App 462, 466 (2002). "Generally, physical differences affect the weight of an identification, not its admissibility." *Craft*, 325 Mich App at 610 (holding that defendant had not met his burden to show entitlement to a *Wade*[13] hearing). Identification of the defendant was not impermissibly suggestive merely because "there was some variance between the participants' heights and weights" when defendant ranked "somewhere in the lower-middle of the sample[.]" *Craft*, 325 Mich App at 611. The defendant also failed to establish that there were "any marked differences in complexion" or "marked variance in the physical build" among the participants that would substantially distinguish defendant. *Id*. at 611.

- **Attire of Lineup Participants**

"[I]t is generally preferable to present lineup participants in attire that is not indicative of their confinement (or alternatively to present all lineup participants in jailhouse attire)[.]" *Craft*, 325 Mich App at 611. However in *Craft*, the "defendant [failed to show] that the lineup was so suggestive as to distinguish substantially [him] from the other participants" where he was one of two participants wearing an orange jumpsuit. *Id*. at 611 (holding any error in the admission of identification of defendant would have been harmless in light of "[s]everal other pieces of evidence presented at trial [that] tended to establish defendant's identity").

[13] *United States v Wade*, 388 US 218 (1967).

7.7 Statements Made by Juveniles[14]

A. Major Felony Recordings

"A law enforcement official[15] interrogating an individual in custodial detention[16] regarding the individual's involvement in the commission of a major felony[17] shall make a time-stamped, audiovisual recording of the entire interrogation.[18] A major felony recording shall include the law enforcement official's notification to the individual of the individual's *Miranda*[19] rights." MCL 763.8(2).[20]

"The requirement in [MCL 763.8] to produce a major felony recording is a directive to departments and law enforcement officials and not a right conferred on an individual who is interrogated." MCL 763.10. In addition, "[a]ny failure to record a statement as required under [MCL 763.8] or to preserve a recorded statement does not prevent any law enforcement official present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible. However, unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9.

"With MCL 763.8, the Legislature codified its preference for recorded statements. With MCL 763.9, the Legislature set forth the remedy for violating the prior section–a jury instruction. The Legislature did not

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[14] This section discusses the admissibility, in juvenile cases, of statements made by juveniles. For a more detailed discussion of admissibility of a defendant's statements, his or her rights under *Miranda v Arizona*, 384 US 436 (1966), and waiver, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3.

[15] For purposes of MCL 763.7–MCL 763.10, "'[l]aw enforcement official' means any of the following:

"(*i*) A police officer of this state or a political subdivision of this state as defined in . . . MCL 28.602.

(*ii*) A county sheriff or his or her deputy.

(*iii*) A prosecuting attorney.

(*iv*) A public safety officer of a college or university.

(*v*) A conservation officer of the department of natural resources and environment.

(*vi*) An individual acting under the direction of a law enforcement official described in [MCL 763.7(*i*)-(*v*)]." MCL 763.7(c).

[16] For purposes of MCL 763.7–MCL 763.10, "'[c]ustodial detention' means an individual's being in a place of detention because a law enforcement official has told the individual that he or she is under arrest or because the individual, under the totality of the circumstances, reasonably could believe that he or she is under a law enforcement official's control and is not free to leave[,]" MCL 763.7(a), and "'[p]lace of detention' means a police station, correctional facility, or prisoner holding facility or another governmental facility where an individual may be held in connection with a criminal charge that has been or may be filed against the individual[,]" MCL 763.7(f).

codify an exclusionary rule for the part of the interrogation that was recorded," and the Court of Appeals refused to create one. *People v Clark*, 330 Mich App 392, 424 (2019) (the trial court did not err "by not instructing sua sponte the jury in accordance with MCL 763.9," where it was assumed that a missing minute or so of the defendant's interrogation fell within MCL 763.8, because "the absent instruction did not affect defendant's substantial rights").

"[F]ailure to comply with [MCL 763.8 and MCL 763.9] does not create a civil cause of action against a department or individual." MCL 763.10.

The trial court erred in its conclusion that MCL 763.7(f)—which defines *place of detention* for purposes of applying the requirements of MCL 763.8 and MCL 763.10—"was dispositive regarding whether or not [the] defendant was in custody" for purposes of *Miranda*, 384 US 436, at the time of his questioning; "[t]he fact that a police station is a 'place of detention' is a fact that should be considered among the totality of the circumstances, but [MCL 763.7] also makes clear that a person can be in a police station without necessarily being in custody." *People v Barritt (Barritt I)*, 318 Mich App 662, 672, 673 (2017), vacated in part on other grounds by *People v Barritt (Barritt II)*, 501 Mich 872 (2017).[21] See also *People v Barritt (Barritt III)*, 325 Mich App 556, 569 n 4 (2018), which rejected the portion of the trial court's analysis that implied "that questioning a suspect in a police station, by itself, can provide a legal basis for a finding that a person is 'in custody,'" because it "runs afoul of [*Oregon v Mathiason*, 429 US 492 (1977).]"[22]

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[17] For purposes of MCL 763.7–MCL 763.10, "'[m]ajor felony' means a felony punishable for imprisonment for life, for life or any term of years, or for a statutory maximum of 20 years or more, or a violation of . . . MCL 750.520d [(third-degree criminal sexual conduct)]." MCL 763.7(d).

[18] For purposes of MCL 763.7–MCL 763.10, "'[i]nterrogation' means questioning in a criminal investigation that may elicit a self-incriminating response from an individual and includes a law enforcement official's words or actions that the law enforcement official should know are reasonably likely to elicit a self-incriminating response from the individual." MCL 763.7(b).

[19] *Miranda v Arizona*, 384 US 436 (1966).

[20] MCL 763.8 "applies if the law enforcement agency has audiovisual recording equipment that is operational or accessible as provided in [MCL 768.11(3)-(4)] or upon the expiration of the relevant time periods set forth in [MCL 768.11(3)-(4)], whichever occurs first." MCL 763.8(1).

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

[22] See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 3, for additional discussion of the *Barritt III* case.

B. Use of Improper Confession

An involuntary statement may not be used for any purpose. *People v Tyson*, 423 Mich 357, 377 (1985). "A confession . . . must be made without intimidation, coercion, or deception, and must be the product of an essentially free and unconstrained choice by its maker." *People v Akins*, 259 Mich App 545, 564 (2003) (internal citation omitted). "The burden is on the prosecution to prove voluntariness by a preponderance of the evidence." *Id.* at 564.

C. Determining Admissibility Under *Miranda*[23]

The *Miranda* rules apply to juveniles.[24] See *JDB v North Carolina*, 564 US 261, 264 (2011) (the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis); *Fare v Michael C*, 442 US 707, 717 n 4, 725 (1979) (a juvenile's request to speak with his probation officer did not constitute an invocation of the juvenile's rights to counsel and to remain silent); *People v Anderson*, 209 Mich App 527, 530–35 (1995).

The age of a child subjected to police questioning "properly informs the *Miranda* custody analysis." *JDB v North Carolina*, 564 US 261, 264 (2011). In *JDB*, 564 US at 264-267, a uniformed police officer removed a 13-year-old student ("JDB") from his seventh-grade classroom and escorted him to a conference room, where, upon interrogation by police, he confessed his involvement in two home break-ins. In the ensuing juvenile proceedings, JDB sought suppression of his statements, asserting that he had been subjected to a custodial interrogation without being afforded *Miranda* warnings. *Id*. at 267-268. The United States Supreme Court, addressing the state supreme court's refusal to "'extend the test for custody to include consideration of [a suspect's] age[,]'" held that JDB's age at the time of the interrogation was relevant to the custody analysis. *Id.* at 268, 277, 281 (internal citation omitted). "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. . . . [C]ourts can account for that reality without doing any damage to the objective nature of the custody analysis." *Id.* at 272. Although officers are not required to consider a suspect's subjective state of mind or other unknowable circumstances, a child's age is a fact that "yields objective conclusions" that "are self-evident to anyone who was_a child once . . . , including any police officer or judge[;]" thus, "a child's age

[23] *Miranda v Arizona*, 384 US 436 (1966).

[24] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" must capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording. MCL 763.8(2). See Section 7.7(A) for discussion of major felony recordings.

differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his [or her] freedom of action." *Id*. at 271-272, 275. Cautioning that "a child's age will [not] be a determinative, or even a significant, factor in every case[,]" the Court concluded that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." *Id*. at 277.

See also *People v White*, 493 Mich 187, 203 (2013) (holding that "the mere fact that [the] defendant was 17 years old and inexperienced in the criminal justice system [did] not mean that he was 'peculiarly susceptible to an appeal to his conscience' or 'unusual[ly] susceptib[le] . . . to a particular form of persuasion[]' [within the meaning of *Rhode Island v Innis*, 446 US 291, 302 (1980)][]").

"[W]hile the fact that police questioning occurred at school or in a principal's office *alone* is not dispositive of custody, it is still a highly relevant factor to consider in a *Miranda* custody analysis involving juveniles at school." *In re NC*, ___ Mich App ___, ___ (2023). "[T]hat a juvenile was interviewed by law enforcement at school or in a principal's office, along with the circumstances surrounding the questioning, are relevant considerations in a custody analysis." *Id*. at ___ (noting "questioning a juvenile in a school or a principal's office" was an issue of first impression in Michigan). In *In re NC*, a 13-year-old boy was removed from his class by the principal, who was accompanied by an armed police officer in full uniform, and escorted "to the main office without explanation, where he was required to wait with an officer nearby." *Id*. at ___ (noting "[t]he backdrop was a school in lockdown; students were not free to leave or move about the school"). The principal's "office doors were closed throughout the questioning" and NC's father "believed that he was not free to withdraw NC from the interview and leave, and that he was permitted at the interview only as a silent observer." *Id.* at ___. The Court of Appeals held that "the location of the interview, NC's young age, the manner in which the interview was initiated and conducted, the school's lockdown, and the failure to inform NC that he was free to leave or free to refuse to answer [the police officer's] questions support that NC was in police custody." *Id.* at ___. Because "[t]hese facts sufficiently support that [the police officer] subjected NC to a custodial interrogation," "the trial court properly suppressed NC's statements" because "he was not given *Miranda* warnings." *Id*. at ___. The Court of Appeals held that the trial court "did not ignore the totality of the circumstances and unduly rely only on that fact that NC was never advised that he was free to leave." *Id*. at ___ (observing that the trial court "explicitly mentioned various facts weighing against NC being in custody").

D. Determining the Voluntariness of a Juvenile's Confession[25]

1. Factors

"The voluntariness of a *Miranda* waiver is evaluated under a totality of the circumstances test, but also includes additional safeguards for juveniles." *People v Eliason*, 300 Mich App 293, 305 (2013). "The admissibility of a juvenile's confession depends upon whether, under the totality of the circumstances, the statement was voluntarily made." *People v Givans*, 227 Mich App 113, 120 (1997). "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his [or her] capacity for self-determination critically impaired." *Id.* at 121. In *Givans*, 227 Mich App at 121, the Court of Appeals set out a nonexhaustive list of additional factors to be used to determine whether a juvenile's statement was voluntarily made:

- whether *Miranda*[26] requirements were met,[27] and whether the juvenile clearly understood and waived those rights;[28]
- the degree of police compliance with MCL 764.27 and the "juvenile court rules";[29]
- the presence of an adult parent, custodian, or guardian;

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[25] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" must capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording. MCL 763.8(2). However, if the defendant's "statement is otherwise admissible[,]" a law enforcement officer may "testify[] in court as to the circumstances and content of the . . . statement" even if the recording requirements of MCL 763.8 are not fulfilled. MCL 763.9. In such a situation, "unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9. See Section 7.7(A) for discussion of major felony recordings.

[26] *Miranda v Arizona*, 384 US 436 (1966).

[27] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" must capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording. MCL 763.8(2). See Section 7.7(A) for discussion of major felony recordings.

[28] If the confession is made outside of a custodial interrogation (where *Miranda* warnings are not required), this factor should not be considered. *In re SLL*, 246 Mich App 204, 210 (2001).

[29] See Section 3.1, Section 3.2, and Section 3.3 for discussion of these requirements.

- the juvenile defendant's personal background;
- the juvenile's age, education, and intelligence level;
- the extent of the juvenile's prior experience with the police;
- the length of detention before the statement was made;
- the repeated and prolonged nature of the questioning; and
- whether the juvenile was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention.

See also *Eliason*, 300 Mich App at 305-306.

Other factors that may be considered include a promise of leniency, *People v Conte*, 421 Mich 704, 711-712, 751, 761-762 (1984), and police misrepresentation, *People v Hicks*, 185 Mich App 107, 113 (1990).

2. Presence of Adult Parent, Guardian, or Custodian

The Court of Appeals has suggested that a juvenile must request the presence of a parent or other adult before the absence of such a person should be considered as having a negative impact on the voluntariness of a juvenile's confession. See *Givans*, 227 Mich App at 121-122 (the juvenile's failure to ask for the presence of his mother during interrogation was one factor supporting the trial court's finding that his statements were voluntary).

3. *Evide*ntia*ry* ("*Walker*") Hearing

A defendant may move to suppress his or her statement, either because it was involuntary or because it was otherwise obtained in violation of his or her constitutional rights. The prosecution bears the burden of showing the admissibility of a confession. *Brown v Illinois*, 422 US 590, 604 (1975).

A hearing on the admissibility of a confession, typically called a *Walker* hearing,[30] must be conducted outside the presence of the jury. MRE 104(c). With the exception of the rules of evidence regarding privilege, the rules of evidence do not apply to *Walker* hearings. MRE 104(a); *People v Richardson*, 204 Mich App 71, 80

[30] *People v Walker (Lee) (On Rehearing)*, 374 Mich 331, 338 (1965).

(1994). By testifying at a *Walker* hearing a defendant "does not become subject to cross-examination on other issues in the case." MRE 104(d).

4. Standard of Review

"A trial court's findings of fact following a suppression hearing will not be disturbed by an appellate court unless the findings are clearly erroneous. The trial court's factual findings are clearly erroneous if, after review of the record, th[e reviewing c]ourt is left with a definite and firm conviction that a mistake has been made." *Givans*, 227 Mich App at 119 (internal citations omitted).

E. Limitations on Use of Statements Made by Juveniles During Informal Proceedings

1. Diversion[31]

A diversion conference may not be held until after any questioning of the minor has been completed or after an investigation has been made concerning the alleged offense. MCL 722.825(2). "Mention of, or promises concerning, diversion must not be made by a law enforcement official or court intake worker in the presence of the minor or the minor's parent, guardian, or custodian during any questioning of the minor." *Id.* Information given by the minor during the conference or after the diversion is agreed to, but before a petition is filed with or authorized by the court, must not be used against the minor. *Id.*

2. Consent Calendar[32]

MCL 712A.2f(12) permits the court, "[i]f it appears to the court at any time that proceeding on the consent calendar is not in the best interest of either the juvenile or the public[,]" to transfer the case to the formal calendar. See also MCR 3.932(C)(9). Once the case is transferred to the formal calendar, the juvenile is entitled to the full panoply of rights under the court rules, *In re Chapel*, 134 Mich App 308, 312 (1984), and the court must "proceed with the case where court proceedings left off before the case was placed on the consent calendar[,]" MCR 3.932(C)(9). Statements made by the juvenile during consent calendar proceedings must not be used at a trial on the formal calendar that is based on the same charge. MCL 712A.2f(13); see also MCR 3.932(C)(9)(b)(*i*).

[31] See Section 4.3 for discussion of diversion.

[32] See Section 4.4 for discussion of the consent calendar.

7.8 Motion to Suppress Warrantless Search or Seizure

This section discusses warrantless search and seizure issues as they relate to juveniles. For a general and more comprehensive discussion of search and seizure issues, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11. For information on the issuance of search warrants, see *Criminal Proceedings Benchbook, Vol. 1*, Chapter 3.

A. Application of Constitutional Protections to Juveniles

The federal and state constitutions prohibit unreasonable searches and seizures.US Const, Am IV; Const 1963, art 1, § 11. These constitutional provisions also apply to juveniles in situations in which the juvenile enjoys a reasonable expectation of privacy. See, e.g., *New Jersey v TLO*, 469 US 325, 337-338 (1985) ("A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy."). A search "occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *People v Chandler*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted).

The reasonableness of a search or seizure is determined by balancing the governmental interest that justifies the intrusion against an individual's right to be free of arbitrary police interference. *Terry v Ohio*, 392 US 1, 20-21 (1968). "In general, searches conducted without both a warrant and probable cause to believe evidence of wrongdoing might be located at the place searched are unreasonable per se." *Chandler*, ___ Mich App at ___ (quotation marks and citation omitted). Indeed, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id*. at ___ (quotation marks and citation omitted).

"[I]n light of the voters' intent to legalize marijuana usage and possession, the smell of marijuana, standing alone, no longer constitutes probable cause sufficient to support a search for contraband." *People v Armstrong*, ___ Mich ___, ___ (2025). In *People v Kazmierczak*, 461 Mich 411 (2000), the Michigan Supreme Court held "that the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement." *Armstrong*, ___ Mich at ___, quoting *Kazmierczak*, 461 Mich at 413. However, "*Kazmierczak*'s holding is no longer good law in light of the passage of the MRTMA" in 2018.[33] *Armstrong*, ___ Mich at ___."MCL 333.27955 provides a list of permissible acts for adults who are 21 years of age or older under the MRTMA, including possessing, using,

purchasing, transporting, or processing 2.5 to 15 grams of marijuana." *Armstrong*, ___ Mich at ___. "[N]ow that marijuana possession and use is generally legal, the odor of marijuana does not on its own supply a *substantial* basis for inferring a fair probability that contraband or evidence of illegal activity will be found in a particular place." *Id*. at ___, citing *Illinois v Gates*, 462 US 213, 238 (1983). Going forward, "the appropriate rule is that the smell of marijuana is one factor that may play a role in the probable-cause determination." *Armstrong*, ___ Mich at ___. "Other relevant inculpatory facts might include, for example, an officer's observation of evidence suggesting intoxication or the presence of smoke."[34] *Id*. at ___.

B. Issues With Warrantless Searches of Juveniles

1. Free and Voluntary Consent

"'Consent searches, *when voluntary*, are an exception to the warrant requirement.'" *People v Chandler*, ___ Mich App ___, ___ (2024), quoting *People v Frederick*, 500 Mich 228, 242 (2017). To be valid, consent must be "unequivocal, specific, and freely and intelligently given." *Chandler*, ___ Mich App at ___ (quotation marks and citation omitted). "Whether consent to a search was voluntary 'turns on whether a reasonable person would, under the totality of the circumstances, feel able to choose whether to consent.'" *Chandler*, ___ Mich App at ___, quoting *Frederick*, 500 Mich at 242; see also *People v Borchard-Ruhland*, 460 Mich 278, 294 (1999) ("Whether consent to search is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances."). "[T]here is no requirement that consent must be verbally given." *United States v Hinojosa*, 606 F3d 875, 882 (CA 6, 2010). "Consent to a search 'may be in the form of words, gesture, or conduct.'" *United States v Carter*, 378 F3d 584, 587 (CA 6, 2004), quoting *United States v Griffin*, 530 F2d 739, 742 (CA 7, 1976).

Failure to object to a search does not constitute actual consent. *People v Chowdhury*, 285 Mich App 509, 525 (2009). In *Chowdhury*, 285 Mich App at 511, police officers administered preliminary

[33]Specifically, the Michigan Supreme Court held that "*Kazmierczak*'s rule that the smell of marijuana, standing alone, is sufficient to support a finding of probable cause under the automobile exception to the warrant requirement is no longer viable in light of the enactment of the MRTMA." *People v Armstrong*, ___ Mich ___, ___ (2025).

[34]Whether and how *Armstrong* affects juveniles and their possession and use of marijuana is unclear. The MRTMA (recreational use of marijuana) applies to individuals over the age of 21. See MCL 333.27955. The MMMA (medical marijuana use) permits a person under the age of 21 (at least age 18) to register as a qualified patient under the act, and a person under the age of 18 may become a qualified patient under certain conditions. See MCL 333.26423(m); MCL 333.26426(b).

breath tests (PBTs) to a group of underage individuals without first requesting consent. The Court of Appeals held that the defendant did not consent to the PBT (which constitutes a search for Fourth Amendment purposes) when he failed to object to the officer's administration of the test. *Id.* at 525-526.

Police officers need not always inform persons of their right to refuse consent. *Ohio v Robinette,* 519 US 33, 39-40 (1996).

2. Parental Consent

"[C]onsent can be obtained from either 'the individual whose property is searched or from a third party who possesses common authority over the premises.'" *People v Chandler*, ___ Mich App ___, ___ (2024), quoting *Illinois v Rodriguez*, 497 US 177, 181 (1990). "Common authority derives from joint access or control, and the belief that one has common authority must be reasonable." *Chandler*, ___ Mich App at ___ (quotation marks omitted). Thus, if a police officer reasonably believes that a parent has joint access and control over a child's bedroom, then that parent may validly consent to a search of the bedroom. *People v Goforth*, 222 Mich App 306, 315-316 (1997). The *Goforth* Court "observed the following non-exhaustive list of factors in considering whether someone had common authority: (1) 'ownership of the house, or provision of or access to the living quarters'; (2) 'the defendant's failure to take steps to exclude others from his room'; (3) whether the area was used by others freely; and (4) entry into the room for services such as cleaning and laundry." *Chandler*, ___ Mich App at ___, quoting *Goforth*, 222 Mich App at 314-316 (holding that "there is no Fourth Amendment violation where police officers conduct a search pursuant to the consent of a third party whom the officers reasonably believe to have common authority over the premises").

3. Burden of Proof

The defendant has the burden of establishing his or her standing to challenge a search or seizure. *People v Zahn,* 234 Mich App 438, 446 (1999). A defendant has standing to challenge a search or seizure "if, under the totality of the circumstances, he [or she] has a subjective expectation of privacy in the object of the search or seizure and the expectation of privacy is one that society is prepared to recognize as reasonable." *Id.* at 446. The burden is on the prosecution to show that a warrantless search or seizure challenged by a defendant was justified by a recognized exception to the warrant requirement. *People v Galloway*, 259 Mich App 634, 638 (2003).

"When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *People v Chandler*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). The prosecution must show by clear and positive evidence that the individual whose property was searched or a third party with common authority over the property consented to the search. *People v Kaigler*, 368 Mich 281, 294 (1962) ("consent must be proved by clear and positive testimony and there must be no duress or coercion, actual or implied") (emphasis omitted); *Illinois v Rodriguez*, 497 US 177, 181 (1990). "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Chandler*, ___ Mich App at ___ (quotation marks and citation omitted). "A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid." *Id*. at ___ (quotation marks and citation omitted). "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." *Id*. at ___ (quotation marks and citation omitted) "The situation is instinct with coercion—albeit colorably lawful coercion." *Id*. at ___ (quotation marks and citation omitted). "Where there is coercion there cannot be consent." *Id*. at ___ (quotation marks and citation omitted).

C. Selected Types of Warrantless Searches

1. Searches That Take Place in a School

Searches that take place in schools may be properly conducted based on a level of suspicion less than probable cause. Courts have justified searches of students based on reasonable suspicion. The child's interest in privacy is balanced against the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. *TLO*, 469 US at 341-343. See also *People v Ward*, 62 Mich App 46, 50-51 (1975) (internal citations omitted):

> "School officials stand in a unique position with respect to their students. They possess many of the powers and responsibilities of parents to enable them to control conduct in their schools. At times, the powers and responsibilities regarding discipline and the maintenance of an educational atmosphere may conflict with fundamental constitutional safeguards. A student cannot be subjected to unreasonable searches and seizures. On the other hand, the public interest in

> maintaining an effective system of education and the more immediate interest of a school official in protecting the well-being of the students entrusted to his [or her] supervision against the omnipresent dangers of drug abuse must be considered. In striking a balance, we adopt a 'reasonable suspicion' standard."

"Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98 (1996).

Searching a student's bra and underwear for drugs without "any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that [the student] was carrying [the drugs] in her underwear[,]" was constitutionally unreasonable and required reversal. *Safford Unified School Dist #1 v Redding*, 557 US 364, 376-377 (2009). In *Safford,* 557 US at 368-369, after searching the student's outer clothing and backpack, the assistant principal then had the student's bra and underwear searched based on information that she was carrying and distributing a forbidden prescription medicine and over-the-counter medications. Because the specific drugs for which the assistant principal was searching were common pain relievers and thus posed a limited threat to students, and because there was no reason to suspect that the student hid the drugs in her underwear, the United States Supreme Court concluded that "the content of the suspicion failed to match the degree of intrusion." *Id.* at 375-376. The Court clarified that "the *TLO*[, 469 US at 337-338,] concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Safford*, 557 US at 377.

The *TLO* Court did not address the issue of whether a public school student has a reasonable expectation of privacy in school lockers. *TLO,* 469 US at 337 n 5. In Michigan, this issue is addressed in MCL 380.1306. MCL 380.1306(1) states that "[a] pupil who uses a locker that is the property of a school district, local act school district, intermediate school district, or public school academy is presumed to have no expectation of privacy in that locker or that locker's contents."

School boards and boards of directors of public school academies must adopt a policy on searches of pupils' lockers and locker contents. MCL 380.1306(2). Schools must provide pupils and their parents with copies of the policy. *Id.* Pursuant to a search policy, a public school principal or designee may search a pupil's locker or a locker's contents at any time. MCL 380.1306(3). "Any evidence obtained as a result of a search of a pupil's locker or locker's contents shall not be inadmissible in any court or administrative proceedings because the search violated this section, violated the policy under subsection (2), or because no policy was adopted." MCL 380.1306(6).

The statute also provides for law enforcement assistance in conducting a search. MCL 380.1306(4) states:

> "A law enforcement agency having jurisdiction over the school may assist school personnel in conducting a search of a pupil's locker and the locker's contents if that assistance is at the request of the school principal or his or her designee and the search is conducted in accordance with the policy under [MCL 380.1306](2)."

2. Searches of Juvenile Probationers

The Family Division may enter an order of disposition placing the juvenile "on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile." MCL 712A.18(1)(b).[35] The court must order terms and conditions of probation "as the court determines necessary for the physical, mental, or moral well-being and behavior of the juvenile." *Id.*

Because the supervision of probationers is an exception to the general probable cause and warrant requirements, the search of a probationer may be justified on a showing of less than probable cause. *People v Chandler*, ___ Mich App ___, ___ (2024), citing *Griffin v Wisconsin*, 483 US 868, 875 (1987) (authorizing probation officers to search probationers when they are suspected of criminal activity); see also *United States v Knights*, 534 US 112, 118-119 (2001) (permitting a search based on a

[35]For purposes of MCL 712A.18, "*related*" means a relative as that term is defined in [MCL 712A.13a]." MCL 712A.18(1)(b). "Relative" means "an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce. A stepparent, ex-stepparent, or the parent who shares custody of a half-sibling shall be considered a relative for the purpose of placement." MCL 712A.13a(j).

probation condition and reasonable suspicion). "States are permitted to infringe on a probationer's privacy in ways that would otherwise be considered unconstitutional because the special needs of a probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by 'reasonable grounds." *Chandler*, ___ Mich App at ___ (quotation marks and citation omitted) (noting that the United States Supreme Court, in *Griffin*, 483 US at 876, opined that "a warrant requirement to search a probationer would interfere to an appreciable degree with the probation system by making a magistrate, rather than the probation officer, the judge of how closely a probationer needs to be supervised") (quotation marks omitted).

"Probationers, however, do not forgo their Fourth Amendment rights in full." *Chandler*, ___ Mich App at ___. "A warrantless search of a probationer's home is unconstitutional if not coupled with an express waiver from the probationer, or the presence of reasonable suspicion." *Id*. at ___. In *Chandler*, defendant's "probation order simply stated he was to submit to a search of his person and property." *Id*. at ___ ("It did not include the requirement of reasonable cause as was stated at sentencing."). Considering *Knights*' totality of the circumstances test, the Court of Appeals noted "the importance of the trial court's probation order as a salient circumstance." *Chandler*, ___ Mich App at ___. "However, [defendant] did not sign or date the probation order, and there [was] no indication that he was aware of its contents or consented to the same." *Id*. at ___ (observing that defendant was told at sentencing "that he would be subject to searches *if* reasonable cause or suspicion existed that he had violated the terms of probation or committed a crime"). Accordingly, "the warrantless search of [defendant's] bedroom violated [defendant's] constitutional rights under the Fourth Amendment" and the fruits of the search must be suppressed "[b]arring any other Fourth Amendment exception to the warrant requirement[.]" *Id*. at ___ (remanding to the trial court for further development of the record regarding whether the defendant's cousin had common authority to consent to the search and whether the cousin's consent was freely and voluntarily given).

3. Strip Searches[36]

For juveniles arrested or detained for a misdemeanor offense or a civil infraction, a strip search must not occur unless:

[36] A "strip search" is "a search which requires a person to remove his or her clothing to expose underclothing, breasts, buttocks, or genitalia." MCL 764.25a(1).

> "(a) The person arrested is being lodged into a detention facility by order of a court or there is reasonable cause to believe that the person is concealing a weapon, a controlled substance, or evidence of a crime[; and]
>
> (b) The strip search is conducted by a person who has obtained prior written authorization from the chief law enforcement officer of the law enforcement agency conducting the strip search, or from that officer's designee; or if the strip search is conducted upon a minor in a juvenile detention facility which is not operated by a law enforcement agency, the strip search is conducted by a person who has obtained prior written authorization from the chief administrative officer of that facility, or from that officer's designee." MCL 764.25a(2).

Anyone conducting or assisting with the strip search must be of the same sex as the person being searched. MCL 764.25a(3). In addition, the strip search must be conducted "in a place that prevents the search from being observed by a person not conducting or necessary to assist with the search." *Id.*

The arresting officer must prepare a report of the strip search and include the following information:

> "(a) The name and sex of the person subjected to the strip search.
>
> (b) The name and sex of the person conducting the strip search.
>
> (c) The name and sex of a person who assists in conducting the strip search.
>
> (d) The time, date, and place of the strip search.
>
> (e) The justification for conducting a strip search.
>
> (f) A list of all items recovered from the person who was strip searched.
>
> (g) A copy of the written authorization required under subsection (2)(b)." MCL 764.25a(4).

By its terms, the protections in MCL 764.25a do not apply to persons arrested or detained for felony offenses. MCL 764.25a(2). They also do not apply to a person being lodged or detained pursuant to a court order. MCL 764.25a(7). For purposes of MCL 764.25a(7), the court order authorizing

detention must be entered upon the record of the court. In criminal cases, an arrest warrant is not "an order of a court authorizing continued custody or detention of a person in a detention facility[.]" OAG, 1985, No 6,298, p 89 (June 6, 1985). See also MCL 712A.2c and MCR 3.933(B), which allow the court to issue an order to apprehend a juvenile. "Detention in a facility subsequent to an arrest, but prior to an appearance before a magistrate, is not pursuant to an order of a court requiring the lodging of the person in a detention facility." OAG, 1985, No 6,298, p 89 (June 6, 1985). "However, a juvenile may not be detained in a secure facility pending hearing unless the court has considered the results of a detention screening tool conducted on the juvenile under MCR 3.907." MCR 3.933(B).

Any strip search must comply with the Fourth Amendment's "reasonableness" requirement. See *Bell v Wolfish*, 441 US 520, 559 (1979) (setting out the balancing test to determine reasonableness, and upholding the practice of routine strip searches following contact visitation); see also *Florence v Board of Chosen Freeholders of County of Burlington*, 566 US 318, 324, 339 (2012) (holding that the Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search before being admitted to a jail's general population).

4. Body Cavity Searches[37]

A body cavity search may be conducted only pursuant to a valid search warrant, unless the person to be searched (1) is serving a sentence for a criminal offense in a detention facility or a state correctional facility housing prisoners under the jurisdiction of the Department of Corrections; (2) is lodged, pursuant to a court order, in an inpatient facility and is self-abusive, making the search necessary for his or her protection; or (3) is a juvenile who is residing in a juvenile detention facility as a result of a dispositional order entered after adjudication. MCL 764.25b(2); MCL 764.25b(3). In order to conduct a warrantless body cavity search, the person conducting the search must obtain "prior written authorization from the chief administrative officer of the facility or from that officer's designee." MCL 764.25b(4).

[37] "Body cavity" is defined as "the interior of the human body not visible by normal observation, being the stomach or rectal cavity of a person and the vagina of a female person." MCL 764.25b(1)(a). "Body cavity search" is defined as "a physical intrusion into a body cavity for the purpose of discovering any object concealed in a body cavity." MCL 764.25b(1)(b).

"A body cavity search shall be conducted by a licensed physician or a physician's assistant, licensed practical nurse, or registered professional nurse acting with the approval of a licensed physician. If the body cavity search is conducted by a person of the opposite sex as the person being searched, the search shall be conducted in the presence of a person of the same sex as the person being searched." MCL 764.25b(5).

Any body cavity search must comply with the Fourth Amendment's "reasonableness" requirement. See *Bell*, 441 US at 559 (setting out the balancing test to determine reasonableness, and upholding the practice of routine strip searches following contact visitation); see also *Florence*, 566 US at 324, 339 (holding that the Fourth Amendment is not violated when correctional officials require a detainee, "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history[,]" to undergo a visual strip search, including a visual search of body cavities, before being admitted to a jail's general population).

7.9 Order for Examination of Juvenile

The court may order a juvenile to be examined by a physician, dentist, psychologist, or psychiatrist. MCL 712A.12. See also MCR 3.923(B), which allows the court to order an evaluation or examination of a juvenile, as well as a parent, guardian, or legal custodian.

A defendant has a Sixth Amendment right to the assistance of counsel before submitting to a court-ordered examination, and the defendant retains his or her Fifth Amendment privilege against self-incrimination during such an examination. *Estelle v Smith*, 451 US 454, 469 (1981).

"[O]nce [a defendant] places into evidence his own expert's psychological report (that used information obtained from defendant), the Fifth Amendment (or its state counterpart) cannot then be used as a shield to prevent the prosecution from accessing similar information from defendant for their own expert's use." *People v Black*, ___ Mich App ___, ___ (2024) (citation omitted). In this case, defendant argued that "the trial court order compelling him to submit to a psychological evaluation by the prosecution's expert, or striking [defendant's psychological expert's] report and testimony, violated his federal and state constitutional right against self-incrimination." *Id*. at ___. "[B]ecause the prosecutor bears the burden of proof at a *Miller*[38] hearing, and that burden is to rebut a presumption that the particular juvenile defendant is not deserving of life without parole, providing the prosecution the ability to have its expert meet with defendant for purposes of expert evaluation and testimony to rebut defendant's evidence does not violate his right

against self-incrimination." *Black*, ___ Mich App at ___ (cleaned up). "Whether viewed as a waiver of his right by placing his current status at issue, or as a substantive conclusion that nothing in the amendment allows a defendant to submit evidence relevant to his current mental status while at the same time refusing the prosecution access to the same information and opportunity, the trial court order did not violate defendant's rights under either constitutional provision." *Id*. at ___ (citation omitted).

7.10 Evaluating a Juvenile's Competency[39]

The conviction of a defendant while he or she is incompetent to stand trial violates due process. US Const, Am V;US Const, Am XIV; Const 1963, art 1, § 17; *People v Newton*, 179 Mich App 484, 487 (1989). "[T]he right not to be tried while incompetent is as fundamental in juvenile proceedings as it is in the criminal context." *In re Carey*, 241 Mich App 222, 231 (2000).[40] "The protection afforded by the Due Process Clause requires that a court sua sponte hold a hearing regarding competency when any evidence raises a bona fide doubt about the competency of the defendant." *Id*. at 227-228.

Effective March 28, 2013, 2012 PA 540 added MCL 330.2060—MCL 330.2074, governing competency determinations in juvenile[41] delinquency proceedings, to the portion of the Mental Health Code governing competency determinations in criminal proceedings, MCL 330.2020 *et seq*. Also effective March 28, 2013, 2012 PA 541 added virtually identical provisions to the Juvenile Code, MCL 712A.1 *et seq*. See MCL

[38] *Miller v Alabama,* 567 US 460 (2012) "'established factors that a sentencing court must consider, now known as the "*Miller* factors," which include: (1) chronological age and immaturity, impetuosity, and the failure to appreciate risks and consequences; (2) the offender's family and home environment; (3) circumstances of the offense, including the extent of participation in the criminal conduct and the effect of familial and peer pressures; (4) the effect of the offender's youth on the criminal-justice process, such as the offender's inability to comprehend a plea bargain; and (5) the possibility of rehabilitation.'" *People v Black*, ___ Mich App ___, ___ n 6 (2024), quoting *People v Parks*, 510 Mich 225, 238 (2022).

[39] For discussion of responsibility for the costs of predisposition procedures such as competency examinations, see Section 18.1.

[40] *In re Carey*, 241 Mich App 222, was decided prior to the enactment of 2012 PA 540 and 2012 PA 541, both effective March 28, 2013, which amended the Mental Health Code and the Juvenile Code, respectively, to include provisions for competency determinations in juvenile delinquency proceedings. In *In re Carey*, 241 Mich App at 234, the Court held that "in the absence of other applicable rules or statutes, . . . [the competency provisions of the Mental Health Code that are applicable to criminal defendants] should be used to assure that the due process rights of a juvenile are protected."

[41] For purposes of MCL 330.2060a–MCL 330.2074, *juvenile* "means a person who is less than 18 years of age who is the subject of a delinquency petition." MCL 330.2060a(4).

712A.1(1) and MCL 712A.18n—MCL 712A.18s.[42] This section discusses these corresponding provisions.

A. Presumption of Competency or Incompetency

"[A] criminal defendant's mental condition at the time of trial must be such as to assure that he [or she] understands the charges against him [or her] and can knowingly assist in his [or her] defense." *People v McSwain*, 259 Mich App 654, 692 (2003).

MCL 330.2062(1) and MCL 712A.18n(1) provide:

> "A juvenile 10 years of age or older is presumed competent to proceed unless the issue of competency is raised by a party. A juvenile less than 10 years of age is presumed incompetent to proceed."

B. Raising the Issue of Competency[43]

MCL 330.2062(2) and MCL 712A.18n(2) provide that if a juvenile is "the subject of a delinquency petition in the court" or is charged with a status offense under MCL 712A.2(a)(2)-(4),[44] the court, on its own motion or at the request of the juvenile, the juvenile's attorney, or the prosecuting attorney, may order "a competency evaluation to determine whether the juvenile is incompetent to proceed[.]"

"The issue of the juvenile's competency may be raised by the court before which the proceedings are pending or being held, or by motion of a party, at any time during the proceeding."[45] MCL 330.2062(2); MCL 712A.18n(2).

Once the issue of the juvenile's competency is raised, the delinquency proceeding must "temporarily cease until determination is made on the competence of the juvenile[.]" MCL 330.2062(3); MCL 712A.18n(3).

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[42] The juvenile competency determination provisions apply to a juvenile who is the subject of a delinquency petition, including a petition involving a status offense under MCL 712A.2(a)(2)-(4). See MCL 330.2060a(1); MCL 330.2062(2); MCL 712A.1(1)(b); MCL 712A.18n(2).

[43] The Michigan Department of Health & Human Services has developed flowcharts regarding the process of juvenile competency evaluation and restoration, as well as juvenile competency and children with serious emotional disturbance. See https://www.michigan.gov/mdhhs/0,5885,7-339-73971_34044_86664_86675_86676---,00.html.

[44] See Section 2.3 for discussion of status offenses.

[45] The court must "maintain a record of how many competency evaluations are requested under [MCL 712A.18n]." MCL 712A.18n(4).

A defendant is entitled to a competency hearing when evidence demonstrates a bona fide doubt as to his or her competency. *People v Harris (Karen)*, 185 Mich App 100, 102 (1990). In fact, the trial court is obligated to raise the issue of the defendant's competence when "facts are brought to its attention which raise a 'bona fide doubt' as to the defendant's competence." *Id.* at 102 (trial court erred when it failed to have the defendant's competence reevaluated before trial where the defendant had a long history of severe mental illness and, at the outset of trial, stated that she was incoherent and felt incompetent to stand trial and requested a court order for hospitalization).

The trial court is not required to accept without question an attorney's representations concerning the competence of his or her client, although counsel's expression of doubt in that regard is a factor that should be considered. *Drope v Missouri*, 420 US 162, 177 n 13 (1975). "[E]vidence of a defendant's irrational behavior, his [or her] demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of th[o]se factors standing alone may, in some circumstances, be sufficient." *Id.* at 180. The trial court's ruling "as to the existence of a 'bona fide doubt'" is reviewed for an abuse of discretion. *Harris (Karen)*, 185 Mich App at 102.

C. Competency Evaluation[46]

1. Qualified Juvenile Forensic Mental Health Examiner ("Examiner")[47]

"A competency evaluation ordered under [MCL 712A.18n] shall be conducted by a qualified juvenile forensic mental health examiner[, who] . . . shall provide the court with an opinion as to whether the juvenile is competent to proceed." MCL 712A.18o(1); see also MCL 330.2064(1). "The court has the final determination of an expert witness serving as a qualified juvenile forensic mental health examiner." MCL 330.2064(1); MCL 712A.18o(1).

A party is not prohibited "from retaining the party's own qualified juvenile forensic mental health examiner to conduct

[46]The Michigan Department of Health & Human Services has developed flowcharts regarding the process of juvenile competency evaluation and restoration, as well as juvenile competency and children with serious emotional disturbance. See https://www.michigan.gov/mdhhs/0,5885,7-339-73971_34044_86664_86675_86676---,00.html.

[47] Although the Juvenile Code refers to the examiner as a "'[q]ualified *juvenile* forensic mental health examiner,'" MCL 712A.1(1)(p) (emphasis added), and the Mental Health Code refers to the examiner as a "'[q]ualified forensic mental health examiner,'" MCL 330.2060b(3), they have substantially similar meanings.

additional evaluations at the party's own expense." MCL 712A.18o(2); see also MCL 330.2064(2).

2. Least Restrictive Environment

A competency evaluation must be conducted in the "least restrictive environment," MCL 330.2064(3); MCL 712A.18o(3), which is "a supervised community placement, preferably a placement with the juvenile's parent, guardian, relative, or a facility or conditions of treatment that is a residential or institutional placement only utilized as a last resort based on the best interest of the juvenile or for reasons of public safety," MCL 330.2060b(1); MCL 712A.1(1)(j).

"There is a presumption in favor of conducting a competency evaluation while the juvenile remains in the custody of a parent or legal guardian, unless removal from the home is necessary for the best interests of the juvenile, for reasons of public safety, or because the parent or guardian has refused to cooperate in the competency evaluation process." MCL 330.2064(3); MCL 712A.18o(3).

3. Records and Information Relevant to the Competency Evaluation

MCL 330.2066(1)-(4) and MCL 712A.18p(1)-(4) provide:

> "(1) The court shall order the prosecuting attorney to provide to the juvenile's attorney all information related to competency and shall order the prosecuting attorney and juvenile's attorney to submit to the . . . examiner any information considered relevant to the competency evaluation, including, but not limited to:
>
> > (a) The names and addresses of all attorneys involved.
> >
> > (b) Information about the alleged offense.
> >
> > (c) Any information about the juvenile's background in the prosecuting attorney's possession.
>
> (2) Except as prohibited by federal law, the court shall require the juvenile's attorney to provide any available records of the juvenile or other information relevant to the evaluation, including, but not limited to, any of the following:

(a) Psychiatric records.

(b) School records.

(c) Medical records.

(d) Child protective services records.

(3) The requirement to provide records or information under subsection (1) or (2) does not limit, waive, or abrogate the work product doctrine or the attorney-client privilege, and release of records and information under subsection (1) or (2) is subject to the work product doctrine and the attorney-client privilege.

(4) All information required under subsections (1) and (2) must be provided to the . . . examiner within 10 days after the court issues the order for the competency evaluation. If possible, the information required under this section shall be received before the juvenile's competency evaluation or the commencement of the competency evaluation in an outpatient setting."

4. Written Competency Evaluation Report

The examiner must submit a written report to the court within 30 days[48] after receipt of a court order requiring a competency evaluation. MCL 330.2066(5); MCL 712A.18p(5). The report must contain specific descriptions and assessments as set out in MCL 330.2066(5)(a)-(c); MCL 712A.18p(5)(a)-(c).

The examiner must "provide the court with an opinion about the juvenile's competency to proceed." MCL 330.2066(6); MCL 712A.18p(6). If the examiner concludes that the juvenile is incompetent to proceed, the examiner must "comment on the nature of any psychiatric or psychological disorder or cognitive impairment, the prognosis, and the services needed and expertise required to restore the juvenile to competency, if possible, within a projected time frame." MCL 330.2066(6); see also MCL 712A.18p(6) (does not require report to include the "expertise required to restore the juvenile to competency[]").

Within five days after receiving the report, the court must provide copies of the report to the juvenile's attorney, the

[48] The court may, for good cause, grant the examiner a 30-day extension for the filing of the report. MCL 330.2066(7); MCL 712A.18p(7).

prosecuting attorney, and the guardian ad litem, if any. MCL 330.2066(8); MCL 712A.18p(8).

D. Competency Hearing[49]

A competency hearing must be held within 30 days after the examiner's report is filed. MCL 330.2068(1); MCL 712A.18q(1).

"At the hearing, the parties may introduce other evidence regarding the juvenile's mental condition or may submit the matter by written stipulation based on the filed report." MCL 330.2068(1); MCL 712A.18q(1).

E. Determination of Incompetency and Substantial Probability That Juvenile Will Remain Incompetent[50]

If the court finds that the juvenile "is incompetent to proceed[51] and . . . that there is a substantial probability that the juvenile will remain incompetent to proceed for the foreseeable future or within the period of [a] restoration[52] order," the charges must be dismissed with prejudice, and the court "may determine custody of the juvenile." MCL 330.2068(2); MCL 712A.18q(2).[53]

Except as otherwise provided in MCL 330.2074 or MCL 712A.18s, if the court receives "a report that there is a substantial probability that the juvenile will remain incompetent to proceed for the foreseeable future or within the period of [a] restoration order," the court must dismiss the charges and determine custody as follows:

- The court may direct that civil commitment proceedings be initiated as allowed under MCL 330.1498d.

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[49]The Michigan Department of Health & Human Services has developed flowcharts regarding the process of juvenile competency evaluation and restoration, as well as juvenile competency and children with serious emotional disturbance. See https://www.michigan.gov/mdhhs/0,5885,7-339-73971_34044_86664_86675_86676---,00.html.

[50]The Michigan Department of Health & Human Services has developed flowcharts regarding the process of juvenile competency evaluation and restoration, as well as juvenile competency and children with serious emotional disturbance. See https://www.michigan.gov/mdhhs/0,5885,7-339-73971_34044_86664_86675_86676---,00.html.

[51] "'Incompetent to proceed' means that a juvenile, based on age-appropriate norms, lacks a reasonable degree of rational and factual understanding of the proceeding or is unable to . . . [c]onsult with and assist his or her attorney in preparing his or her defense in a meaningful manner[and/or] . . . [s]ufficiently understand the charges against him or her." MCL 330.2060a(3); MCL 712A.1(1)(h).

[52] "'Restoration' means the process by which education or treatment of a juvenile results in that juvenile becoming competent to proceed." MCL 330.2060c(1); MCL 712A.1(1)(s).

[53] "The court [must] report to the state court administrator the number of juveniles found to be incompetent to proceed." MCL 712A.18q(4).

- If the court determines that commitment proceedings are inappropriate, the juvenile must be released to his or her parent, guardian, or custodian "under conditions considered appropriate to the court."

MCL 330.2074(4); MCL 712A.18s(4).

F. Determination of Incompetency With Possibility of Restoration to Competency[54]

1. Dismissal or Suspension of Matter

If the juvenile is determined to be incompetent to proceed,[55] "but the court finds that the juvenile may be restored[56] to competency in the foreseeable future," the matter must be dismissed or suspended, depending on the type of offense charged:

- A matter involving a traffic offense must be dismissed.
- A matter involving a misdemeanor, other than a serious misdemeanor,[57] must be dismissed.
- A matter involving a serious misdemeanor must be either dismissed *or* suspended.
- A matter involving a felony must be further suspended.

MCL 330.2074(1)(a)-(c); MCL 712A.18s(1)(a)-(c).

2. Restoration of Juvenile in Suspended Proceedings

"'Restoration'" is "the process by which education or treatment of a juvenile results in that juvenile becoming competent to proceed." MCL 330.2060c(1); MCL 712A.1(1)(s).

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[54]The Michigan Department of Health & Human Services has developed flowcharts regarding the process of juvenile competency evaluation and restoration, as well as juvenile competency and children with serious emotional disturbance. See https://www.michigan.gov/mdhhs/0,5885,7-339-73971_34044_86664_86675_86676---,00.html.

[55] "The court [must] report to the state court administrator the number of juveniles found to be incompetent to proceed." MCL 712A.18q(4).

[56] "'Restoration'" is "the process by which education or treatment of a juvenile results in that juvenile becoming competent to proceed." MCL 330.2060c(1); MCL 712A.1(1)(s). See Section 7.9(H)(2) for discussion of restoration.

[57] "'Serious misdemeanor' means that term as defined in . . . MCL 780.811." MCL 330.2060c(2); MCL 712A.1(1)(u).

The following requirements apply if proceedings are suspended because the court finds that a juvenile who is incompetent to proceed may be restored to competency in the foreseeable future:

- Before issuing a restoration order, the court must hold a hearing to determine the least restrictive environment[58] for completion of the restoration.

- The court may issue a restoration order that is valid for 60 days from the date of the initial finding of incompetency *or* until any of the following occurs, whichever occurs first:

    - the examiner, based on information provided by the qualified restoration provider,[59] submits a report that the juvenile has regained competency or that there is no substantial probability that the juvenile will regain competency within the period of the order;

    - the charges are dismissed; or

    - the juvenile reaches 18 years of age.

- Following issuance of the restoration order, the qualified restoration provider must submit a report to the court and the examiner that includes the information required under MCL 330.2066 and MCL 712A.18p (records and information relevant to the competency evaluation).[60] The report must be submitted to the court and the examiner every 30 days, or sooner if, and at the time, the qualified restoration provider determines:

    - that the juvenile is no longer incompetent to proceed, or

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[58] "'Least restrictive environment' means a supervised community placement, preferably a placement with the juvenile's parent, guardian, relative, or a facility or conditions of treatment that is a residential or institutional placement only utilized as a last resort based on the best interest of the juvenile or for reasons of public safety." MCL 330.2060b(1); MCL 712A.1(1)(j).

[59] A "'[q]ualified restoration provider'" is "an individual who the court determines, as a result of the opinion provided by the qualified forensic mental health examiner, has the skills and training necessary to provide restoration services." MCL 712A.1(1)(q); see also MCL 330.2060b(4). "The court [must] take measures to avoid any conflict of interest among agencies or individuals who may provide evaluation and restoration." MCL 330.2060b(4); MCL 712A.1(1)(q).

[60] See Section 7.9(C)(3).

- that there is no substantial probability that the juvenile will be competent to proceed within the period of the order.

MCL 330.2074(2); MCL 712A.18s(2).

"Not later than 14 days before the expiration of the initial 60-day [restoration] order, the qualified restoration provider may recommend to the court and the . . . examiner that the restoration order be renewed by the court for another 60 days, if there is a substantial probability that the juvenile will not be incompetent to proceed within the period of that renewed restoration order. The restoration order and any renewed restoration order shall not exceed a total of 120 days." MCL 330.2074(3); MCL 712A.18s(3).

Except as otherwise provided in MCL 330.2074 or MCL 712A.18s, if the court receives "a report that there is a substantial probability that the juvenile will remain incompetent to proceed for the foreseeable future or within the period of [a] restoration order," the court must dismiss the charges and determine custody as follows:

- The court may direct that civil commitment proceedings be initiated as allowed under MCL 330.1498d.

- If the court determines that commitment proceedings are inappropriate, the juvenile must be released to his or her parent, guardian, or custodian "under conditions considered appropriate to the court."[61]

MCL 330.2074(4); MCL 712A.18s(4).

G. Substantial Probability of Inability to Be Restored Due to Serious Emotional Disturbance[62]

1. Order for Mental Health Services

MCL 330.2074(5) and MCL 712A.18s(5) provide:

[61] Similar requirements apply when a finding of substantial probability of continued incompetency is made following the initial competency hearing and the matter is dismissed. See MCL 330.2068(2); MCL 712A.18q(2); see also Section 7.10(E).

[62] The Michigan Department of Health & Human Services has developed flowcharts regarding the process of juvenile competency evaluation and restoration, as well as juvenile competency and children with serious emotional disturbance. See https://www.michigan.gov/mdhhs/0,5885,7-339-73971_34044_86664_86675_86676---,00.html.

> "Upon receipt of a report from [an examiner] that there is a substantial probability that the juvenile is unable to be restored due to serious emotional disturbance, the court may in its discretion, except as provided under the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309, order that mental health services be provided to the juvenile by the [Department of Community Health], subject to the availability of inpatient care, a community mental health services program, the [Department of Human Services], a county department of human services, or another appropriate mental health services provider for a period not to exceed 60 days. The court shall retain jurisdiction over the juvenile throughout the duration of the order. The entity ordered to provide services under this subsection shall continue to provide services for the duration of the period of treatment ordered by the court."[63]

2. Report of Service Provider

At least 14 days before the expiration of an order for mental health services or a renewed order for an additional period of treatment as provided in MCL 330.2074(6)(a); MCL 712A.18s(6)(a),[64] the entity providing the services must submit a report to the court and the examiner regarding the juvenile. MCL 330.2074(6); MCL 712A.18s(6).

3. Renewal of Order for Mental Health Services or Dismissal

Upon receipt of the report from the treatment provider, the court must review the report and either:

- renew the order for another period of treatment not to exceed 60 days, and not to exceed a combined total of 120 days for the order for treatment and renewed order; or
- determine custody of the juvenile and dismiss the charges against the juvenile.

[63] The Department of Community Health must "maintain a record of the number of juveniles for whom the court ordered that mental health services be provided" under MCL 712A.18s(5) or MCL 712A.18s(6). MCL 712A.18s(7).

[64] See Section 7.9(G)(3).

MCL 330.2074(6)(a)-(b); MCL 712A.18s(6)(a)-(b).

H. Subsequent Use of Evidence and Statements Obtained During Competency Evaluation

1. Statements

"The constitutional protections against self-incrimination apply to all competency evaluations." MCL 330.2070(1); MCL 712A.18r(1).

Statements made by a juvenile during a competency evaluation:

- are inadmissible in any proceeding to determine the juvenile's responsibility, MCL 330.2070(2); MCL 712A.18r(2);
- are inadmissible in any proceeding to determine the juvenile's responsibility for charges based on any other events or transactions, MCL 330.2070(3); MCL 712A.18r(3);
- may not be used for any purpose other than assessment of competency, unless the juvenile or his or her guardian, following an opportunity to consult with his or her attorney, provide written consent, MCL 330.2070(4); MCL 712A.18r(4); and
- are not subject to disclosure, MCL 330.2070(7); MCL 712A.18r(7).

2. Evidence

Any evidence obtained during a competency evaluation is not admissible in any proceeding to determine the juvenile's responsibility. MCL 330.2070(2); MCL 712A.18r(2).

Any evidence resulting from a juvenile's statement, made during a competency evaluation, that concerns any other event or transaction is not admissible in any proceeding to determine the juvenile's responsibility for any other charges that are based on that event or transaction. MCL 330.2070(3); MCL 712A.18r(3).

Any evidence resulting from a statement made by a juvenile during a competency evaluation is not subject to disclosure. MCL 330.2070(7); MCL 712A.18r(7).

I. Sealing of Reports

"After the case proceeds to adjudication or the juvenile is found to be unable to retain competence," the court must order the sealing of all of the reports that are submitted in the competency evaluation process under MCL 330.2062—MCL 330.2068 or MCL 712A.18n—MCL 712A.18q. MCL 330.2070(5); MCL 712A.18r(5).

The court may order that reports that are sealed under MCL 330.2070(5) or MCL 712A.18r(5) be opened only for the following purposes:

- for further competency or criminal responsibility evaluations, MCL 330.2070(5)(a); MCL 712A.18r(5)(a);
- to assist in mental health treatment ordered under the Mental Health Code, if the records are considered to be necessary, MCL 330.2070(5)(c); MCL 712A.18r(5)(c); or
- for statistical analysis, data gathering, or scientific study or other legitimate research, MCL 330.2070(5)(b); MCL 330.2070(5)(d)-(e); MCL 712A.18r(5)(b); MCL 712A.18r(5)(d)-(e).

Reports that are opened for the purposes of statistical analysis, data gathering, or scientific study "shall remain confidential." MCL 330.2070(6); MCL 712A.18r(6).

"Any statement that a juvenile makes during a competency evaluation, or any evidence resulting from that statement, is not subject to disclosure." MCL 330.2070(7); MCL 712A.18r(7).

7.11 Raising Alibi or Insanity Defenses

In order to raise an alibi or an insanity defense in juvenile delinquency proceedings, the following timing and notice requirements must be met:

> "(1) Within 21 days after the juvenile has been given notice of the date of trial, but no later than 7 days before the trial date, the juvenile or the juvenile's attorney must file a written notice with the court and prosecuting attorney of the intent to rely on a defense of alibi or insanity. The notice shall include a list of the names and addresses of defense witnesses.
>
> (2) Within 7 days after receipt of notice, but no later than 2 days before the trial date, the prosecutor shall provide written notice to the court and defense of an intent to offer

> rebuttal to the above-listed defenses. The notice shall include names and addresses of rebuttal witnesses.
>
> (3) Failure to comply with subrules (1) and (2) may result in the sanctions set forth in MCL 768.21." MCR 3.922(C).

It is unclear whether Michigan's statutory "guilty but mentally ill" verdict, MCL 768.36, applies in juvenile delinquency cases. See *In re Ricks*, 167 Mich App 285, 293-294 (1988) (Court of Appeals declined to address the issue because the trial court agreed with the respondent's argument that "the statute has no applicability in a juvenile proceeding"), and MCR 3.942(D) (verdict in delinquency proceeding must be guilty or not guilty of either the offense charged or a lesser-included offense). See also *People v Abraham (Nathaniel)*, 256 Mich App 265, 271 n 2 (2003), citing *People v Carpenter (James)*, 464 Mich 223, 237 (2001) (diminished capacity is not a cognizable defense in Michigan).

7.12 Demand for and Waiver of Jury Trial

A. Demand for Jury Trial

MCR 3.911(A) states that "[t]he right to a jury in a juvenile proceeding exists only at the trial."[65] A party may demand a jury trial by filing a written demand with the court. MCR 3.911(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to jury trial, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.* MCL 712A.17(2) allows an interested person to demand a jury trial, or the court, on its own motion, to order a jury trial in noncriminal trials. See *In re Whittaker*, 239 Mich App 26, 29 (1999) (juvenile proceedings are not criminal proceedings).

B. Waiver of Jury Trial or Withdrawal of Demand

Neither the Juvenile Code nor the applicable court rules sets out the procedure to waive the right to jury trial or withdraw a demand for jury trial. *In re Whittaker*, 239 Mich App at 29. In *In re Whittaker*, 239 Mich App at 29, the Court of Appeals held that MCL 763.3, which governs waiver of the right to jury trial in criminal cases, does not apply to delinquency cases. Additionally, because juveniles do not have a constitutional right to jury trial in delinquency proceedings, the "waiver process does not implicate constitutional concerns." *In re Whittaker*, 239 Mich App at 28. The Court concluded that the

[65] However, this is not a constitutional right. *McKeiver v Pennsylvania*, 403 US 528, 545 (1971).

applicable due-process standard of fundamental fairness was met when the respondent's attorney withdrew the respondent's jury request on the record in the presence of, and without objection by, the respondent, his parents, the prosecutor, and the court. *Id.* at 28-30.[66]

7.13 "Speedy Trial" Requirements

"In all cases the trial must be held within 6 months after the authorization of the petition, unless adjourned for good cause. If the juvenile is detained, the trial has not started within 63 days after the juvenile is taken into custody, and the delay in starting the trial is not attributable to the defense, the court must immediately order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter." MCR 3.942(A).

A. When Motion for Traditional Waiver is Denied

In cases where the prosecutor has sought waiver of the court's jurisdiction and the motion has been denied, MCR 3.950(F) states that "[i]f the juvenile is detained and the trial of the matter in the family division has not started within 28 days after entry of the order denying the waiver motion, and the delay is not attributable to the defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter."

B. Motion for Expedited Trial on Behalf of Victim

An expedited trial may be scheduled if the prosecuting attorney declares the victim to be one of the following:

> "(a) A victim of child abuse, including sexual abuse or any other assaultive crime.
>
> (b) A victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit criminal sexual conduct involving penetration or to commit criminal sexual conduct in the second degree.
>
> (c) Sixty-five years of age or older.

[66] The *Whittaker* Court did not address the applicability of MCR 1.104 to the case. MCR 3.901(A)(1) states in part that "[t]he rules in . . . subchapter 1.100 . . . govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code." MCR 1.104 states that "[r]ules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court."

(d) An individual with a disability that inhibits the individual's ability to attend court or participate in the proceedings." MCL 780.786a(1).

Upon motion of the prosecuting attorney for an expedited trial, the court must set a hearing date on the motion within 14 days after it is filed. MCL 780.786a(2). If the motion is granted, the trial must be scheduled at least 21 days from the date of the hearing. *Id.*

7.14 Closing Delinquency Proceedings to the Public

Generally, all juvenile court proceedings on the formal calendar and all preliminary hearings shall be open to the public. MCR 3.925(A)(1). However, on motion of a party or a victim, the court may close proceedings to the general public during the testimony of a child witness or a victim or to protect the welfare of a child witness or a victim. MCL 712A.17(7); MCR 3.925(A)(2). In making such a decision, the court must consider:

- the age and maturity of the witness or victim;
- the nature of the proceeding; and
- the witness's or victim's preference, and if the witness or victim is a child, the preference of his or her parent, guardian, or legal custodian. MCL 712A.17(7); MCR 3.925(A)(2).

For purposes of MCL 712A.17(7) a child witness does not include the juvenile against whom the proceeding is brought. MCL 712A.17(8); MCR 3.925(A)(2).

Except where the victim requests a copy of the adjudication order under MCL 780.799, the records from a hearing that is closed under MCL 712A.17(7) must only be opened by court order to persons having a legitimate interest. MCL 712A.28(2)-(3).[67]

7.15 Alternative Procedures to Obtain Testimony of Victim

A. Victims and Witnesses (Regardless of Age or Disability)

A trial court is given broad authority to employ special procedures to protect any victim or witness while testifying:

[67] See Section 21.2(B) for the criteria to determine who has "a legitimate interest."

> "The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." MRE 611(a).

Under MRE 611(a), "'a trial court, in certain circumstances, may prohibit a defendant who is exercising his [or her] right to self-representation from personally questioning the victim.'" *People v Daniels*, 311 Mich App 257, 268 (2015) (citation omitted). "MRE 611(a) allows the trial court to prohibit a defendant from personally cross-examining vulnerable witnesses-particularly children who have accused the defendant of committing sexual assault[; t]he court must balance the criminal defendant's right to self-representation with 'the State's important interest in protecting child sexual abuse victims from further trauma.'" *Daniels*, 311 Mich App at 269 (citation omitted).

"MRE 611(a)(3) . . . grants a trial court the power to exercise reasonable control over the mode and order of examining witnesses [in order] to protect witnesses from harassment or undue embarrassment." *People v Helmer*, ___ Mich App ___, ___ (2026). In *Helmer*, defendant "lit his ex-girlfriend on fire using gasoline," causing her to suffer extensive and permanent injuries. *Id*. at ___. "Defendant represented himself at trial." *Id*. at ___. "Before trial, the prosecutor moved to prevent defendant from personally cross-examining [the victim] under MRE 611(a)(3) . . . ." *Helmer*, ___ Mich App at ___. "The motion asserted [the victim] expressed extreme emotional trauma from the incident, and thus requested that the trial court order that cross examination be authored by defendant in writing and be read to the witness by way of Defendant's standby attorney." *Id*. at ___ (quotation marks omitted). "The trial court granted that motion, and defendant's standby counsel questioned [the victim] at trial using questions prepared by defendant." *Id*. at ___. "[D]efendant contend[ed] this violated his Sixth Amendment rights to self-representation and to confront witnesses." *Id*. at ___. "As interpreted by [*People v Daniels*, 311 Mich App 257, 268 (2015)], MRE 611(a) permits a trial court to prohibit a defendant from personally cross-examining vulnerable witnesses." *Helmer*, ___ Mich App at ___ (quotation marks omitted). The victim "was understandably [vulnerable], with the prosecutor rightly expressing significant concern that allowing defendant to personally question her would subject her to undue trauma, embarrassment, and harassment." *Id*. at ___ (quotation marks omitted). Defendant argued that *Daniels* applies "'particularly' to 'children who have accused [a] defendant of committing sexual assault'" and not to the adult victim in his case. *Helmer*, ___ Mich App at ___, quoting *Daniels*, 311 Mich App at 269.

"To the contrary, MRE 611(a)(3) broadly protects all harassment or undue embarrassment." *Helmer*, ___ Mich App at ___ (quotation marks omitted). Therefore, "[d]isallowing defendant to personally question [the victim] after what he admittedly did to her . . . is exactly the type of protection for witnesses contemplated by MRE 611(a)." *Helmer*, ___ Mich App at ___.

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4, for discussion of MRE 611(a) and prohibiting a defendant from personally cross-examining vulnerable witnesses.

B. Protections for Child or Developmentally Disabled Witnesses

1. Scope

MCL 712A.17b provides the court with alternatives to traditional testimony when a witness is an alleged victim of an offense specified in MCL 712A.17b(2) and is either under 16 years of age, or is 16 years of age or older and has a developmental disability.[68] MCL 712A.17b(1)(e); MCL 712A.17b(2). The procedures in MCL 712A.17b are in addition to other protections or procedures afforded to a witness by law or court rule. MCL 712A.17b(18).[69] The alternative procedures listed in MCL 712A.17b may be used for a proceeding brought under MCL 712A.2(a)(1) in which the alleged offense, if committed by an adult, would be any of the following felonies:

- child abuse, MCL 750.136b;
- sexually abusive activity involving children, MCL 750.145c;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e; and
- assault with intent to commit criminal sexual conduct, MCL 750.520g. MCL 712A.17b(2)(a).

[68] "Developmental disability" is defined in MCL 712A.17b(1)(b).

[69] See, e.g., MCR 3.923(F), which allows the court to appoint an impartial person to address questions to a child witness.

2. Types of Alternative Procedures[70]

a. Dolls or Mannequins

"If pertinent, the witness shall be permitted the use of 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 712A.17b(3). See also MCR 3.923(E) (allowing the use of anatomical dolls as authorized by MCL 712A.17b).

b. Support Person

"A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony." MCL 712A.17b(4). See also MCR 3.923(E) (allowing the use of a support person as authorized by MCL 712A.17b). A notice of intent to use this procedure must be filed with the court and served on all parties.[71] MCR 3.922(F)(1)(a).

However, "a fully abled adult witness may not be accompanied by a . . . support person while testifying" and "[e]ven assuming a trial court had the inherent authority to allow such a procedure, [the Court of Appeals] would not approve its use if the basis for it was simply that doing so would allow the witness to be 'more comfortable'" or because "this is something she wants.'" *People v Shorter*, 324 Mich App 529, 540, 542 (2018) (holding that "the trial court erred by granting the prosecution's motion to allow the complaining witness to testify while accompanied by a support dog and its handler").

Where there was no evidence of nonverbal communication between the victim and her father, the trial court did not err in allowing the seven-year-old sexual assault victim to sit on her father's lap while testifying. *People v Rockey*, 237 Mich App 74, 78 (1999) (permitted under MCL 600.2163a, which is substantially similar to MCL 712A.17b).

[70] The procedures listed in this sub-subsection may be used only when the witness and the offense meet the eligibility requirements discussed in Section 7.15(B).

[71] See Section 7.15(C) for notice of intent requirements.

c. Use of Support Dog

"The court must . . . permit a witness who is called upon to testify to have a courtroom support dog[72] and handler sit with, or be in close proximity to, the witness during his or her testimony." MCL 600.2163a(4).[73] "A notice of intent to use a . . . courtroom support dog is only required if the . . . courtroom support dog is to be utilized during trial and is not required for the use of a . . . courtroom support dog during any other courtroom proceeding." MCL 600.2163a(5). "A notice of intent . . . must be filed with the court and must be served upon all parties to the proceeding," and "[t]he notice must name the . . . courtroom support dog . . . and give notice to all parties that the witness may request that the named . . . courtroom support dog sit with the witness when the witness is called upon to testify during trial." *Id*.

"A court must rule on a motion objecting to the use of a named . . . courtroom support dog before the date when the witness desires to use the . . . courtroom support dog." MCL 600.2163a(5). "[I]t is within the trial court's inherent authority to control its courtroom and the proceedings before it to allow a witness to testify while accompanied by a support animal." *People v Johnson (Jordan)*, 315 Mich App 163, 176, 178 (2016), citing MCL 768.29; MRE 611(a).[74] A trial court is not required to make findings of good cause or necessity before allowing the use of a support animal. *Johnson (Jordan)*, 315 Mich App at 187. However, "as a practical matter it will be the better practice for a trial court to make some findings regarding [the] decision to use or not use a support animal," and "the court should consider the facts and circumstances of each individual witness to determine whether the use of the support animal will be useful to the expeditious and effective ascertainment of the truth." *Id*. at 187, 189.

The use of a support dog to accompany a young victim of sexual abuse and another young witness (the victim's brother) when they testified "did not implicate the

[72]Courtroom support dog "means 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)

[73] MCL 600.2163a is substantially similar to MCL 712A.17b.

[74]The *Johnson (Jordan)* case was decided before 2018 PA 282, which amended MCL 600.2163a(4) to include the use of a courtroom support dog.

Confrontation Clause because it did not deny [the] defendant a face-to-face confrontation with his accuser[.]" *Johnson (Jordan)*, 315 Mich App at 187 (noting that "the victim and the victim's brother testified on the witness stand without obstruction, . . . the presence of the dog did not affect the witnesses' *competency* to testify[or] . . . the oath or affirmation given to the witnesses, the witnesses were still subject to cross-examination, and the trier of fact was still afforded the unfettered opportunity to observe the witnesses' demeanor").

Following *Johnson*, another panel of the Court of Appeals concluded that "*Johnson's* holding was tied to the facts presented, i.e., the use of a support animal during a *child's* testimony" and that "there is a fundamental difference between allowing a support animal to accompany a child witness, as in *Johnson*, and allowing the animal to accompany a fully abled adult witness[.]" *People v Shorter*, 324 Mich App 529, 538 (2018).

d. Rearranging the Courtroom/Using a Questioner's Stand or Podium

Before adjudication, a party may make a motion to rearrange the courtroom and/or used a questioner's stand or podium to protect the welfare of a witness. MCL 712A.17b(14); MCL 712A.17b(15). *Id.* In determining whether it is necessary to rearrange the courtroom or use a questioner's stand or podium to protect the welfare of the witness, the court must consider the following:

> "(a) The age of the witness.
>
> (b) The nature of the offense or offenses." MCL 712A.17b(14).

If the court determines on the record that it is necessary to protect the welfare of the witness, the court must order one or both of the following:

> "(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and

be able to communicate with his or her attorney.

(b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand." MCL 712A.17b(15).

e. Videotaped Depositions or Closed-Circuit Television

The court must order a videorecorded deposition of a witness to be admitted at the adjudication stage of the proceedings instead of live testimony if, on motion of a party or in the court's discretion, the court finds on the record that the witness "is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections afforded the witness in [MCL 712A.17b](3), [MCL 712A.17b](4), or [MCL 712A.17b](15)[.]" MCL 712A.17b(16). The court must find that the witness would be unable to testify truthfully and understandably in the juvenile's presence, not that the witness would stand mute when questioned. *People v Pesquera*, 244 Mich App 305, 311 (2001) (permitted under MCL 600.2163a, which is substantially similar to MCL 712A.17b).

If the court allows the use a videorecorded deposition in place of live testimony, the deposition must comply with the following requirements:

- the examination and cross-examination of the witness must proceed in the same manner as if the witness testified at the adjudication stage; and
- the court must order that the witness, during his or her testimony, not be confronted by the respondent, but the respondent must be permitted to hear the testimony of the witness and to consult with his or her attorney. MCL 712A.17b(17).

In order to preserve a juvenile's Sixth Amendment right to confrontation, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child witness who seeks to testify. *Pesquera*, 244 Mich App at 309-310.[75]

[75]Note that *Pasquera* predates *Crawford v Washington*, 541 US 36 (2004).

> "The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than mere nervousness or excitement or some reluctance to testify[.]" *Maryland v Craig*, 497 US 836, 855-856 (1990) (quotation marks and citations omitted).[76]

See also *In re Vanidestine*, 186 Mich App 205, 209-212 (1990) (applying *Craig* to juvenile delinquency case).[77]

"In allowing [a forensic analyst's] two-way, interactive video testimony [at trial] over the defendant's objection, the trial court violated the defendant's Confrontation Clause rights." *People v Jemison*, 505 Mich 352, 366-367 (2020) (remanded to "determin[e] whether that violation was harmless beyond a reasonable doubt"). Where the witness was "neither the victim nor a child," and it was undisputed that the "evidence was testimonial," "[t]he

[76]See *People v Jemison*, 505 Mich 352, 365 (2020), noting that *Craig* was decided prior to *Crawford*, 541 US 36, and although *Crawford* did not overrule *Craig*, the Court indicated it "will apply *Craig* only to the specific facts it decided: a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection."

[77] See also *In re Brock*, 442 Mich 101, 110 (1993) (holding that in a child protective proceeding, the court properly allowed the jury to view a child's videotaped deposition, conducted by an independent examiner, in lieu of the child's live testimony).

defendant had a right to face-to-face cross-examination; [the witness] was available, and the defendant did not have a prior chance to cross-examine him." *Id*. at 365-366. Thus, "[t]he defendant's state and federal constitutional rights to confrontation were violated by the admission of [the witness's] two-way, interactive video testimony." *Id*. at 366. "[E]xpert witnesses called by the prosecution are witnesses against the defendant," and "[t]he prosecution *must* produce" witnesses against the defendant. *Id*. at 364 (further holding "expense is not a justification for a constitutional shortcut").

C. Notice of Intent to Use Alternative Procedure

MCR 3.922(F) sets out the notice requirements for use of an alternative procedure to obtain testimony of a victim:

> "(1) Within 21 days after the parties have been given notice of the date of trial, but no later than 7 days before the trial date, the proponent must file with the court, and serve all parties, written notice of the intent to:
>
> (a) use a support person, including the identity of the support person, the relationship to the witness, and the anticipated location of the support person during the hearing.
>
> (b) request special arrangements for a closed courtroom or for restricting the view of the respondent/defendant from the witness or other special arrangements allowed under law and ordered by the court.
>
> (c) use a videotaped deposition as permitted by law.
>
> * * *
>
> (2) Within 7 days after receipt or notice, but no later than 2 days before the trial date, the nonproponent parties must provide written notice to the court of an intent to offer rebuttal testimony or evidence in opposition to the request and must include the identity of the witnesses to be called.
>
> (3) The court may shorten the time periods provided in [MCR 3.922(F)] if good cause is shown."

Chapter 8: Pleas of Admission or No Contest in Delinquency Proceedings

8.1. Right to Have Judge Take Plea 8-2
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In this chapter. . .

This chapter discusses the rules governing pleas in delinquency cases other than pleas to alleged probation violations. Pleas to alleged probation violations are discussed in Chapter 11. For discussion of the court rule requirements for plea proceedings in criminal cases, see Section 15.10. For discussion of a victim's right to confer with the prosecution and to make a statement at a plea proceeding, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

8.1 Right to Have Judge Take Plea

The parties have a right to a judge at a hearing on the formal calendar, which includes plea proceedings. MCR 3.912(B); see also MCR 3.903(A)(10), which defines the formal calendar to include plea proceedings.

If a party has not demanded that a judge take a juvenile's plea, a referee may be assigned to conduct the plea proceedings and make recommended findings and conclusions. MCR 3.913(A)(1). However, a referee may not enter an order of adjudication following plea proceedings. Instead, a referee must issue a recommendation under MCL 712A.10(1), which states that if a referee is to conduct a hearing, he or she must:

> "(b) Administer oaths and examine witnesses.
>
> (c) If a case requires a hearing and the taking of testimony, make a written signed report to the judge containing a summary of the testimony and a recommendation for the court's findings and disposition."

"Neither the court rules nor any statute permits a hearing referee to enter an order for any purpose." *In re AMB*, 248 Mich App 144, 217 (2001). A referee's recommendation cannot be accepted without judicial examination. *Id.* at 217.

Except as otherwise provided in MCL 712A.10,[1] only a person licensed to practice law in Michigan may serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing if the juvenile is before the court for allegedly committing an offense that would be a criminal offense if committed by an adult. MCR 3.913(A)(2)(a).[2]

8.2 Prosecuting Attorney's Participation in Plea Proceedings

If the court requests, the prosecuting attorney must review the petition for legal sufficiency and appear at any delinquency proceeding. MCR 3.914(A); MCL 712A.17(4). If the court has jurisdiction under MCL 712A.2(a)(1) (violations of law or ordinance), the prosecuting attorney must

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[1] MCL 712A.10(2) allows a probation officer or county agent who is not a licensed attorney to serve as a referee at a delinquency proceeding other than a preliminary inquiry or preliminary hearing if he or she was designated to serve as referee before January 1, 1988, and was acting as a referee on that date.

[2] See Section 2.18 for additional discussion of referees. See Section 2.19 for rules governing judicial review of a referee's recommendations.

"participate in every delinquency proceeding . . . that requires a hearing and the taking of testimony." MCR 3.914(B)(2); MCL 712A.17(4) (requiring the prosecuting attorney to appear if a criminal offense is alleged and the proceeding requires a hearing and the taking of testimony). Thus, the prosecuting attorney must appear and participate in a plea hearing.

8.3 Advice of Right to Counsel

A defendant's Sixth Amendment right to counsel attaches at the defendant's initial proceeding, regardless of the prosecution's involvement in, or awareness of, the proceeding. *Rothgery v Gillespie Co*, 554 US 191, 194-195 (2008). If a juvenile is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). See also MCR 3.915(A)(1), which states that this advice is required "at each stage of the proceedings on the formal calendar, including . . . plea of admission[.]"[3]

8.4 Plea Procedures[4]

A. Generally

The court may not accept an admission or no contest plea unless it is satisfied that the plea is understanding, voluntary, and accurate. MCR 3.941(A). Before accepting an admission or no contest plea, "the court must personally address the juvenile and must comply with [MCR 3.941(C)(1)-(4)]." MCR 3.941(C). A plea of admission or no contest must be on the record. MCR 3.925(B).

Taking a plea under advisement may not constitute acceptance of a plea. See *In re Diehl*, 329 Mich App 671, 694 (2019). In *Diehl*, respondent's no contest plea was not accepted where although "the trial court initially stated that it would accept respondent's plea of no contest, . . . it later stated–both during the hearing and in its written order–that [it] would take respondent's plea under advisement" because "a court speaks through its written orders and judgments, not through its oral pronouncements." *Id*. (further finding that "police reports provided the factual basis for the plea, . . . [but t]he trial court expressly stated that it had reservations regarding the satisfaction of

[3] See Section 7.6(C) for further discussion of a juvenile's right to counsel.

[4] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

the elements [of the offense]") (quotation marks and citations omitted).

B. An Understanding Plea

To establish that a plea is understanding, the court must tell the juvenile:

> "(a) the name of the offense charged,
>
> (b) the possible dispositions,
>
> (c) that if the plea is accepted, the juvenile will not have a trial of any kind, so the juvenile gives up the rights that would be present at trial, including the right:
>
> (*i*) to trial by jury,
>
> (*ii*) to trial by the judge if the juvenile does not want trial by jury,
>
> (*iii*) to be presumed innocent until proven guilty,
>
> (*iv*) to have the petitioner or prosecutor prove guilt beyond a reasonable doubt,
>
> (*v*) to have witnesses against the juvenile appear at the trial,
>
> (*vi*) to question the witnesses against the juvenile,
>
> (*vii*) to have the court order any witnesses for the juvenile's defense to appear at the trial,
>
> (*viii*) to remain silent and not have that silence used against the juvenile, and
>
> (*ix*) to testify at trial, if the juvenile wants to testify." MCR 3.941(C)(1)(a)-(c).

Committee Tip

To establish a sufficient factual basis in the record for a determination that a plea is understandingly made, it may be necessary to ask questions of the juvenile. For example, the court may want to inquire about the juvenile's age, extent of education, and grades in school. If the juvenile is represented by counsel, the court may want to ask whether he or she has had an

adequate opportunity to discuss the plea with his or her attorney. Also, the court may ask if the juvenile is under the influence of drugs, alcohol, or medication, which might affect his or her ability to understand the proceedings.

C. A Voluntary Plea

To establish that a plea is voluntary, the court must:

- "confirm any plea agreement[5] on the record[,]" and
- "ask the juvenile if any promises have been made beyond those in a plea agreement or whether anyone has threatened the juvenile." MCR 3.941(C)(2)(a)-(b).

D. An Accurate Plea

To establish that a plea is accurate, the court must determine that there is support for a finding that the juvenile committed the offense:

> "(a) either by questioning the juvenile or by other means when the plea is a plea of admission, or
>
> (b) by means other than questioning the juvenile when the juvenile pleads no contest. The court shall also state why a plea of no contest is appropriate."[6] MCR 3.941(C)(3)(a)-(b).

E. Support for Plea

MCR 3.941(C)(4) states:

> "The court shall inquire of the parent, guardian, legal custodian, or guardian ad litem, if present, whether there is any reason why the court should not accept the plea tendered by the juvenile."

Any agreement with or objection to the juvenile's plea must be on the record. MCR 3.925(B).

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[5] See Section 8.6 for discussion of plea agreements.

[6] See Section 8.5 for discussion of no-contest pleas.

8.5 No Contest Pleas

A number of appropriate reasons to allow acceptance of no contest pleas have been recognized in criminal cases, including:

- reluctance of a defendant to relate details of a particularly sordid crime;
- severe intoxication impairing a defendant's memory of details of the crime;
- commission of so many crimes of a similar nature that a defendant was unable to differentiate one from another; and
- the desire to minimize other consequences, e.g., civil liability. *In re Guilty Plea Cases,* 395 Mich 96, 134 (1975).

The ultimate test of whether a no contest plea is appropriate is whether "the interests of the defendant and the proper administration of justice d[o] not require interrogation of the defendant regarding his [or her] participation in the crime as would have been necessary in a guilty plea[.]" *In re Guilty Plea Cases*, 395 Mich at 133.

8.6 Plea Agreements

If there is any plea agreement, the court must confirm the agreement on the record and ask the juvenile if any promises have been made beyond those in the agreement or if anyone has threatened the juvenile. MCR 3.941(C)(2)(a)-(b).

Once the court accepts a plea induced by a plea agreement, the terms of the agreement must be fulfilled. *Santobello v New York,* 404 US 257, 262 (1971). See also *In re Robinson,* 180 Mich App 454, 459 (1989) (a juvenile delinquency case relying on *Santobello,* 404 US 257), where the Court of Appeals stated:

> "A defendant's rights under *Santobello v New York*, 404 US 257 (1971), to have the prosecutor perform his [or her] promise in a plea bargaining agreement does not inure to a defendant until after he [or she] has pled guilty or performed part of the plea agreement to his [or her] prejudice in reliance upon the agreement. *Santobello* and its progeny do not involve court-compelled performance of a tentative agreement from which the prosecutor has withdrawn prior to judicial approval." (Internal citation omitted.)

8.7 Taking Pleas Under Advisement and Plea Withdrawal

A. Generally

MCR 3.941(D) allows the court to take a plea under advisement and establishes standards for withdrawal of pleas:

> "The court may take a plea of admission or of no contest under advisement. Before the court accepts the plea, the juvenile may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the juvenile to withdraw a plea."[7]

B. Withdrawal of Plea After Being Denied Admission to Drug Treatment Court

A juvenile who is denied admission to a drug treatment court after admitting responsibility is entitled to withdraw his or her admission of responsibility. MCL 600.1068(5) states:

> "An individual who has waived his or her right to a preliminary examination and has pled guilty or, in the case of a juvenile, has admitted responsibility, as part of his or her application to a drug treatment court and who is not admitted to a drug treatment court, shall be permitted to withdraw his or her plea and is entitled to a preliminary examination or, in the case of a juvenile, shall be permitted to withdraw his or her admission of responsibility."

C. Withdrawal of Plea After Acceptance

"'[I]n order to withdraw a guilty plea before sentencing, the defendant must first establish that withdrawal of the plea is supported by reasons based on the interests of justice. If sufficient reasons are provided, the burden then shifts to the prosecution to demonstrate substantial prejudice.'" *In re Hastie*, unpublished opinion per curiam of the Court of Appeals, issued March 28, 2000 (Docket No. 213880), quoting *People v Spencer*, 192 Mich App 146, 151 (1991). "To constitute substantial prejudice, the prosecution must show that its ability to prosecute is somehow hampered by the delay. This would appear to require more than mere inconvenience in preparing for trial." *Id.* at 151.

[7] See also Section 9.14 for discussion of rehearings and motions for new trial under MCR 3.992.

8.8 Conditional Pleas

"The court may accept a plea of admission or of no contest conditioned on preservation of an issue for appellate review." MCR 3.941(B). However, in criminal cases, "a guilty plea does not insulate all claims from review." *People v Reid*, 420 Mich 326, 332 (1985) (allowing a defendant, after submitting a conditional plea, to challenge the state's ability to bring the case because of alleged Fourth Amendment violations). "Only those defenses which challenge the very authority of the state to prosecute a defendant may be raised on appeal after entry of a plea of [guilty or] nolo contendere." *People v New*, 427 Mich 482, 491, 493 (1986).

Chapter 9: Trials in Delinquency Proceedings

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In this chapter. . .

This chapter outlines the general procedural requirements for delinquency trials or "adjudicative hearings." Section 9.1 distinguishes between delinquency adjudications and criminal convictions and contains a discussion of the common-law "infancy defense." For discussion of demands for trial by jury or by judge, See Sections 2.18 and 7.12.

9.1 Purpose and Definition of Delinquency Adjudications

A. Purpose

The rehabilitative purpose of proceedings under the Juvenile Code is set out in MCL 712A.1(3):

> "This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents." See also MCR 3.902(B).

B. Definition

For purposes of delinquency proceedings, a "trial" is "the fact-finding adjudication of an authorized petition to determine if the minor comes within the jurisdiction of the court." MCR 3.903(A)(27). To find a juvenile within the jurisdiction of the court, the factfinder must find that the juvenile has violated a criminal law or committed a civil infraction or status offense. MCL 712A.2(a)(1)-(4). See also *In re Alton*, 203 Mich App 405, 407 (1994) (when a criminal offense is alleged as a basis for the court's jurisdiction, the "critical issue" is whether the juvenile violated a substantive criminal law). The verdict in a delinquency proceeding must be guilty or not guilty of the offense charged or a lesser-included offense. MCR 3.942(D).

If a juvenile is found not to be within the court's jurisdiction (i.e., "not guilty" of the alleged offense), the court must dismiss the petition. MCL 712A.18(1). If a juvenile is found to be within the court's jurisdiction, the court must "order the juvenile returned to his or her parent if the return of the juvenile to his or her parent would not cause a substantial risk of harm to the juvenile or society." *Id*. The court may also enter any order of disposition "that [is] appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained[.]" *Id*.[1]

[1] Juvenile dispositions are discussed in Chapter 10.

C. The "Infancy Defense"

Before the advent of the juvenile court, the common law "infancy defense" was applied to minors charged with crimes. The infancy defense consists of three presumptions regarding a minor's capacity to form a criminal intent. If a minor is under seven years old, he or she is conclusively presumed incapable of forming a criminal intent and therefore cannot be criminally punished. *Allen v United States*, 150 US 551, 558 (1893). If a minor is between the ages of seven and 14, a rebuttable presumption arises that the minor is incapable of forming a criminal intent. *Id.* at 558. Minors over the age of 14 are conclusively presumed to have the capacity to form a criminal intent. *Id*.

The Michigan Supreme Court has held that a child under 7 years of age is incapable of committing a crime. *Queen Ins Co v Hammond*, 374 Mich 655, 657-658 (1965). However, Michigan appellate courts have not addressed the applicability of the infancy defense to criminal or delinquency proceedings.

9.2 Conducting the Trial[2]

Parties have the right to a judge at a hearing on the formal calendar, which includes a trial. MCR 3.903(A)(10); MCR 3.912(B). A judge must conduct a jury trial. MCR 3.912(A).

A party may demand that a judge preside at a bench trial rather than a referee by filing a written demand with the court. MCR 3.912(B). The demand must be filed within "(1) 14 days after the court gives notice of the right to a judge, or (2) 14 days after an appearance by an attorney or lawyer-guardian ad litem, whichever is later, but no later than 21 days before trial. The court may excuse a late filing in the interest of justice." *Id.*[3]

Whenever practicable, two or more matters within the Family Division's jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023.

A judge may be disqualified as provided in MCR 2.003. MCR 3.912(D).

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[2] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[3] See Section 2.18 for discussion of a referee's scope of authority. See Section 20.1 for discussion of reviewing a referee's recommendation.

As provided in MCR 3.904(A)(2), "court[s] may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding[.]" MCR 3.904(A)(2). "At trial, the court may use videoconferencing technology with the consent of the parties." MCR 3.904(A)(3). "A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting." *Id*. See Section 1.4 for discussion of videoconferencing technology.

"Statements made by the juvenile during the proceeding on the consent calendar must not be used against the juvenile at a trial on the formal calendar on the same charge." MCL 712A.2f(13); see also MCR 3.932(C)(9)(b)(*i*).

9.3 Prosecuting Attorney's Participation

If the court requests, the prosecuting attorney must review the petition for legal sufficiency and appear at any delinquency proceeding. MCL 712A.17(4); MCR 3.914(A). If a criminal offense is alleged, the prosecuting attorney must participate in every delinquency proceeding "that requires a hearing and the taking of testimony." MCR 3.914(B)(2). MCL 712A.17(4) requires the prosecuting attorney to *appear* only if a criminal offense is alleged and the proceeding requires a hearing and the taking of testimony. Thus, if a status offense is alleged, the prosecuting attorney must appear at trial if the court requests; if a criminal offense is alleged, the prosecuting attorney must appear and participate in a trial.

9.4 Preliminary Matters

A. General Procedures

At the beginning of trial, the court must determine whether all parties are present. MCR 3.942(B)(1). Both the juvenile and the victim have the right to be present at trial. MCR 3.942(B)(1)(a); MCR 3.942(B)(1)(c). The juvenile has the right to have his or her attorney, parent, guardian, legal custodian, or guardian ad litem present. MCR 3.942(B)(1)(a). However, the court may proceed without the presence of a parent, guardian, or legal custodian if he or she was properly notified to appear. MCR 3.942(B)(1)(b).

The court must read the allegations set out in the petition, unless waived. MCR 3.942(B)(2).

Jeopardy attaches in a delinquency proceeding when a juvenile court begins to hear evidence in the case. *Breed v Jones*, 421 US 519, 531

(1975). A juvenile has the constitutional right to not be placed in double jeopardy. *In re Carey*, 241 Mich App 222, 227 (2000).

If a juvenile who is charged with a criminal offense or a status offense is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings, including trial. MCR 3.942(B)(3). See also MCL 712A.17c(1); MCR 3.915(A)(1). "If the juvenile requests to proceed without the assistance of an attorney, the court must advise the juvenile of the dangers and disadvantages of self-representation and make sure the juvenile is literate and competent to conduct the defense." MCR 3.942(B)(3).

A juvenile may waive his or her right to counsel as follows:

> "The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on [MCR 3.915(A)(2)(e)]. The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made." MCR 3.915(A)(3). See also MCL 712A.17c(3), which is substantively similar.

See also *In re Bennett,* 135 Mich App 559, 565 (1984) (as a best practice, the court should require the juvenile and parent, guardian, or custodian to sign a waiver of counsel form).[4]

B. Procedures in Cases Involving Violation of Motor Vehicle Code

When a juvenile is accused of violating the Michigan Vehicle Code, the hearing procedures in MCL 712A.2b apply, "any other provision of [the Juvenile Code] notwithstanding[.]"

MCL 712A.2b states, in relevant part:

> "(a) No petition shall be required, but the court may act upon a copy of the written notice to appear given the accused juvenile as required by . . . MCL 257.728[.]
>
> "(b) The juvenile's parent or parents, guardian, or custodian may be required to attend a hearing conducted under this section when notified by the court, without additional service of process or delay.

[4] See SCAO Form JC 06, *Waiver of Attorney or Request for Appointment of Attorney*.

> However, the court may extend the time for that appearance.
>
> "(c) If after hearing the case the court finds the accusation to be true, the court may dispose of the case under [MCL 712A.18]."

9.5 Jury Procedures

In delinquency proceedings, prospective jurors must be summoned and impaneled in accordance with MCL 600.1300 *et seq*. MCL 712A.17(2). Juries in delinquency cases consist of six individuals. *Id*. Alternate jurors may be impaneled and may deliberate pursuant to MCR 2.511(B) and MCR 2.514(A)(3).[5] See MCR 3.911(C), which states that jury procedures are governed by MCR 2.508–MCR 2.516, except that each party is entitled to 5 peremptory challenges and the verdict must be unanimous. MCR 3.911(C)(1).

For purposes of peremptory challenges in delinquency cases, "[t]wo or more parties on the same side . . . are considered a single party[.]" MCR 3.911(C)(3). In these situations, MCR 3.911(C)(3) provides:

> "(a) When two or more parties are aligned on the same side and have adverse interests, the court shall allow each such party represented by a different attorney 3 peremptory challenges.
>
> "(b) When multiple parties are allowed more than 5 peremptory challenges under this subrule, the court may allow the opposite side a total number of peremptory challenges not to exceed the number allowed to the multiple parties."

9.6 Jury Instructions

A. Generally

MCR 2.512(D) governs the creation, modification, and use of Model Civil Jury Instructions and Model Criminal Jury Instructions. MCR 2.512(D)(2) provides:

> "Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or the

[5] Civil court rules pertaining to jury procedure are discussed in the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 7.

> Committee on Model Criminal Jury Instructions or a predecessor committee must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party."

See also MCR 2.512(D)(4), which states:

> "This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions, when given, must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative."

In addition to providing a written copy, the court must orally provide the jury with pretrial instructions and final instructions. See MCR 2.513(A); MCR 2.513(N)(1); MCR 2.513(N)(3).

"Under MCR 2.512(D)(2), the use of the model jury instructions is generally required unless the trial court determines that the instruction does not accurately reflect the state of the law." *People v Kvasnicka (On Remand)*, ___ Mich App ___, ___ (2025). M Crim JI 38.4, the model jury instruction for making a terrorist threat "requires that the prosecution must prove that an objectively reasonable person would understand that his message was a true threat, not that the defendant must be subjectively aware that his message was a true threat." *Kvasnicka*, ___ Mich App at ___. Accordingly, "the trial court should not use the model jury instruction in this case as written." *Id*. at ___. "Rather, if it uses the model jury instruction it should adapt it so as to 'give additional instructions on applicable law not covered by the model instructions.'" *Id*. at ___, quoting MCR 2.512(D)(4). "[C]onsistent with [the Court of Appeals'] construction of MCL 750.543m(1)(a), the [trial] court should instruct the jury that the prosecution must prove that [defendant] recklessly threatened to commit an act of terrorism, i.e., that he consciously disregarded a substantial risk that his [or her] communications would be viewed as threatening violence." *Kvasnicka*, ___ Mich App at ___ (quotation marks and citation omitted; last alteration in original).

B. Instructing the Jury on the Nature of the Proceedings

The court must give the jury preliminary instructions on the nature of the proceedings and the applicable law:

> "Before or after arguments or at both times, as the court elects, the court shall instruct the jury on the applicable law, the issues presented by the case, and, if a party requests as provided in [MCR 2.512(A)(2)], that party's theory of the case." MCR 2.512(B)(2).

9.7 Motions for Directed Verdict in Jury Trials

A motion for directed verdict may be made at the close of the evidence offered by the opponent. MCR 2.516. The motion must state specific facts in support of the motion. *Id.* If the motion is denied, the moving party may offer evidence without having reserved the right to do so, as if the motion had not been made. *Id.* A motion for a directed verdict that is not granted does not constitute a waiver of trial by jury, even though all parties have moved for directed verdicts. *Id.*

In deciding a motion for directed verdict, the court must review the evidence presented up to the time of the motion and view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *In re Fenderson*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2009 (Docket No. 281262), slip op p 1, citing *People v Gillis*, 474 Mich 105, 113 (2006). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *In re Fenderson*, slip op p 1, citing *People v Schultz*, 246 Mich App 695, 702 (2001).

9.8 Verdict in a Jury Trial

The verdict in a delinquency proceeding must be guilty or not guilty of the offense charged or a lesser-included offense. MCR 3.942(D). MCR 3.911(C)(1)(b) requires the verdict to be unanimous. A party may require the jury to be polled. MCR 2.514(B)(2). If the number of jurors agreeing is less than required (i.e., if the verdict is not unanimous), the jury must be sent back for further deliberation. MCR 2.514(B)(3). The court may discharge a jury:

> "(1) because of an accident or calamity requiring it;
>
> "(2) by consent of all the parties;
>
> "(3) whenever an adjournment or mistrial is declared;
>
> "(4) whenever the jurors have deliberated and it appears that they cannot agree.

"The court may order another jury to be drawn, and the same proceedings may be had before the new jury as might have been had before the jury that was discharged." MCR 2.514(C).

9.9 Sequestering Witnesses and Victims

A. Witnesses Other Than Victims

All trials must be open to the public. MCL 600.1420. However, "for good cause shown, [the court may] exclude from the courtroom other witnesses in the case when they are not testifying and may, in actions involving scandal or immorality, exclude all minors from the courtroom unless the minor is a party or witness. This section shall not apply to cases involving national security." *Id.* In addition, under MRE 615, at a party's request or on its own, "the court may order witnesses excluded so that they cannot hear other witnesses' testimony." A party who is a natural person, a non-natural party's representative, or an essential person may not be excluded. *Id*. This last exception ordinarily applies in criminal cases where law enforcement personnel assist the prosecutor with the presentation of evidence, or where victim "support persons" are used. See *People v Jehnsen*, 183 Mich App 305, 307-308, 311 (1990) (trial court did not abuse its discretion in denying the defendant's motion to sequester the four-year-old victim's mother in a criminal sexual conduct case).

The decision whether to exclude a witness from the courtroom is within the trial court's discretion, *Jehnsen*, 183 Mich App at 309, and requests should ordinarily be granted. *People v Hill*, 88 Mich App 50, 65 (1979). The purpose of sequestering a witness is to prevent the witness from "coloring" his or her testimony to conform with the testimony of other witnesses. *People v Stanley*, 71 Mich App 56, 61 (1976).

B. Victims[6]

A victim of a crime has the right to attend the trial related to that crime. Const 1963, art 1, § 24. However, if the victim is a witness, the court may, for good cause, sequester the victim until he or she first testifies. MCL 780.789. The court cannot order the victim to remain sequestered once he or she testifies. *Id.*

[6] For more information on crime victims' rights, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

9.10 Rules of Evidence and Standard of Proof

MCR 3.942(C) states that "[t]he Michigan Rules of Evidence and the standard of proof beyond a reasonable doubt apply at trial." The "beyond a reasonable doubt" standard of proof also applies to trials where a status offense is alleged. *In re Weiss*, 224 Mich App 37, 42 (1997) (juvenile was accused of being incorrigible and the Court remanded the case for application of the "beyond a reasonable doubt" standard of proof).

Application of the "beyond a reasonable doubt" standard of proof in a juvenile delinquency case is a constitutional requirement. *In re Winship*, 397 US 358, 366-368 (1970).

"MCL 768.27a [(a statutory rule of evidence concerning the admissibility of evidence that a defendant accused of committing a listed offense against a minor committed *another* listed offense against a minor)] applies in juvenile-delinquency trials." *In re Kerr, Minor*, 323 Mich App 407, 411-412 (2018), citing *People v Watkins*, 491 Mich 450, 473, 476-477 (2012) (because "MCL 768.27a embodies substantive policy considerations regarding criminal law, and there is no provision in the juvenile code or juvenile court rules that conflicts or parallels with MCL 768.27a," it applies to juvenile-delinquency proceedings). See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2, for more information on other acts evidence, including application of MCL 768.27a.

9.11 The Court's Authority to Call Additional Witnesses or Order Production of Additional Evidence

MCR 3.923(A) provides the court with authority to call or examine witnesses and to order production of additional evidence:

> "If at any time the court believes that the evidence has not been fully developed, it may:
>
> "(1) examine a witness,
>
> (2) call a witness, or
>
> (3) adjourn the matter before the court, and
>
> (a) cause service of process on additional witnesses, or
>
> (b) order production of other evidence."

See *In re Alton*, 203 Mich App 405, 407-408 (1994) (court properly allowed additional testimony that directly addressed key conflicts between the testimony of the complainant and juvenile).

9.12 Findings of Fact and Conclusions of Law by Judge or Referee in Nonjury Trial

Subchapter 3.900 of the Michigan Court Rules does not include a specific court rule addressing required findings of fact and conclusions of law by a judge or referee in a nonjury delinquency trial. However, the requirements in MCR 2.517 (civil court rule requiring findings of fact/ conclusions of law in nonjury cases) have been applied in criminal cases. See *People v Jackson (Robert)*, 390 Mich 621, 627 (1975), which stated that "in criminal cases as well as civil cases a judge who sits without a jury is obliged to articulate the reasons for his [or her] decision in findings of fact." Accordingly, it is good practice to apply the same standards to juvenile delinquency bench trials.

9.13 Record of Proceedings at Adjudicative Hearings

MCR 3.925(B) states that "[a] record of all hearings must be made. All proceedings on the formal calendar must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108." See also MCL 712A.17(1), which requires the court to record the proceedings via stenographic notes or another method of transcription.

9.14 Motions for Rehearing or New Trial

A. Generally

In a delinquency proceeding, a party may seek a rehearing or new trial by filing a written motion[7] stating the basis for the relief sought. MCR 3.992(A). MCL 712A.21 allows a petition for rehearing to be filed by "an interested person[,]" which includes a member of a local foster care review board with whom the juvenile's case has been assigned. MCL 712A.21(3). "A motion will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case." MCR 3.992(A).

[7] See SCAO Form JC 15m, *Motion and Authorization/Denial*.

B. Procedural Requirements

1. Timing

The written motion stating the basis for the relief sought must be filed "within 21 days after the date of the order resulting from the hearing or trial. The court may entertain an untimely motion for good cause shown." MCR 3.992(A).

Any response by parties to a motion for rehearing or new trial "must be in writing and filed with the court and served on the opposing parties within 7 days after notice of the motion." MCR 3.992(C).

2. Notice

"All parties must be given notice of the motion in accordance with [MCR] 3.920."[8] MCR 3.992(B).

3. No Hearing Required

The court does not need to hold a hearing before ruling on a motion for rehearing or new trial. MCR 3.992(E). "Any hearing conducted shall be in accordance with the rules for dispositional hearings and, at the discretion of the court, may be assigned to the person who conducted the hearing."[9] *Id.*

4. Stay of Proceedings and Grant of Bail

The court may stay any order or grant bail to a detained juvenile pending a ruling on a motion for rehearing or new trial. MCR 3.992(F).

5. Findings by Court

The court must state the reasons for its decision on the record or in writing. MCR 3.992(E).

C. Standards for Granting Relief

MCR 3.992(A) does not state the standard for granting relief following a court's consideration of a party's motion for rehearing or new trial. See *In re Alton*, 203 Mich App 405, 409 (1994). However, MCR 2.613(A), the "harmless error rule" for civil proceedings, applies

[8] See Section 5.2.

[9] See Section 10.7 for discussion of the applicable evidentiary rules.

to juvenile delinquency proceedings. MCR 3.902(A). See also *In re Alton,* 203 Mich App at 410. MCR 2.613(A) states:

> "An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice."

In *In re Alton*, 203 Mich App at 409-410, the Court of Appeals remanded the case to the juvenile court for a rehearing on the juvenile's motion for a new trial, adopting the following guidelines for ruling on such motions:

> "In ruling on the motion, the parties and the trial court applied the rules for granting a new trial embodied in MCR 2.611(A)(1). That court rule is not applicable in juvenile delinquency proceedings. See MCR [3].901(B). Therefore, we remand this case for the trial court to reconsider the juvenile's motion under the proper standard of review: whether, in light of the new evidence presented, it appears to the trial court that a failure to grant the juvenile a new trial would be inconsistent with substantial justice. MCR 2.613(A). In this case, that means the trial court must decide whether it appears that if the court refuses to grant the motion, it will be exercising jurisdiction over a juvenile who is not properly within its jurisdiction. The trial court must state the reasons for its decision on the record or in writing. MCR [3].992(E)."

But see *In re Ayres,* 239 Mich App 8, 23-24 (1999), a delinquency case in which the Court of Appeals applied the standard that governs criminal cases when deciding whether to grant a new trial–that the verdict was against the great weight of the evidence. According to the *Ayers* Court, a court may grant such a motion "only if the evidence preponderates heavily against the verdict so that a miscarriage of justice would result from allowing the verdict to stand. The trial judge is not allowed to sit as the 'thirteenth' juror and grant a new trial on the basis of a disagreement with the jurors' assessment of credibility." *Id.* at 23-24, citing *People v Lemmon,* 456 Mich 625, 642, 647 (1998).

"Under MCR 2.611(A)(1)(e), a new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons: a verdict or decision is against the great weight of the evidence or

contrary to law." *People v Knepper*, ___ Mich App ___, ___ (2024) (cleaned up). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at ___ (quotation marks and citation omitted). "The hurdle that a judge must clear in order to overrule a jury and grant a new trial is unquestionably among the highest in our law." *Id*. at ___ (quotation marks and citation omitted). "As a general principle, a verdict may be vacated only when the evidence does not reasonably support it and it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *Id*. at ___ (quotation marks and citation omitted). Accordingly, "unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at ___ (cleaned up). "The trial court may also override the jury's credibility determination when the testimony is 'patently incredible' or it is 'so inherently implausible that it could not be believed by a reasonable juror, or where the [witness's] testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id*. at ___ (quotation marks and citation omitted). "Thus, to obtain a new trial, the defendant must establish that one of these circumstances exists, and that there is a real concern that an innocent person may have been convicted or that it would be a manifest injustice to allow the guilty verdict to stand." *Id*. at ___ (quotation marks and citation omitted).

In *Knepper*, the "defendant challeng[ed] his conviction for attempt to commit CSC-I by contending that the jury verdict was against the great weight of the evidence." *Id*. at ___. The defendant argued "that the victim's testimony was so patently implausible that it could not be believed by any reasonable juror," "his theory of the case was not impeached, and that an extraneous influence on the jury—the victim asserting for the first time at trial that defendant raped her—caused the guilty verdict." *Id*. at ___. "But defendant [failed to] identify any specific element of the crime of conviction that he believes is negated by inconsistent testimony." *Id*. at ___. Although "defendant thoroughly attack[ed] the victim's testimony about the altercation she had with her father on the night in question," he did "not explain how inconsistent testimony on that issue support[ed] his argument that his conviction of attempt to commit CSC-I was against the great weight of the evidence." *Id*. at ___. "Despite the victim's credibility issues," "her testimony was [not] impeached to the point that it was deprived of all probative value or that the jury could not believe it, or that her testimony contradicted indisputable physical facts or defied physical realities." *Id*. at ___. "Simply stated, the record contain[ed] ample

evidence to support defendant's conviction for attempt to commit CSC-I, so defendant is not entitled to a new trial on the basis of the great weight of the evidence." *Id*. at ___. "The fact that the victim's father would not have approved of his daughter engaging in sexual acts with defendant could bear upon the victim's credibility, but it [did] not negate her version of events, so the issue remain[ed] one of credibility." *Id*. at ___ (stating that "even if defendant was correct in claiming that the victim and her father engaged in a violent altercation, that does not negate the victim's claim that defendant committed the offense of attempt to commit CSC-I"). "In sum, although the evidence supporting defendant's conviction was not strong, consisting primarily of the victim's testimony which suffered from inconsistencies and an accompanying lack of credibility, the bar defendant must clear to obtain relief in the form of a new trial is exceedingly high." *Id*. at ___ (holding that defendant failed to meet that high standard).

As the trier of fact, "[t]he jury [is] permitted to infer that [a defendant's] implausible testimony [is] evidence of guilt." *People v Skippergosh*, ___ Mich App ___, ___ (2024). "[I]f the jury [does] disbelieve the defendant, it [is] further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Id*. at ___ (cleaned up). "In this case, [the defendant] was found guilty of domestic violence as a habitual offender under MCL 750.81(5)." *Skippergosh*, ___ Mich App at ___. Following testimony from the victim's family members and neighbors, the defendant "provided implausible testimony to explain away . . . two assaults and the circumstances surrounding them." *Id*. at ___. "For example, [the defendant] testified that the January 2020 assault against [the victim] was committed by four anonymous women in the living room while they were covering his eyes, and that [the victim] was screaming for help in December 2021 because she required assistance removing taco meat from the refrigerator." *Id*. at ___. During sentencing, the trial court "characterized [the defendant's] testimony as 'almost laughable in terms of what you tried to convince the jury actually happened.'" *Id*. at ___.

The *Skippergosh* Court further held that "[a] prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id*. at ___ (quotation marks and citation omitted). However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id*. at ___ (quotation marks and citation omitted). The Court further noted that "in light of the testimony presented at trial, it was reasonable for the prosecution to infer and argue that [the victim's] family members did not have any unusual or impermissible motivations for testifying,

and that they were compelled to do so simply out of commonplace concern for the well-being of a family member." *Id*. at ___. "Further, nothing in the prosecution's closing argument . . . hint[ed] at having special knowledge of the family members' truthfulness or reasons for testifying." *Id*. at ___.

D. Remedies

MCR 3.992(D) states that "[t]he judge may affirm, modify, or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the court in its discretion finds appropriate for the case." The court may also enter an order for supplemental disposition while the juvenile remains under the court's jurisdiction. MCL 712A.21(1).

Chapter 10: Juvenile Dispositions

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In this chapter. . .

This chapter discusses:

- Dispositional hearing requirements;
- Dispositional hearing procedures;
- Dispositional options for court;
- Required evaluation for juveniles adjudicated of cruelty to animals or arson;

- Required procedures when juvenile escapes placement;
- Supplemental dispositional orders.

10.1 Purpose of Dispositional Hearings

In delinquency proceedings, dispositional hearings are conducted after a jury or the court has found that a juvenile has committed an offense. MCR 3.943(A). The purpose of a disposition hearing is "to determine what measures the court will take with respect to a juvenile and, when applicable, any other person, once the court has determined following trial or plea that the juvenile has committed an offense." *Id.*

A dispositional hearing may also be conducted in designated case proceedings if the court chooses to order a disposition following conviction instead of sentencing the juvenile as an adult. MCL 712A.2d(8); MCL 712A.18(1)(o).[1]

10.2 Time Requirements for Dispositional Hearings

"The interval between the plea of admission or trial and disposition, if any, is within the court's discretion. When the juvenile is detained, the interval may not be more than 35 days, except for good cause." MCR 3.943(B). The dispositional hearing may immediately follow the adjudicative hearing where the parties do not object, and where they have notice of the proceedings and an opportunity to present suggestions and objections. See *In re Hardin*, 184 Mich App 107, 109 (1990), abrogated on other grounds by *In re Alton*, 203 Mich App 405 (1994).[2]

10.3 Right to Have Judge Preside at Dispositional Hearing

Parties have the right to have a judge preside at a hearing on the formal calendar, which is defined to include dispositional hearings. MCR 3.912(B). See also MCR 3.903(A)(10), which defines the formal calendar as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency . . . proceeding[.]"

"Unless a party has demanded trial by jury or by a judge . . . , a referee may conduct the trial and further proceedings through disposition." MCR 3.913(B). Therefore, if a referee tries a case, that same referee may conduct dispositional and dispositional review hearings even if the juvenile later requests that a judge preside at a hearing.

If a juvenile disposition rather than an adult or blended sentence is imposed following trial or a plea in a designated case, the juvenile does

[1] See Section 15.17 for discussion of the court's options following conviction in a designated case.

[2] See also Section 10.4(D) regarding a victim's right to make an impact statement.

not have the right to have the same judge who presided at trial or who accepted a plea in the designated case preside at the dispositional hearing. MCR 3.912(C)(2).[3]

10.4 Persons Entitled or Required to Be Present at Dispositional Hearings

A. Juvenile

"The juvenile may be excused from part of the dispositional hearing for good cause shown, but must be present when the disposition is announced." MCR 3.943(D)(1).

MCL 780.793(1) provides in relevant part that "[t]he victim has the right to appear and make an oral impact statement at the juvenile's disposition or sentencing." MCL 780.793(3) further provides:

> "Unless the court has determined, in its discretion, that the juvenile is behaving in a disruptive manner or presents a threat to the safety of any individuals present in the courtroom, the juvenile must be physically present in the courtroom at the time a victim makes an oral impact statement under subsection (1). In making its determination under this subsection, the court may consider any relevant statement provided by the victim regarding the juvenile being physically present during that victim's oral impact statement."

B. Parent or Guardian

The parent or guardian of a juvenile who is within the court's jurisdiction under MCL 712A.2(a)(1) (violations of law or ordinance) must attend all hearings unless excused for good cause. MCL 712A.6a. This provision may be enforced through the court's contempt power. *Id.*[4]

C. Prosecuting Attorney

If the court requests, the prosecuting attorney must appear at any delinquency proceeding. MCL 712A.17(4); MCR 3.914(A). If an offense that would be a criminal offense if committed by an adult is alleged, the prosecuting attorney must participate in every delinquency proceeding "that requires a hearing and the taking of testimony." MCR 3.914(B)(2).

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[3] See Section 15.17 for discussion of the court's options following conviction in a designated case.

[4] See Section 2.11(B) for a detailed discussion of MCL 712A.6a.

MCL 712A.17(4) requires the prosecuting attorney to appear only if a criminal offense is alleged and the proceeding requires a hearing and the taking of testimony. Therefore, if a status offense is alleged, the prosecuting attorney must appear at a dispositional hearing if the court requests; if a criminal offense is alleged, the prosecuting attorney must appear and participate in a dispositional hearing.

D. Victim

"The victim has the right to be present at the dispositional hearing and to make an impact statement as provided by the Crime Victim's Rights Act, MCL 780.751 *et seq*."[5] MCR 3.943(D)(2). See also MCL 780.792; MCL 780.793.

10.5 Advice of Right to Counsel

A defendant's Sixth Amendment right to counsel attaches at the defendant's initial proceeding, regardless of the prosecution's involvement in, or awareness of, the proceeding. *Rothgery v Gillespie Co*, 554 US 191, 194-195 (2008). If a juvenile charged with a criminal offense or a status offense is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). MCR 3.915(A)(1) states that this advice is required "at each stage of the proceedings on the formal calendar, including . . . disposition."[6]

10.6 Procedure at Dispositional Hearings[7]

In order to establish a record, the proper procedure for the court to follow is to take sworn testimony on the record, allow defense counsel and the prosecuting attorney to argue for an appropriate disposition, and articulate reasons for the disposition imposed. See *In re Chapel*, 134 Mich App 308, 314-315 (1984), citing *People v Coles*, 417 Mich 523 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630 (1990).

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[5] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 7, for discussion of victim impact statements.

[6] See Section 6.3(C) for discussion of the juvenile's right to counsel and of the requirements for a valid waiver of counsel.

[7] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

Committee Tip:

Sworn testimony is not always taken at dispositional hearings. A probation officer or caseworker assigned to the juvenile's case may submit a report and recommendation for disposition. Defense counsel may make a statement agreeing with or disputing the recommendation. In addition to the probation officer's or caseworker's report, the court may receive reports from the juvenile's school, psychological evaluations, substance abuse evaluations, and, if commitment to the Department of Health and Human Services is contemplated, a classification and assignment report submitted by a delinquency services worker.

MCR 3.904(A)(1) authorizes courts to use videoconferencing technology when conducting dispositional hearings and postdispositional progress reviews.[8] See Section 1.4 for a discussion of videoconferencing technology.

A crime victim has the right to submit a written impact statement for inclusion in a disposition or presentence investigation report and to deliver an oral impact statement to the court at disposition or sentencing. MCL 780.792; MCL 780.793.[9]

10.7 Evidentiary Standards at Dispositional Hearings

MCR 3.943(C) governs the admissibility of evidence at dispositional hearings:

> "(1) The Michigan Rules of Evidence, other than those with respect to privileges, do not apply at dispositional hearings. All relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative

[8] Courts may use videoconferencing technology when conducting "preliminary hearings under MCR 3.935(A)(1), [and] preliminary examinations under MCR 3.953 and MCR 3.985 . . . MCR 3.904(A)(1). Additionally, courts "may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under [subchapter 3.900 of the Michigan Court Rules]." See MCR 3.904(A)(2).

[9] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 7, for discussion of victim impact statements.

> value, even though such evidence may not be admissible at trial.
>
> (2) The juvenile, or the juvenile's attorney, and the petitioner shall be afforded an opportunity to examine and controvert written reports so received and, in the court's discretion, may be allowed to cross-examine individuals making reports when those individuals are reasonably available.
>
> (3) No assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at a dispositional hearing, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment."

Although MCR 3.943(C)(1) authorizes the court to consider oral and written reports when making its decision, it does not mandate consideration of any particular report. *In re Lowe,* 177 Mich App 45, 47 (1989). Because a juvenile dispositional proceeding is not criminal and is not governed by the Code of Criminal Procedure, the Family Division need not consider a sentencing information report, as is required for adults. *Id.* at 47.

10.8 Required Evaluation of Juveniles Adjudicated of Cruelty to Animals or Arson

Juveniles found responsible for an offense that if committed by an adult would constitute cruelty to animals[10] or arson[11] must be evaluated to determine the need for psychiatric or psychological treatment. MCL 712A.18*l*. "If the court determines that psychiatric or psychological treatment is appropriate for that juvenile, the court may order that treatment." *Id.* The court is not precluded from entering any other order of disposition under the Juvenile Code. *Id.*

10.9 Risks and Needs Assessment Before Disposition

A risks and needs assessment must be conducted by a designated, trained individual or agency on each juvenile prior to dispositional recommendation. MCL 712A.18(9); MCR 3.907(A); MCR 3.907(E). Local jurisdictions can select a risk and needs assessment tool, as long as the tool is research-based, nationally validated, and complies with SCAO guidelines. MCL 712A.2f(3)(a)-(b). The risk and needs assessment tools

[10] MCL 750.50b.

[11] MCL 750.71—MCL 750.80.

that meet the criteria set forth in the relevant statutes and are approved by the SCAO are listed in the *Juvenile Justice Screening and Assessment Tools Guidelines*. MCL 712A.2f(4); MCL 712A.18(13).

A. Individual's/Agency's Use of Results

In making the most appropriate dispositional recommendation, an individual or agency must consider all of the following:

> "(a) The least restrictive setting possible.
>
> (b) Public safety.
>
> (c) Victim interests.
>
> (d) Rehabilitation of the juvenile.
>
> (e) Improved juvenile outcomes, including, but not limited to, educational advancement." MCR 3.907(E)(1). See also MCL 712A.18(9)(b)(*i*)-(*v*).

Assessment information and results, "including any admission, confession, or incriminating evidence," are not subject to subpoena and cannot be admitted as evidence in any adjudicatory hearing or other court process. MCL 712A.18(15). See also MCR 3.907(F).

B. Reporting

"The results of the risk and needs assessment along with a written dispositional recommendation must be filed with the court and provided to the juvenile, juvenile's attorney, and prosecuting attorney no less than 7 days before the dispositional hearing as provided in MCR 3.922(B)(4)." MCR 3.907(E)(2). See also MCL 712A.18(9)(a). "The written recommendation must include all of the following:"

> "(a) Overall risk score.
>
> (b) Type of supervision.
>
> (c) Level of supervision.
>
> (d) Length of supervision.
>
> (e) Specific terms and conditions, including, but not limited to, frequency of reviews and requirements for early termination of supervision." MCR 3.907(E)(2).

C. Court's Consideration of Results

"The court must consider the results of the assessment when making a dispositional decision regarding a juvenile, including, but not limited to, whether to place a juvenile:

> (a) under supervision, including the length, level, and conditions of supervision;
>
> (b) on probation; or
>
> (c) in out-of-home placement." MCR 3.907(E)(3). See also MCL 712A.18(10)(a)-(c).

D. Reassessment

"The court must order that a new risk and needs assessment for the juvenile be conducted and used as provided in [MCR 3.907(E)] if any of the following conditions occur:

> (a) Six months have passed since the juvenile's last risk and needs assessment.
>
> (b) The juvenile has experienced a major life event.
>
> (c) There is a major change in the juvenile's proceedings." MCR 3.907(E)(4)(a)-(c). See also MCL 712A.18(11)(a)-(c).

10.10 Dispositional Options Available to Court

"If [a] juvenile has been found to have committed an offense[12] and the court has considered the results of a risk and needs assessment pursuant to MCR 3.907, the court may enter an order of disposition as provided by MCL 712A.18." MCR 3.943(E)(1).[13] Both the Juvenile Code and the applicable court rules state a preference for leaving the juvenile in his or her home. See MCL 712A.1(3), which states that "[i]f a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should

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[12] An "offense by a juvenile" is defined as a violation of a criminal law or ordinance, violation of a traffic law, or commission of a status offense. MCR 3.903(B)(3).

[13] See also MCL 712A.2(i), which provides, in relevant part:

"In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018. As used in this subdivision, 'party' means 1 of the following:

(*i*) In a delinquency proceeding, the petitioner and juvenile."

have been given to the juvenile by his or her parents." See also MCR 3.902(B), which contains substantially similar language.

MCL 712A.18(1) states:

> "If the court finds that a juvenile concerning whom a petition is filed is not within [the Juvenile Code], the court shall enter an order dismissing the petition. Except as otherwise provided in [MCL 712A.18(8)] and subject to [MCL 712A.18(9)],[14] if the court finds that a juvenile is within [the Juvenile Code], the court shall order the juvenile returned to the juvenile's parent if the return of the juvenile to the juvenile's parent would not cause a substantial risk of harm to the juvenile or society. Subject to [MCL 712A.18(9)], the court may also enter any of the following orders of disposition that are appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained[.]"[15]

A court's authority to make dispositional orders extends beyond the remedies listed in MCL 712A.18. *In re Macomber*, 436 Mich 386, 393, 398 (1990). In *In re Macomber*, 436 Mich at 398, the Michigan Supreme Court stated:

> "We are persuaded that to interpret the Juvenile Code only to authorize the dispositional remedies expressly provided in [MCL 712A.18] would severely limit the . . . court's effectiveness in providing for the well-being of children."

If a juvenile who is a student at a school in Michigan is adjudicated for committing criminal sexual conduct or assault with intent to commit sexual conduct involving sexual penetration or in the second degree, MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, or MCL 750.520g, a court must include in its adjudication order that the juvenile is prohibited from "attending the same school building that is attended by the victim of the violation." MCL 750.520o(1)(a). The court order must also prohibit the juvenile from "[u]tilizing a school bus for transportation to and from any school if . . . the juvenile will have contact with the victim during use of the school bus." MCL 750.520o(1)(b).[16]

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[14] MCL 712A.18(8) and MCL 28.243 require the Family Division, before entering an order of disposition or a judgment of sentence, to ensure that the juvenile's biometric data, including fingerprints, have been collected and forwarded as required by law.

[15] Orders that may be appropriate are listed in MCL 712A.18(1)(a)-(p).

[16] See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 8, for more information on MCL 750.520o.

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[17]

The court's dispositional requirements options under MCL 712A.18 are discussed in the following subsections.

A. Return Juvenile to His or Her Parents

In addition to entering any of the dispositional orders listed in MCL 712A.18(1)(a)-(o), the court *must* "order the juvenile returned to his or her parent if the return of the juvenile to his or her parent would not cause a substantial risk of harm to the juvenile or society." MCL 712A.18(1). This requirement was added to the statute effective June 12, 2018. See 2018 PA 58. To date, no cases have discussed its application.

B. Warn Juvenile and Dismiss Petition

The court may warn the juvenile or the juvenile's parents, guardian, or custodian and dismiss the petition. If the juvenile's offense has resulted in financial damages to any victim, the court must order the juvenile or the juvenile's parent to pay restitution as provided in MCL 712A.30, MCL 712A.31, MCL 780.794, and MCL 780.795. MCL 712A.18(1)(a); MCL 712A.18(7).

C. In-Home Probation

A court may "[p]lace the juvenile on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile." MCL 712A.18(1)(b). For purposes of MCL 712A.18, "*related*" means a relative as that term is defined in [MCL 712A.13a]." MCL 712A.18(1)(b). "Relative" means "an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce. A stepparent, ex-stepparent, or the parent who shares custody of a half-sibling shall be considered a relative for the purpose of placement." MCL 712A.13a(j).

[17] See Section 10.11 for additional information on MCR 3.937.

The court must order terms and conditions of probation or suspension, including reasonable rules governing the conduct of the parents, guardian, or custodian, if any, as the court believes determines necessary for the physical, mental, or moral well-being and behavior of the juvenile. MCL 712A.18(1)(b).[18] As a condition of probation or supervision, the court must order the juvenile to pay the minimum state cost prescribed by MCL 712A.18m. MCL 712A.18(1)(b). The court may also order a juvenile to participate in a drug treatment court as a term of probation.[19] *Id.*

Unlike the statutes governing probation in criminal cases,[20] MCL 712A.18 does not contain mandatory and discretionary probation terms and conditions.[21]

D. Foster Care

The court may place the juvenile in a suitable foster care home subject to the court's supervision. MCL 712A.18(1)(c).

Once in foster care,[22] the DHHS may place the child in a qualified residential treatment program (QRTP). See MCL 722.123a. Once placed, the court or its designated administrative body must approve or disapprove of a child's placement in a qualified residential treatment program. MCL 722.123a(3); see also MCR 3.947. A QRTP is a program within a child caring institution that provides specialized services to the minor children placed there. See MCL 722.111(w). A QRTP has a trauma-informed treatment model in which an awareness and knowledge of trauma and skills in dealing with trauma are included in the program's culture, practices, and policies. MCL 722.111(w)(*i*). Registered or licensed nursing and clinical staff are on-site or are available 24/7 to provide care in the scope of their practices. MCL 722.111(w)(*ii*). In addition, a QRTP "integrates families into treatment, including maintaining sibling connections," provides services for at least six months after discharge, is accredited as indicated in 42 USC 672(k)(4)(G) by an independent not-for-profit organization, and "does not include a detention facility, forestry camp, training school, or other facility operated primarily for

[18] See Section 2.12 and Section 10.10(H) for further discussion of the court's authority to enter orders concerning adults.

[19] See the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 10, for more information on drug treatment courts.

[20] See MCL 771.3.

[21] But see the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for mandatory conditions when restitution has been ordered as a condition of probation.

[22] "Foster care" is "24-hour substitute care for a child placed away from his or her parent or guardian and for whom the title IV-E agency has placement and care responsibility." MCL 722.123a(9)(a).

detaining minor children who are determined to be delinquent." MCL 722.111(w)(*iii*)-(*vi*).

Within 30 days of placing a child in a QRTP, the Department of Health and Human Services (DHHS) must have a qualified individual[23] conduct an assessment of the child's strengths and needs, determine which placement most aligns with the child's needs, and develop a list of mental and behavioral health goals for the child. See MCL 722.123a(1) for more information.

DHHS must file an ex parte petition requesting the court approve or disapprove the juvenile's placement in a QRTP within 45 days of the initial placement. MCR 3.947(A)(1). The petition must "be accompanied by the assessment, determination, and documentation made by the qualified individual," and the DHHS must serve all parties with the ex parte petition and all accompanying documentation. MCR 3.947(A)(1)(a)-(b). See also MCL 722.123a(1)-(2). "Within 14 days of filing, the court, or an administrative body appointed or approved by the court independently, shall review the petition, and any supporting documentation filed pursuant to [MCR 3.947(A)], and issue an order approving or disapproving of the placement." MCR 3.947(A)(2); MCL 722.123a(3)(a); MCL 722.123a(3)(c). "The court is not required to hold a hearing on the ex parte petition under [MCR 3.947(A)]." MCR 3.947(A)(2). The order shall include individualized findings by the court or administrative body as to whether the child's needs can be met in foster care, or if not, whether placement in a QRTP "provides the most effective and appropriate level of care for the child in the least restrictive environment and whether that placement is consistent with the goals for the child, as specified in the permanency plan for the child." MCL 722.123a(3)(b); MCR 3.947(2)(a)-(c). The court's or administrative body's written documentation of the determination and QRTP approval or disapproval must be made part of the child's case plan. MCL 722.123a(4). "The court shall serve the order on parties." MCR 3.947(A)(2).

"As long as a child remains placed in a qualified residential treatment program, the department must submit evidence at each dispositional review hearing and each permanency planning hearing held with respect to the child that does the following:

[23] A "qualified individual" is "a trained professional or licensed clinician who is not an employee of the department and who is not connected to, or affiliated with, any placement setting in which children are placed by the department. The department may seek a waiver from the [United States Secretary of the Department of Health and Human Services] to approve a qualified individual who does not meet the criteria in this subdivision to conduct the assessment. The individual must maintain objectivity with respect to determining the most effective and appropriate placement for the child." MCL 722.123a(9)(b)-(c).

> (a) Demonstrates that ongoing assessment of the strengths and needs of the child cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment, and that the placement is consistent with the short-term and long-term goals for the child, as specified in the permanency plan for the child.
>
> (b) Documenting the specific treatment or service needs that will be met for the child in the placement and the length of time the child is expected to need the treatment or services.
>
> (c) Documents the reasonable efforts made by the department to prepare the child to return home or to be placed with a fit and willing relative, a legal guardian, or an adoptive parent, or in a foster family home." MCL 722.123a(5).

The court must approve or disapprove of a child's placement in a QRTP when the matter is raised in a review hearing or a permanency planning hearing. MCL 712A.19(10); MCL 712A.19a(14); MCL 722.123a(6).

Detailed information about the treatment and services provided to a child placed in a QRTP, and the assessment and monitoring of a child's progress in the program by a qualified professional is found in MCL 722.123a.

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[24]

E. Placement in or Commitment to a Private Institution or Agency

The court may place the juvenile in or commit the juvenile to a private institution or agency approved or licensed by the Department of Health and Human Services' division of child welfare licensing for the care of juveniles of similar age, sex, and characteristics. MCL

[24] See Section 10.11 for additional information on MCR 3.937.

712A.18(1)(d). The court must transmit a summary of its information concerning the child with the order of disposition. MCL 712A.24.

MCL 712A.18a sets out special requirements for placing a juvenile in or committing a juvenile to a private institution or agency outside of Michigan:

> "If desirable or necessary, the court may place a ward of the court in or commit a ward of the court to a private institution or agency incorporated under the laws of another state and approved or licensed by that state's department of social welfare, or the equivalent approving or licensing agency, for the care of children of similar age, sex, and characteristics."

However, MCR 3.943(E)(3) provides that before a juvenile may be placed in an institution outside of Michigan, the court must find that:

> "(a) institutional care is in the best interests of the juvenile,
>
> b) equivalent facilities to meet the juvenile's needs are not available within Michigan, and
>
> (c) the placement will not cause undue hardship."

In a placement under MCL 712A.18(1)(d) or a commitment under MCL 712A.18(1)(e), "except to a state institution or a county juvenile agency, the juvenile's religious affiliation must be protected by placement or commitment to a private child placing or child caring agency or institution, if available." MCL 712A.18(1)(e).

Committing the juvenile to a private institution or agency does not divest the Family Division of jurisdiction unless the juvenile is legally adopted. MCL 712A.5.

> **Note**: A juvenile about whom "a complaint has been made or a petition has been filed under [MCL 712A.1 *et seq*.]," may be detained pending hearing "in a facility as the court designates," MCL 712A.15(1), provided the child meets at least one of the conditions in MCL 712A.15(2), and subject to the risk-screening requirements in MCL 712A.15(3).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[25]

F. Commitment to a Public Institution or Agency[26]

MCL 712A.18(1)(e) states in part:

> "Except as otherwise provided in this subdivision, [the court may] commit the juvenile to a public institution, county facility, institution operated as an agency of the court or county, or agency authorized by law to receive juveniles of similar age, sex, and characteristics. If the juvenile is not a ward of the court, the court shall commit the juvenile to the [Department of Health and Human Services (DHHS)] or, if the county is a county juvenile agency, to that county juvenile agency for placement in or commitment to an institution or facility as the [DHHS] or county juvenile agency determines is most appropriate, subject to any initial level of placement the court designates."

In a placement under MCL 712A.18(1)(d) or a commitment under MCL 712A.18(1)(e), "except to a state institution or a county juvenile agency, the juvenile's religious affiliation must be protected by placement or commitment to a private child placing or child caring agency or institution, if available." MCL 712A.18(1)(e).

"In a proceeding under [MCL 712A.2(h)[27]], [MCL 712A.18] only applies to a disposition for a violation of a personal protection order and subsequent proceedings." MCL 712A.18(21). MCR 3.988 governs the procedure for dispositional hearings on violations of a minor personal protection order issued under MCL 600.2950 and MCL 600.2950a, and contains language substantially similar to MCL 600.2950(23) and MCL 600.2950a(23) as to penalties and dispositional alternatives for minor respondents.

Where a court continues wardship over a juvenile and commits the juvenile to the DHHS, the court retains control over the juvenile's placement. *In re Family Independence Agency (On Rehearing)*, 248 Mich App 565, 569, 571-572 (2001). In *In re Family Independence Agency*, 248 Mich App at 567, the Family Division judge entered an order of disposition that continued temporary wardship over the juvenile, committed the juvenile to the DHHS,[28] and directed the DHHS to

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[25] See Section 10.11 for additional information on MCR 3.937.

[26] Public agency "means the [Department of Health and Human Services], a local unit of government, the family division of the circuit court, the juvenile division of the probate court, or a county juvenile agency." MCL 712A.1(1)(o).

[27] MCL 712A.2(h) gives the Family Division of Circuit Court jurisdiction over PPO proceedings under MCL 600.2950 and MCL 600.2950a in which the respondent is under age 18.

[28] Formerly the Family Independence Agency (FIA).

place the juvenile in the Maxey Boys Training School. The DHHS sought an order of superintending control and argued that the court's order deprived it of its authority under MCL 712A.18(1)(e) to determine an appropriate placement for the juvenile. *In re Family Independence Agency*, 248 Mich App at 567-568. The Court of Appeals concluded that the first sentence of MCL 712A.18(1)(e) gives the Family Division general authority to commit juveniles to the facilities and institutions designated in the statute. *In re Family Independence Agency*, 248 Mich App at 571. The only limitation on that authority arises when the juvenile is not continued as a court ward. *Id*. If the juvenile is not a court ward, the court must commit the juvenile to the DHHS or a county juvenile agency and may only designate an initial level of placement.[29] *Id.*

Placement options include:

- Referral to the DHHS for placement and care under MCL 400.55(h). See SCAO Form JC 14b, *Order of Disposition, Out-of-Home (Delinquency Proceedings)*.

- Commitment to the DHHS under the Youth Rehabilitation Services Act, MCL 803.301 *et seq*. See MCL 712A.18(1)(e). See also SCAO Form JC 14b, *Order of Disposition, Out-of-Home (Delinquency Proceedings)*.

- Placement in a juvenile boot camp program[30] established by the DHHS under MCL 400.1301 *et seq*. MCL 712A.18(1)(n). See also SCAO Form JC 14b, *Order of Disposition, Out-of-Home (Delinquency Proceedings)*.

- Commitment to a detention facility for use of a firearm. MCL 712A.18g(1)(c); MCR 3.943(E)(7)(a). Pursuant to these provisions, a juvenile must be committed under MCL 712A.18(1)(e) to a detention facility for a specified period of time if the court finds that the juvenile used a firearm during a criminal violation. MCL 712A.18g(1)(c); MCR 3.943(E)(7)(a). The period of time in detention shall not exceed the length of the sentence that could have been imposed if the juvenile had been sentenced as an adult for the offense. MCL 712A.18g(2); MCR 3.943(E)(7)(b).

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[29] If the court designates an initial level of placement, eligibility for funding under Title IV-E of the Social Security Act may be affected. See the DHHS Children's Foster Care Manual (FOM), *Funding Determinations and Title IV-E Eligibility*, 902, p 13, which states that in order to be eligible for Title IV-E funds, the court's order must make the DHHS "solely responsible for the child's placement and care." In addition, "[i]f the delinquency court supervises the youth's delinquency case and assumes placement and care responsibilities, then the youth is not title IV-E eligible." DHHS FOM, p 14. However, a juvenile may still be eligible for Title IV-E funds if the court orders placement as long as the court meets all requirements as stated in the DHHS FOM. See DHHS FOM, pp 14-15.

[30] This placement is authorized by MCL 712A.18(1)(n) and is discussed in Section 10.10(M).

> **Note**: A juvenile about whom "a complaint has been made or a petition has been filed under [MCL 712A.1 *et seq*.]," may be detained pending hearing "in a facility as the court designates," MCL 712A.15(1), provided the child meets at least one of the conditions in MCL 712A.15(2), and subject to the risk-screening requirements in MCL 712A.15(3).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[31]

G. Order for Health Care

The court may "[p]rovide the juvenile with medical, dental, surgical, or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship, and with clothing and other incidental items the court determines are necessary." MCL 712A.18(1)(f).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[32]

H. Orders Directed to Parents and Other Adults[33]

1. Refrain From Conduct Harmful to the Juvenile

The court may "[o]rder the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under [the court's jurisdiction] or that obstructs placement or commitment of the juvenile" pursuant to a dispositional order. MCL 712A.18(1)(g). See also MCL 712A.6 (court has jurisdiction over adults and may make such orders affecting adults that it finds necessary for physical, mental, or moral well-being of juveniles under its jurisdiction).

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[31] See Section 10.11 for additional information on MCR 3.937.

[32] See Section 10.11 for additional information on MCR 3.937.

[33] See Section 2.12 for further discussion of the court's authority to enter orders concerning adults.

"There are no limits to the 'conduct' [under MCL 712A.18(1)(g)] which the court might find harmful to a child." *In re Macomber*, 436 Mich at 393 (upholding trial court's order removing sexually abusive father from family home).

2. Participate in Treatment

The court may "order the juvenile's parent or guardian to personally participate in treatment reasonably available in the parent's or guardian's location." MCL 712A.18(1)(m).

3. Notice and Opportunity for Hearing

An order directed to a parent or other person who is not the juvenile is not binding (1) unless the parent or other person has been given an opportunity for a hearing pursuant to the issuance and service of a summons or notice as provided in MCL 712A.12 and MCL 712A.13, and (2) until the parent or other person is served with a copy of the order as provided in MCL 712A.13. MCL 712A.18(4).

I. Appoint a Guardian

Pursuant to a petition filed with the court by a person interested in the welfare of the juvenile, the court may appoint a guardian under MCL 700.5204. MCL 712A.18(1)(h). If the court appoints a guardian under MCL 712A.18(1)(h), it may dismiss the petition under MCL 712A.1 *et seq*. MCL 712A.18(1)(h).

J. Community Service

The court may "order the juvenile to engage in community service." MCL 712A.18(1)(i).

K. Civil Fines

The court may "order the juvenile to pay a civil fine in the amount of the civil or penal fine provided by the ordinance or law" that the juvenile violated. MCL 712A.18(1)(j).

The maximum amount of a penal fine is usually found in the penal statute that defines the offense. If the penal statute is silent on the amount of the fine, then the maximum amount of the fine is $5,000 for a felony and $500 for a misdemeanor. MCL 750.503; MCL 750.504.

- "Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except

when the court allows otherwise, for good cause shown." MCR 1.110.

L. Placement in a Secure Facility

If the court finds that the juvenile has violated an order under MCL 712A.2(a)(2)-(4), it may order the juvenile placed in a secure facility.[34] MCL 712A.18(1)(k). The court order "must state all of the following:

> (*i*) The court order the juvenile violated.
>
> (*ii*) The factual basis for determining that there was reasonable cause to believe that the juvenile violated the court order.
>
> (*iii*) The court's finding of fact to support a determination that there is no appropriate less restrictive alternative placement available considering the best interests of the juvenile.
>
> (*iv*) The length of time, not to exceed 7 days, that the juvenile may remain in the secure facility and the plan for the juvenile's release from the facility.
>
> (*v*) That the order may not be renewed or extended." MCL 712A.18(1)(k).

The court may issue a subsequent order under MCL 712A.18(1)(k) for a second or subsequent violation of a court order under MCL 712A.2(a)(2)-(4), "but only if the court finds both of the following:

> (*i*) The juvenile violated a court order after the date that the court issued the first order under [MCL 712A.18(1)(k)].
>
> (*ii*) The court has procedures in place to ensure that a juvenile held in a secure facility by a court order is not in custody more than 7 days or the length of time authorized by the court, whichever is shorter." MCL 712A.18(1)(*l*).
>
> **Note**: A juvenile about whom "a complaint has been made or a petition has been filed under [MCL 712A.1 *et seq*.]," may be detained pending hearing

[34] *Secure facility* "means any public or private licensed child caring institution identified by the [Department of Health and Human Services] as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

> "in a facility as the court designates," MCL 712A.15(1), provided the child meets at least one of the conditions in MCL 712A.15(2). "Before a juvenile may be detained in a secure facility pending hearing, an individual or agency designated by the court shall use a detention screening tool on the juvenile," and "shall consult the results of the detention screening tool and follow any rules regarding its use that are promulgated by the supreme court." MCL 712A.15(3).
>
> "A juvenile taken into custody under [MCL 712A.2(a)(2)-(4)] must not be detained in a cell or other secure area of a secure facility designed to incarcerate adults unless . . . the juvenile is not less than 18 years of age and is under the jurisdiction of the court under a supplemental petition under [MCL 712A.2(h)]." MCL 712A.15(6)(b)."Except as otherwise provided in [MCL 712A.15], the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process." MCL 712A.16(1).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[35]

M. Juvenile Boot Camp

The court may place the juvenile in and order the juvenile to satisfactorily complete a training program in a juvenile boot camp established by the Department of Health and Human Services (DHHS) under the Juvenile Boot Camp Act, MCL 400.1301 *et seq*. MCL 712A.18(1)(n). If the county is a county juvenile agency, the court must commit the juvenile to the county juvenile agency for placement in a boot camp program. *Id.*[36]

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[35] See Section 10.11 for additional information on MCR 3.937.

[36] The only county eligible to be a county juvenile agency is Wayne County. See House Legislative Analysis, SB 1185, December 9, 1998; see also Section (C). Currently, it is not operating as a county juvenile agency.

"A juvenile boot camp program shall provide a program of physically strenuous work and exercise, patterned after military basic training, and other programming as the [DHHS] determines, including at a minimum educational and substance abuse programs, and counseling." MCL 400.1304.

When deciding whether to place a juvenile in or commit a juvenile to a juvenile boot camp program, a court must determine all of the following:

> "(*i*) Placement in a juvenile boot camp will benefit the juvenile.
>
> (*ii*) The juvenile is physically able to participate in the program.
>
> (*iii*) The juvenile does not appear to have any mental handicap that would prevent participation in the program.
>
> (*iv*) The juvenile will not be a danger to other juveniles in the boot camp.
>
> (*v*) There is an opening in a juvenile boot camp program.
>
> (*vi*) If the court must commit the juvenile to a county juvenile agency, the county juvenile agency is able to place the juvenile in a juvenile boot camp program." MCL 712A.18(1)(n).

A juvenile's placement in a juvenile boot camp is limited to a period of not less than 90 days or more than 180 days. MCL 400.1305(2). Following satisfactory completion of the juvenile boot camp program, the juvenile must complete an additional period of not less than 120 days or more than 180 days of intensive supervised community reintegration in the juvenile's local community. MCL 400.1305(3); MCL 712A.18(1)(n).

If (1) a juvenile does not meet the program's requirements, (2) there is no opening in a program, (3) the county juvenile agency is unable to place the juvenile in a juvenile boot camp program, (4) the juvenile does not perform satisfactorily, or (5) the juvenile is medically unable to participate in the program for more than 25 days, the juvenile must be returned to the court for entry of an alternative order of disposition. MCL 400.1305(1)-(2); MCL 712A.18(18). A juvenile must not be placed in a juvenile boot camp pursuant to an order of disposition more than once. MCL 712A.18(18). However, if (1) the juvenile was returned to the court for a medical condition, (2) there was no opening in a juvenile boot camp program at the time of

disposition, or (3) the county juvenile agency was unable to place the juvenile in a boot camp program, the juvenile may be placed again in the juvenile boot camp program after the medical condition is corrected, an opening becomes available, or the county juvenile agency is able to place the juvenile. *Id.*

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[37]

N. Restitution

If the juvenile's offense has resulted in financial damages to any victim, then the court must order the juvenile or the juvenile's parent to pay restitution as provided in MCL 712A.30, MCL 712A.31, MCL 780.794, and MCL 780.795. MCL 712A.18(7); MCL 712A.30(2).[38]

10.11 Advice of Appellate Rights

"At the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody, the court must advise the juvenile on the record that:

> (1)The juvenile has a right to appellate review of the order.
>
> (2) If the juvenile cannot afford an attorney for appeal, the court will appoint an attorney at public expense and provide the attorney with the complete transcripts and record of all proceedings.
>
> (3) A request for the appointment of an appellate attorney must be made
>
> > (a) within 21 days after notice of the order is given or an order is entered denying a timely-filed postjudgment motion, if the juvenile wants to preserve any appeal by right authorized by these rules; or
> >
> > (b) within 6 months of the entry of the order to be appealed." MCR 3.937(A); MCR 3.943(F).

[37] See Section 10.11 for additional information on MCR 3.937.

[38] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for discussion of restitution requirements.

"An advisement of rights must be made in language designed to ensure the juvenile's understanding of their rights. After advising a juvenile of their rights, the court must inquire whether the juvenile understands each of their rights." MCR 3.937(B).

"The court must provide the juvenile with a request for appointment of appellate counsel form containing an instruction that the form must be completed and filed as required by MCR 3.993(D) if the juvenile wants the court to appoint an appellate attorney." MCR 3.937(C).

10.12 Required Procedures When a Juvenile Escapes From Placement

MCL 750.186a(1) makes it a felony for an individual who is placed in a juvenile facility to escape or attempt to escape from that juvenile facility or from the custody of an employee of that facility.[39] A juvenile facility includes an institution operated as an agency of the county or court, and a state institution to which an offender has been committed for a misdemeanor or felony offense. MCL 750.186a(2)(b).

A. Notification Required When Juvenile Escapes

1. Law Enforcement

A law enforcement agency must be notified when a juvenile escapes from a facility or residence in which he or she has been placed. Specifically, MCL 712A.18j(1) states:

> "If a juvenile escapes from a facility or residence in which he or she has been placed for a violation described in section 2(a)(1) of this chapter [(violations of law or ordinance)], other than his or her own home or the home of his or her parent or guardian, the individual at that facility or residence who has responsibility for maintaining custody of the juvenile at the time of the escape shall immediately notify 1 of the following of the escape or cause 1 of the following to be immediately notified of the escape:
>
> > "(a) If the escape occurs in a city, village, or township that has a police department, the police department of that city, village, or township.

[39] "'[E]scape' means to leave without lawful authority or to fail to return to custody when required." MCL 712A.18j(3).

> "(b) Except as provided in subdivision (a), 1 of the following:
>
> > "(*i*) The sheriff department of the county in which the escape occurs.
> >
> > "(*ii*) The department of state police post having jurisdiction over the area in which the escape occurs."

MCL 400.115n and MCL 803.306a contain substantially similar provisions regarding juveniles placed with the Department of Health and Human Services (DHHS) and juveniles committed to the DHHS (public wards), respectively.

A juvenile's escape must be entered into the Law Enforcement Information Network ("LEIN"). MCL 400.115n(2); MCL 712A.18j(2); MCL 803.306a(3).

2. Victim

In juvenile delinquency proceedings, if the victim requests notification in writing, the DHHS, county juvenile agency, or court must give the victim notice of the juvenile's escape from "a secure detention or treatment facility." MCL 780.798(3). The victim must be given "immediate notice of the escape by any means reasonably calculated to give prompt actual notice." *Id.*

In addition, upon the victim's written request, the court, the DHHS, or county juvenile agency must make a good faith effort to notify the victim when the juvenile is detained for committing a subsequent criminal offense. MCL 780.798(1)(d).

B. Apprehension of Juveniles Absent From Placement Without Authority

The court may issue an order to apprehend a juvenile who is absent without leave from a facility or institution in which the juvenile has been committed under MCL 712A.18. MCL 712A.2c. The order must identify the juvenile and the location "where there is probable cause to believe the juvenile is to be found." *Id.*

A public ward[40] may be apprehended and returned to placement without a warrant. MCL 803.306(1).

C. Detaining Juvenile Who Leaves Placement Without Authority

If a juvenile who has been found responsible for committing a criminal offense is apprehended after leaving his or her out-of-home placement without authority, the juvenile may be detained without the right to bail if authorized by the court. MCR 3.946(A). A juvenile who is placed in secure detention is entitled to a detention hearing within 48 hours of being taken into custody, excluding Sundays and holidays, if "no new petition is filed that would require a preliminary hearing pursuant to MCR 3.935, and no probation violation petition is filed[.]" MCR 3.946(B). "At the detention hearing the court must:

> "(1) assure that the custodial parent, guardian, or legal custodian has been notified, if that person's whereabouts are known,
>
> "(2) advise the juvenile of the right to be represented by an attorney,
>
> "(3) determine whether the juvenile should be released or should continue to be detained." MCR 3.946(C).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[41]

10.13 Supplemental Orders of Disposition

At any time while a juvenile is under the court's jurisdiction, the court may amend or supplement a disposition order "within the authority granted to the court in [MCL 712A.18.]" MCL 712A.19(1). MCR 3.943(E)(2) requires the court to consider imposing graduated sanctions upon a juvenile when making second and subsequent dispositions in delinquency cases:

> "In making second and subsequent dispositions in delinquency cases, the court must consider imposing

[40] A "public ward" is defined as either "[a] youth accepted for care by a youth agency who is at least 12 years of age when committed to the youth agency by . . . the family division of circuit court under [MCL 712A.18(1)(e)], if the court acquired jurisdiction over the youth under [MCL 712A.2(a) (violations of law or ordinance and certain status offenses)] or [MCL 712A.2(d) ("wayward minor" status offenses)], and the act for which the youth is committed occurred before his or her eighteenth birthday[,]" or "[a] youth accepted for care by a youth agency who is at least 14 years of age when committed to the youth agency by a court of general criminal jurisdiction under . . . MCL 769.1, if the act for which the youth is committed occurred before his or her eighteenth birthday." MCL 803.302(c).

[41] See Section 10.11 for additional information on MCR 3.937.

> increasingly severe sanctions, which may include imposing additional conditions of probation; extending the term of probation; ordering a juvenile who has been residing at home into an out-of-home placement; ordering a more restrictive placement; ordering state wardship for a child who has not previously been a state ward; or any other conditions deemed appropriate by the court. Waiver of jurisdiction to adult criminal court, either by authorization of a warrant or by judicial waiver, is not considered a sanction for the purpose of this rule."

Chapter 11: Probation Violations in Cases Involving Juvenile Dispositions

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In this chapter. . .

The rules in this chapter govern probation violations in cases in which juvenile disposition has been imposed, i.e., in delinquency cases; in minor personal protection order cases in which a juvenile has been placed on probation following a violation of the personal protection order, MCL 712A.18(21) and MCR 3.989; and in designated proceedings in which the court has imposed a juvenile disposition following conviction, MCL 712A.18(1)(o).

For probation violations in other contexts, see the following:

- For discussion of probation violations in designated proceedings in which the court has delayed imposition of an adult sentence, see Chapter 15, Part F.
- For discussion of probation violations in automatic waiver cases in which the court has imposed juvenile probation and committed the juvenile to state wardship, see Chapter 16, Part E.

- For discussion of probation violations in traditional waiver cases and in designated and automatic waiver cases in which adult sentence has been imposed, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2.

11.1 Initiating Probation Violation Proceedings

In a case in which probation was imposed in a juvenile disposition, a court has two options under MCR 3.944(A) when initiating probation violation proceedings:

> "(1) Upon receipt of a sworn supplemental petition alleging that the juvenile has violated any condition of probation, the court may:
>
> (a) direct that the juvenile be notified pursuant to MCR 3.920 to appear for a hearing on the alleged violation, which notice must include a copy of the probation violation petition and a notice of the juvenile's rights as provided in [MCR 3.944](C)(1)[1]; or
>
> (b) order that the juvenile be apprehended and brought to the court for a detention hearing, which, except as otherwise provided in [MCR 3.944], must be commenced within 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays as defined in MCR 8.110(D)(2)."

11.2 Detention Hearings[2]

A. Apprehending a Juvenile for Probation Violation

Instead of issuing a summons directing a juvenile to appear for a probation violation hearing, the court may issue an order to apprehend a juvenile and bring him or her before the court for a detention hearing. MCL 712A.2c states:

> "The court may issue an order authorizing a peace officer or other person designated by the court to

[1] See Section 11.3(B) for a list of these rights.

[2] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

> apprehend a juvenile who . . . has violated probation. . . . The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes with the lawful attempt to execute an order issued under this section 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."

If a juvenile is detained, notice of the detention hearing must be given to the juvenile and his or her parent as soon as the hearing is scheduled, in person, in writing, on record, or by telephone. See MCR 3.920(D)(2)(a); MCR 3.944(A)(2)(b).

An officer who apprehends a juvenile for a probation violation must immediately take the juvenile to the court for a detention hearing or to the place designated by the court pending the scheduling of a detention hearing. MCR 3.944(A)(2)(a). The officer must also notify the juvenile's custodial parent, guardian, or legal custodian of (1) the juvenile's apprehension; (2) the time and place of the detention hearing, if known; and (3) the need for the parent's, guardian's, or legal custodian's presence at the detention hearing. MCR 3.944(A)(2)(b).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[3]

B. Conducting a Detention Hearing

The procedural requirements at a detention hearing are similar to those required at a preliminary examination. See MCR 3.944(B), which states, in part:

> "(1) The court must determine whether a parent, guardian, or legal custodian has been notified and is present. If a parent, guardian, or legal custodian has been notified, but fails to appear, the detention hearing may be conducted without a parent, guardian, or legal custodian if a guardian ad litem or attorney appears with the juvenile.
>
> (2) The court must provide the juvenile with a copy of the petition alleging probation violation.

[3] See Section 10.11 for additional information on MCR 3.937.

> (3) The court must read the petition to the juvenile, unless the attorney or juvenile waives the reading.
>
> (4) The court must advise the juvenile of the juvenile's rights as provided in [MCR 3.944](C)(1) and of the possible dispositions.[4]
>
> (5) The juvenile must be allowed an opportunity to deny or otherwise plead to the probation violation. If the juvenile wishes to admit the probation violation or plead no contest, the court must comply with [MCR 3.944](D)[5] before accepting the plea.
>
> (6) The court must consider the results of a detention screening tool in accordance with MCR 3.907."

If the court accepts a plea of admission or no contest from the juvenile, the court may modify the existing probation order or "may order any disposition available under MCL 712A.18 or MCL 712A.18a." MCR 3.944(B)(5)(a).[6]

If the juvenile denies violating probation or remains silent at the detention hearing, the juvenile may be detained without bond pending a probation violation hearing if the court finds probable cause to believe that the juvenile violated probation. MCR 3.944(B)(5)(b).

If the juvenile is detained in a secure facility[7] pending a detention hearing for violating a court order under MCL 712A.2(a)(2)-(4), the petitioner must "ensure that an appropriately trained, licensed, or certified mental health or substance abuse professional interviews the juvenile in person within 24 hours to assess the immediate mental health and substance abuse needs of the juvenile." MCL 712A.15(4); MCR 3.944(B)(5)(c). The completed assessment must be provided to the court within 48 hours of the placement. *Id*. At the detention hearing, the court must "determine all of the following:

> (*i*) If there is reasonable cause to believe that the juvenile violated the court order.

---

[4] See Section 11.3(B) for a list of these rights. Section 11.6 discusses possible dispositions following a finding of probation violation.

[5] See Section 11.5 for plea requirements at a probation violation hearing.

[6] See Section 11.5 for plea requirements at a probation violation hearing.

[7] Secure facility "means any public or private licensed child caring institution identified by the [Department of Health and Human Services] as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

(*ii*) The appropriate placement of the juvenile pending the disposition of the alleged violation, including if the juvenile should be placed in a secure facility." MCL 712A.15(4); MCR 3.944(B)(5)(c).

"Any statement, admission, confession, or incriminating evidence obtained from a juvenile in the course of a screening under [MCL 712A.15] is not admissible as evidence in an adjudicatory hearing in which the juvenile is accused, is not subject to subpoena, and may not be used in any other court proceeding or for any other purpose." MCL 712A.15(3).

See Section 11.6(B) for information on the required findings for placing a juvenile in a secure facility following a probation violation hearing.

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[8]

11.3 Probation Violation Hearings[9]

A. Time Requirements

If the juvenile was apprehended and subjected to a detention hearing under MCR 3.944(B), a probation violation hearing must be held only if the juvenile denied violating probation or remained silent at the detention hearing. MCR 3.944(B)(5)(b). The probation violation hearing must be held within 42 days of the detention hearing. *Id*. "If the hearing is not commenced within 42 days, and the delay in commencing the hearing is not attributable to the juvenile, the juvenile must be released pending hearing without requiring that bail be posted." *Id.*

If the court did not order the juvenile to be apprehended when it received the petition alleging a probation violation, there does not

[8] See Section 10.11 for additional information on MCR 3.937.

[9] Criminal cases often refer to probation violation hearings as "probation revocation hearings." Some criminal cases are discussed in this subsection where no juvenile case law on point exists. However, it is important to note that, although a reference may be made to "probation revocation hearings," the court may, but is not required to, revoke probation if it finds that a probation violation has been committed. See MCR 3.944(E)(1). "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

appear to be a time requirement for holding the probation violation hearing. See MCR 3.944(A)(1)(a). All that is required is sufficient notice under MCR 3.920. MCR 3.944(A)(1)(a).

B. Due Process Rights

A probation violation hearing is considered to be a dispositional hearing rather than an adjudicative hearing because "[t]he hearing is conducted only to determine whether probation has been violated; the hearing does not result in a conviction on the underlying crime." *In re Scruggs*, 134 Mich App 617, 622 (1984). However, a juvenile has rights—contained in applicable court rules and required by due process—at a probation violation hearing. See *id.* at 621; MCR 3.944(C)(1). MCR 3.944(C)(1) states that a juvenile has the following rights at a probation violation hearing:

> "(a) the right to be present at the hearing,
>
> (b) the right to an attorney pursuant to MCR 3.915(A)(1),[10]
>
> (c) the right to have the petitioner prove the probation violation by a preponderance of the evidence,
>
> (d) the right to have the court order any witnesses to appear at the hearing,
>
> (e) the right to question witnesses against the juvenile,
>
> (f) the right to remain silent and not have that silence used against the juvenile, and
>
> (g) the right to testify at the hearing, if the juvenile wants to testify."

There is no right to a jury trial at a probation violation hearing. MCR 3.944(C)(2).

C. Evidentiary Issues

The Michigan Rules of Evidence, other than those with respect to privileges, do not apply at a probation violation hearing. MCR 3.944(C)(2).

A probationer cannot be compelled to testify against himself or herself at a probation violation hearing. See *People v Manser*, 172 Mich App 485, 488 (1988). See also MCR 3.944(C)(1)(g).

[10] See Section 6.3(C).

"[E]vidence of a defendant's failure to respond to an accusation of wrongdoing is inadmissible to prove guilt even if the defendant had, prior to his [or her] silence, waived his [or her] right to remain silent." *People v Staley*, 127 Mich App 38, 41-42 (1983). This rule applies to probation revocation hearings. *Id.* at 42.

A court has the authority to call or examine witnesses and to order production of additional evidence or witnesses:

> "If at any time the court believes that the evidence has not been fully developed, it may:
>
> (1) examine a witness,
>
> (2) call a witness, or
>
> (3) adjourn the matter before the court, and
>
> (a) cause service of process on additional witnesses, or
>
> (b) order production of other evidence." MCR 3.923(A).

D. Probation Violation Based on Finding of Responsibility For an Offense

A juvenile may be found to have violated probation based on a finding of responsibility for an offense from a plea or at trial. MCR 3.944(C)(3).

It is not necessary to delay a probation revocation hearing because proceedings involving the underlying offense against the probationer are pending and involve the same conduct for which revocation is sought. *People v Nesbitt*, 86 Mich App 128, 136 (1978). However, if a probation revocation hearing is conducted before a trial involving the same facts, the probationer's testimony at the hearing and any evidence derived from it are admissible only for purposes of impeachment or rebuttal at the subsequent trial. *People v Rocha*, 86 Mich App 497, 512-513 (1978). A probationer must be advised before he or she takes the stand at the revocation hearing that his or her testimony and its fruits will not be admissible against him or her at a subsequent criminal trial on the underlying offense. *Id.* at 513.

A probationer is not subjected to double jeopardy where the same criminal activity is the subject of both probation violation and criminal proceedings. *People v Burks*, 220 Mich App 253, 256 (1996). Jeopardy does not attach at a probation revocation hearing because it is not a criminal prosecution and "a determination by a trial court that a probationer has violated the terms of the probation order does not

burden the probationer with a new conviction or expose the probationer to punishment other than that to which the probationer was already exposed as a result of the previous conviction for which the probationer was placed on probation." *Id.* at 256.

11.4 Advice of Rights in the Summons or at a Detention Hearing

In a notice to appear for a probation violation hearing or at the detention hearing, the juvenile must be provided a copy of the probation violating petition and advised of his or her rights under MCR 3.944(C)(1).[11] MCR 3.944(A)(1)(a); MCR 3.944(B)(2); MCR 3.944(B)(4).

11.5 Plea Procedures

MCR 3.944(D) sets out the required procedures for accepting a plea of admission or no contest to an alleged probation violation:[12]

> "If the juvenile wishes to admit the probation violation or plead no contest, before accepting the plea, the court must:
>
> (1) tell the juvenile the nature of the alleged probation violation;
>
> (2) tell the juvenile the possible dispositions;[13]
>
> (3) tell the juvenile that if the plea is accepted, the juvenile will not have a contested hearing of any kind, so the juvenile would give up the rights that the juvenile would have at a contested hearing, including the rights as provided in [MCR 3.944](C)(1);[14]
>
> (4) confirm any plea agreement on the record;
>
> (5) ask the juvenile if any promises have been made beyond those in the plea agreement and whether anyone has threatened the juvenile;
>
> (6) establish support for a finding that the juvenile violated probation,

[11] See Section 11.3(B) for a list of rights afforded the juvenile under MCR 3.944(C)(1).

[12] The required procedures are similar to those required for accepting a plea from a juvenile who has allegedly committed an offense. See Chapter 8 for a detailed discussion of these procedures.

[13] See Section 11.6 for discussion of possible dispositions following a finding that a juvenile violated probation.

[14] See Section 11.3(B) for a list of rights afforded a juvenile at a probation violation hearing.

(a) by questioning the juvenile or by other means when the plea is a plea of admission, or

(b) by means other than questioning the juvenile when the juvenile pleads no contest. The court must also state why a plea of no contest is appropriate;

(7) inquire of the parent, guardian, legal custodian, or guardian ad litem whether there is any reason why the court should not accept the juvenile's plea. Agreement or objection by the parent, guardian, legal custodian, or guardian ad litem to a plea of admission or of no contest by a juvenile shall be placed on the record if the parent, guardian, legal custodian, or guardian ad litem is present; and

(8) determine that the plea is accurately, voluntarily and understandingly made."

Generally, the record must reflect that the probationer was made aware of his or her right to a contested hearing as an alternative to pleading guilty. *People v Edwards,* 125 Mich App 831, 833 (1983). Failure to inform a probationer of his or her right to a contested hearing violates due process. *Id.* at 833. Absent "direct and affirmative proof" that the probationer read and understood a notice of probation violation containing notice of the right to a contested hearing, the probationer's receipt of such a notice does not constitute adequate advice of the right. *Id.* at 834-835. Notice of the right to a contested hearing as an alternative to pleading guilty is especially important when the probationer has waived the right to counsel. *People v Alame,* 129 Mich App 686, 690 (1983).

Advice of the right to a contested hearing is not required where the plea proceeding immediately follows an arraignment[15] at which the probationer was fully advised of his or her right to a contested probation revocation hearing. *People v Terrell,* 134 Mich App 19, 23 (1984).

11.6 Dispositions Following a Finding of Probation Violation

If a court accepts a juvenile's plea of admission or no contest to a probation violation, or if the court finds a probation violation following a violation hearing, the court may modify the existing probation order or order any other disposition under MCL 712A.18 or MCL 712A.18a.[16] MCR 3.944(B)(5)(a); MCR 3.944(E)(1).

[15] An arraignment in a criminal proceeding is the functional equivalent of a preliminary hearing in a juvenile delinquency proceeding. *In re Wilson,* 113 Mich App 113, 121 (1982).

A. Failure to Pay Restitution

"A juvenile must not be detained or incarcerated solely because of nonpayment of restitution. If the juvenile has the resources to pay and has not made a good-faith effort to pay restitution, the court may revoke or alter the terms and conditions of probation as provided in MCL 712A.30." MCR 3.944(F).[17]

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[18]

B. Detention in a Secure Facility

If, after hearing, the court finds that the juvenile has violated a court order under MCL 712A.2(a)(2)-(4), the court may order that the juvenile be placed in a secure facility if it has considered the results of a detention screening tool in accordance with MCR 3.907.[19] MCR 3.944(E)(2). An order requiring the juvenile to be placed in a secure facility must include all of the following individualized findings by the court:

> "(*i*) The court order the juvenile violated.
>
> (*ii*) The factual basis for determining that there was reasonable cause to believe that the juvenile violated the court order.
>
> (*iii*) The court's finding of fact to support a determination that there is no appropriate less restrictive alternative placement available considering the best interests of the juvenile.
>
> (*iv*) The length of time, not to exceed 7 days, that the juvenile may remain in the secure facility and the plan for the juvenile's release from the facility." MCL 712A.18(1)(k)(*i*)-(*iv*); MCR 3.944(E)(2)(a)-(d).

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[16] See Chapter 10 for discussion of juvenile dispositions.

[17] See MCR 6.425(D)(3) (governing incarceration for nonpayment in adult criminal and contempt cases) for guidance in determining whether a juvenile or parent has the ability to pay court-ordered financial obligations. See Section 19.2 for discussion of MCR 6.425(D)(3).

[18] See Section 10.11 for additional information on MCR 3.937.

[19] Secure facility "means any public or private licensed child caring institution identified by the [Department of Health and Human Services] as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

An order under MCL 712A.18(1)(k) "may not be renewed or extended." MCL 712A.18(1)(k)(*v*); MCR 3.944(E)(2)(e). However, the court may issue a second or subsequent order under MCL 712A.18(1)(k) for a second or subsequent violation of a court order under MCL 712A.2(a)(2)-(4), "but only if the court finds both of the following:

> (*i*) The juvenile violated a court order after the date that the court issued the first order under [MCL 712A.18(1)(k).
>
> (*ii*) The court has procedures in place to ensure that a juvenile held in a secure facility by a court order is not in custody for more than 7 days or the length of time authorized by the court, whichever is shorter." MCL 712A.18(1)(*l*).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[20]

C. Reporting Disposition

A probation violation based on a juvenile's responsibility for committing an offense must be recorded as a probation violation only, not as a finding of responsibility for the underlying offense. MCR 3.944(E)(3). "That finding must not be reported to the State Police or the Secretary of State as an adjudication or a disposition." *Id.*

D. Supplemental Dispositions

At any time while a juvenile is under the court's jurisdiction, the court may terminate jurisdiction or amend or supplement a disposition order "within the authority granted to the court in [MCL 712A.18.]" MCL 712A.19(1). MCR 3.943(E)(2) requires the court to consider imposing graduated sanctions on a juvenile when making second and subsequent dispositions in delinquency cases:

> "In making second and subsequent dispositions in delinquency cases, the court must consider imposing increasingly severe sanctions, which may include imposing additional conditions of probation; extending the term of probation; ordering a juvenile who has been residing at home into an out-of-home placement; ordering a more restrictive placement; ordering state

[20] See Section 10.11 for additional information on MCR 3.937.

> wardship for a child who has not previously been a state ward; or any other conditions deemed appropriate by the court. Waiver of jurisdiction to adult criminal court, either by authorization of a warrant or by judicial waiver, is not considered a sanction for purposes of this rule."

11.7 Recording Probation Violation and Detention Hearings

> "A record of all hearings must be made. All proceedings on the formal calendar must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded." MCR 3.925(B).

The formal calendar includes all judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing. MCR 3.903(A)(10). Therefore, detention hearings, plea hearings, and probation violation hearings must be recorded.

Chapter 12: Review of Juvenile Dispositions & Extending Jurisdiction

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In this chapter. . .

The rules in this chapter govern review of dispositions in delinquency cases and, when the juvenile is under age 18, in minor personal protection order proceedings. The rules in this chapter also apply in designated case proceedings in which the court has imposed a juvenile disposition following conviction; however, MCL 712A.18d(6) states that MCL 712A.18d, which governs commitment review hearings, "does not apply to a juvenile convicted under [the Juvenile Code] for committing a crime." It is unclear what statute or court rule governs commitment review hearings in such cases. For an explanation of review proceedings in designated cases in which the court has delayed imposition of adult sentence, see Chapter 15, Part E. Review proceedings in automatic waiver cases are discussed in Chapter 16, Part D.

All of the review hearings discussed in this chapter occur after the judge or referee has chosen one or more of the dispositional options available in MCL 712A.18(1).[1] These hearings are as follows:

- Periodic review hearings at intervals designated by the court or when requested by a party, probation officer, or caseworker. MCR 3.945(A)(1).[2]

[1] See Section 10.10 for discussion of those options.

- Disposition review hearings to approve or disapprove of a child's initial or continued placement in a qualified residential treatment program. MCR 3.945(A)(2)(c).[3]

- Dispositional review hearings required before a juvenile may be moved to a more physically restrictive placement. MCR 3.945(A)(2)(b).[4]

- Dispositional review hearings every 182 days for all juveniles who have been placed into out-of-home care. MCR 3.945(A)(2)(a).[5]

- Commitment review hearings at age 19 to determine whether the Family Division should continue jurisdiction over a court-committed juvenile until age 21. MCR 3.945(B).[6]

- Dispositional review hearings every 182 days after a commitment review hearing. MCR 3.945(C)(1).[7]

- Commitment review hearings at any age that are initiated by the institution to which the juvenile has been committed. MCR 3.945(C)(2).[8]

12.1 Dispositional Review Hearings[9]

A. Generally

MCR 3.945(A)(1) requires the court to conduct periodic hearings to review dispositional orders in juvenile delinquency cases where the juvenile was placed outside his or her own home:

> "Such review hearings must be conducted at intervals designated by the court, or may be requested at any

[2] See Section (A).

[3] See Section 10.10(D).

[4] See Section (C).

[5] See Section (B).

[6] See Section 12.2.

[7] See Section 12.2(G).

[8] See Section 12.2(G).

[9] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

> time by a party or by a probation officer or caseworker. The victim has a right to make a statement at the hearing or submit a written statement for use at the hearing, or both. At a dispositional review hearing, the court may modify or amend the dispositional order or treatment plan to include any disposition permitted by MCL 712A.18 and MCL 712A.18a or as otherwise permitted by law; and shall permit the court to approve or disapprove of the child's initial or continued placement in a qualified residential treatment.[10] The Michigan Rules of Evidence, other than those with respect to privileges, do not apply."

MCR 3.904(A)(1) provides that courts may use videoconferencing technology when conducting dispositional hearings and postdispositional progress reviews. See Section 1.4 for discussion of videoconferencing technology.

A juvenile does not have a right to a jury at a dispositional review hearing under the Juvenile Code. See MCR 3.911(A), which states that "[t]he right to a jury in a juvenile proceeding exists only at the trial."

B. Juveniles Placed in Out-of-Home Care

1. Generally

MCR 3.945(A)(2)(a) states that "[i]f the juvenile is placed in out-of-home care, the court must hold dispositional review hearings no later than every 182 days after the initial disposition, as provided in MCL 712A.19(2)."[11] MCL 712A.19(2) states in relevant part:

> "Except as provided in . . . [MCL 712A.19](4), . . . a review hearing must be held not more than 182 days from the date a petition is filed to give the court jurisdiction over the child and no later than every 91 days after that for the first year that the child is subject to the court's jurisdiction. After the

---

[10] See MCL 712A.2(i), which provides, in relevant part:

"In a proceeding under [the Juvenile Code] concerning a juvenile's care and supervision, the court may issue orders affecting a party as necessary[until] . . . May 1, 2018. As used in this subdivision, 'party' means 1 of the following:

(*i*) In a delinquency proceeding, the petitioner and juvenile."

[11] 2004 PA 477 eliminated the language in MCL 712A.19(2) governing dispositional review hearings for juveniles placed in foster care, and the statute now solely governs review hearings for children who remain in their own homes. Although the statute no longer governs review hearings for juveniles in out-of-home care, MCR 3.945(A)(2)(a) still refers to it, and is therefore applicable by reference.

> first year that the child is subject to the court's jurisdiction, a review hearing shall be held no later than 182 days from the immediately preceding review hearing before the end of that first year and no later than every 182 days from each preceding review hearing after that until the case is dismissed."

A review hearing under MCL 712A.19(2) must not be canceled or delayed, but the hearing may be held earlier on motion by a party or at the court's discretion to review any element of the case service plan. *Id.*

MCL 712A.19(4) governs dispositional review hearings where the juvenile is under the care and supervision of the Department of Health and Human Services (DHHS) and is in relative placement that is intended to be permanent, or is in a permanent foster family agreement. In those circumstances, a review hearing must be held "not more than 182 days after the child has been removed from his or her home and no later than every 182 days after that so long as the child is subject to the jurisdiction of the court, the Michigan children's institute, or other agency." *Id.* A review hearing under MCL 712A.19(4) must not be canceled or delayed, but the hearing may be held earlier on motion by a party or at the court's discretion to review any element of the case service plan. *Id.*

"At a review hearing held under this section, the court shall approve or disapprove of a child's initial placement or continued placement in a qualified residential treatment program." MCR 3.945(A)(2)(c).

Notice of a dispositional review hearing must be provided as required by MCR 3.920 and MCR 3.921. See Chapter 5 for service of process requirements in delinquency proceedings.

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[12]

[12] See Section 10.11 for additional information on MCR 3.937.

2. Juveniles Committed to Public Institution or Agency[13]

If a juvenile is committed to a public institution or agency under MCL 712A.18(1)(e) "for an offense which, if committed by an adult, would be punishable by imprisonment for more than 1 year or an offense expressly designated by law to be a felony," or because he or she was adjudicated and found to come within the court's jurisdiction under MCL 712A.2(a), the court must retain jurisdiction over the juvenile. MCL 712A.18c(1); MCL 712A.18c(2). When the court retains jurisdiction under either of these provisions, it must conduct an annual dispositional review. MCL 712A.18c(3). The court must review "the services being provided to the child, the child's placement, and the child's progress in that placement." In conducting this annual review, the court must examine the annual report prepared by the Department of Human Services pursuant to MCL 803.223. MCL 712A.18c(3). "The court may order changes in the child's placement or treatment plan based on the review." *Id.*[14]

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[15]

3. Reasonable Efforts

In order to receive federal foster care maintenance payments under Title IV-E of the Social Security Act in delinquency cases, the juvenile and his or her placement must be eligible for Title IV-E funding,[16] and the court is required to make a finding that reasonable efforts have been made to avoid non-emergency removal of a child from his or her home and placement of the child in foster care. 42 USC 672(a)(1).

Accordingly, the court "must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured[.]" 45 CFR 1356.21(b). The court must make a child's

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[13] Public agency "means the [Department of Health and Human Services], a local unit of government, the family division of the circuit court, the juvenile division of the probate court, or a county juvenile agency." MCL 712A.1(1)(o).

[14] See SCAO Form JC 57, *Supplemental Order of Disposition Following Review Hearing (Delinquency Proceedings)*.

[15] See Section 10.11 for additional information on MCR 3.937.

[16] See Section (E) for information on eligibility.

health and safety its paramount concern when making reasonable efforts determinations. 45 CFR 1356.21(b).

The court's failure to make a reasonable efforts determination within 60 days of the child's removal will result in the child's ineligibility for federal foster care maintenance payments under Title IV-E during the child's stay in foster care. 45 CFR 1356.21(b)(1).

C. Moving a Juvenile to a More Physically Restrictive Placement

The court must conduct a review hearing before moving a juvenile to a more physically restrictive placement, unless the court provided for a more restrictive placement in its dispositional order or the juvenile and his or her parent consent in a writing filed with the court. MCR 3.945(A)(2)(b).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[17]

12.2 Continued Jurisdiction Beyond a Juvenile's 18th Birthday[18]

A. Generally

The Family Division has jurisdiction over juveniles under 18 years of age who violate a law or ordinance or commit a status offense. MCL 712A.2(a). However, jurisdiction may be continued until a child reaches the age of 20 or 21 under MCL 712A.2a. If the court has exercised jurisdiction over a juvenile under MCL 712A.2(a), it must extend jurisdiction until the juvenile reaches age 20, unless the court terminates jurisdiction sooner by order. MCL 712A.2a(1). However, if the court has exercised jurisdiction over a juvenile under MCL 712A.2(a)(1) for committing an enumerated serious offense,

[17] See Section 10.11 for additional information on MCR 3.937.

[18] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth[,]" is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred[]") (emphasis supplied; citations omitted).

jurisdiction may be extended until the juvenile reaches age 21. MCL 712A.2a(5).[19]

MCL 712A.19(1) states in part that "if a child remains under the court's jurisdiction, a cause may be terminated or an order may be amended or supplemented, within the authority granted to the court in [MCL 712A.18.]"

B. Minor Personal Protection Order Proceedings

If the court has issued a minor personal protection order (PPO) under MCL 712A.2(h), the court's jurisdiction continues until the PPO expires, but any action regarding the PPO after the juvenile reaches age 18 is not governed by the procedures contained in the Juvenile Code.[20] MCL 712A.2a(6).

C. Juveniles Committed to Public Institution or Agency[21]

Generally, the court retains jurisdiction over a juvenile committed under MCL 712A.18(1)(e) to a public institution or agency until the juvenile reaches age 19. MCL 712A.18c(4). However, if the juvenile was committed for violating an enumerated statute, and the court determines that the juvenile has not been rehabilitated under MCL 712A.18d(1), the court may retain jurisdiction until the juvenile reaches age 21. MCL 712A.2a(5); MCL 712A.18d(3).

MCL 712A.2a(5) and MCL 712A.18d(1) provide that the court may extend jurisdiction over a juvenile until age 21 if the juvenile is committed to a public institution or agency under MCL 712A.18(1)(e) for an offense that would be a violation or attempted violation of any of the following:

- first-degree arson, MCL 750.72;
- assault with intent to commit murder, MCL 750.83;
- assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation, MCL 750.84;
- assault with intent to maim, MCL 750.86;

[19] See Section 12.2(C) for the list of enumerated offenses.

[20] See Chapter 13 for the applicable procedures.

[21] Public agency "means the [Department of Health and Human Services], a local unit of government, the family division of the circuit court, the juvenile division of the probate court, or a county juvenile agency." MCL 712A.1(1)(o).

- assault with intent to rob and steal while unarmed, MCL 750.88;
- assault with intent to rob and steal while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree home invasion, MCL 750.110a(2);
- escape from a juvenile facility, MCL 750.186a;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- unarmed robbery, MCL 750.530;
- bank, safe, or vault robbery, MCL 750.531; and
- possession of, or manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver, 1,000 grams or more of any Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(*i*) and MCL 333.7403(2)(a)(*i*).

D. Time Requirements

"Unless adjourned for good cause, a commitment review hearing must be held as nearly as possible to, but before, the juvenile's 19th birthday." MCR 3.945(B)(1)(a).

E. Notice Requirements

At least 14 days before the review hearing, a notice of hearing must be given to the prosecuting attorney, the agency or the superintendent of

the institution or facility to which the juvenile has been committed, the juvenile, and the juvenile's parent, guardian, or legal custodian if his or her address or whereabouts are known. MCL 712A.18d(4); MCR 3.945(B)(1)(b).[22]

The notice must clearly indicate that the court may extend jurisdiction over the juvenile until age 21, and advise the juvenile and his or her parent, guardian, or legal custodian that the juvenile has the right to an attorney. MCL 712A.18d(4); MCR 3.945(B)(1)(b).

F. Right to Counsel

The court must appoint an attorney to represent a juvenile at a review hearing if counsel has not been retained or already appointed. MCL 712A.18d(4); MCR 3.945(B)(2). The court "may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply."[23] MCL 712A.18d(4).

G. Determining Continued Jurisdiction

The purpose of the required commitment review hearing is to determine whether the juvenile has been rehabilitated or still presents a serious risk to public safety. See MCL 712A.18d(1). The juvenile has the burden of proving by a preponderance of the evidence that he or she has been rehabilitated and does not present a serious risk to public safety. MCL 712A.18d(2); MCR 3.945(B)(4). In making this determination, the court must consider all of the following factors:

> "(a) The extent and nature of the juvenile's participation in education, counseling, or work programs.
>
> (b) The juvenile's willingness to accept responsibility for prior behavior.
>
> (c) The juvenile's behavior in his or her current placement.
>
> (d) The juvenile's prior record and character and his or her physical and mental maturity.
>
> (e) The juvenile's potential for violent conduct as demonstrated by prior behavior.

[22] See Section 2.11(B) for discussion of required parental attendance at hearings after the court has taken jurisdiction over the juvenile.

[23] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/4a548b/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

> (f) The recommendations of the institution, agency, or facility charged with the child's care for the juvenile's release or continued custody.
>
> (g) Other information the prosecuting attorney or juvenile may submit." MCL 712A.18d(1). MCR 3.945(B)(4) contains substantially similar criteria.

In addition, the institution or agency to which the juvenile was committed must submit a commitment report, which the court must consider when deciding whether to extend jurisdiction over the juvenile. MCL 712A.18d(5); MCR 3.945(B)(3). "The report must contain information required by MCL 803.225." MCR 3.945(B)(3). See also MCL 712A.18d(5). MCL 803.225(1) requires the commitment report to contain a description of all of the following:

> "(a) The services and programs currently being utilized by, or offered to, the juvenile and the juvenile's participation in those services and programs.
>
> (b) Where the juvenile currently resides and the juvenile's behavior in his or her current placement.
>
> (c) The juvenile's efforts toward rehabilitation.
>
> (d) Recommendations for the juvenile's release or continued custody."

If the court determines that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety, jurisdiction over the juvenile must be continued until the juvenile reaches age 21. MCL 712A.18d(1); MCR 3.945(B)(4). However, if the institution or agency to which the juvenile was committed believes that the juvenile has been rehabilitated and does not present a serious risk to public safety, it may request a subsequent review hearing any time before the juvenile reaches age 21.[24] MCL 712A.18d(3); MCR 3.945(C)(2). In addition, the court must hold a subsequent review hearing no later than every 182 days after the hearing where it extended jurisdiction. MCR 3.945(C)(1).

The Michigan Rules of Evidence, other than those with respect to privileges, do not apply to extended jurisdiction review hearings. MCR 3.945(B)(3).

[24] If continuing jurisdiction has not been established, and the institution or agency believes the juvenile has been rehabilitated or does not present a serious risk to public safety, the commitment review hearing may be held any time before the juvenile reaches age 19. MCL 712A.18d(3). In other words, the institution or agency does not have to wait until a review hearing is required to request a review hearing if it believes the juvenile satisfies the requirements of MCL 712A.18d(1).

H. Release of Juvenile at Age 21

If the court continues jurisdiction over the juvenile, the juvenile must be automatically discharged when he or she reaches age 21. See MCL 712A.2a(5). See also MCL 712A.5 (commitment to public institution is invalid after juvenile reaches maximum jurisdictional age under MCL 712A.2a) and MCL 803.307(2) (public wardship ends upon reaching age 21).

12.3 Requirements of the Crime Victim's Rights Act

A victim may have the right to be notified of events including (1) the juvenile's dismissal from court jurisdiction or discharge from commitment, MCL 780.798(1)(a); (2) the juvenile's transfer from one facility to another, MCL 780.798(1)(b); (3) review hearings, MCL 780.798(9); and (4) a juvenile's probation termination if it is terminated earlier than originally ordered, MCL 780.795a. In addition, a victim has the right to make an oral statement or submit a written statement for use at a review hearing. MCL 780.798(9). For more information on these provisions, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 5.

12.4 Recording Review Hearings

"A record of all hearings must be made." MCR 3.925(B). In review hearings, the record "must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108." MCR 3.925(B).[25]

A verbatim record must be made by the court if a dispositional review hearing is conducted using videoconferencing technology. MCR 3.904(C).[26]

[25] MCR 3.925(B) requires the recording a preservation of any proceeding on the formal calendar, which is defined to include review hearings. See MCR 3.903(A)(6).

[26] See Section 1.4 for discussion of videoconferencing technology.

Chapter 13: Minor Personal Protection Order Enforcement Proceedings

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In this chapter. . .

This chapter contains discussion of the substantive and procedural rules governing personal protection order (PPO) proceedings involving a minor respondent. For a more complete discussion of PPO laws and procedures, see the Michigan Judicial Institute's *Domestic Violence Benchbook*.

A PPO is a court order that prohibits or requires certain actions by a respondent and provides penalties for its violation. Personal protection orders are enforced in contempt proceedings. For a detailed discussion of contempt of court, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

Conduct that violates a PPO may also violate a criminal law. In such cases, a juvenile who commits an offense that would be a criminal offense if committed by an adult may also be subject to delinquency or criminal proceedings as discussed in other portions of this benchbook.

Rules governing appeals in minor PPO proceedings are discussed in Section 20.3. Collection of biometric data, including fingerprints, and reporting requirements are discussed in Chapter 21, Part B.

13.1 Rules Applicable to Minor PPO Proceedings[1]

A. Generally

If a respondent is under age 18, issuance of a PPO is subject to the provisions in the Juvenile Code. MCL 600.2950(27); MCL 600.2950a(28).[2]

Except as otherwise provided in subchapter 3.700 of the Michigan Court Rules and in MCL 600.2950 and MCL 600.2950a, PPO actions relating to domestic violence or stalking are governed by the court rules.

In minor PPO actions, procedural issues are governed by subchapter 3.900 of the Michigan Court Rules, except as provided in MCR 3.981. MCR 3.701(A). MCR 3.981 states:

> "Procedure for the issuance, dismissal, modification, or recision of minor personal protection orders is governed by subchapter 3.700. Procedure in appeals related to minor personal protection orders is governed by MCR 3.709 and MCR 3.993."

"For the purpose of MCR 3.981–[MCR] 3.989, 'minor personal protection order' includes a foreign protection order against a minor respondent enforceable in Michigan under MCL 600.2950*l*." MCR 3.982(A).[3]

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[1] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[2] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth[,]" is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred[]") (emphasis supplied; citations omitted).

B. Enforcement

"A minor personal protection order is enforceable under MCL 600.2950(22), [MCL 600.2950](25), [MCL] 600.2950a(22), [MCL 600.2950a](25), [MCL] 764.15b, and [MCL] 600.1701 *et seq*." MCR 3.982(A).

Proceedings to enforce a minor PPO are governed by subchapter 3.900 of the Michigan Court Rules. MCR 3.701(A); MCR 3.708(A)(2); MCR 3.982(B). Specifically, contempt proceedings for the enforcement of minor PPOs are governed by MCR 3.981–MCR 3.989, unless a court rule specifically indicates otherwise. MCR 3.982(B); see also MCR 3.901(B)(6). If a respondent is 18 years old or older when an alleged PPO violation occurs, enforcement proceedings are governed by MCR 3.708. MCR 3.708(A)(2).

The use of videoconferencing technology in minor PPO enforcement proceedings is governed by MCR 3.904(A). See Section 1.4 for discussion of videoconferencing technology.

13.2 Jurisdiction of Minor PPO Proceedings

MCL 712A.2(h) states, in part:

> "[The Family Division has j]urisdiction over a proceeding under . . . MCL 600.2950 [or MCL] 600.2950a[] in which a minor less than 18 years of age is the respondent, or a proceeding to enforce a valid foreign protection order issued against a respondent who is a minor less than 18 years of age. A personal protection order must not be issued against a respondent who is a minor less than 10 years of age.[4]"[5]

If the court exercises its jurisdiction under MCL 712A.2(h), jurisdiction continues until the order expires, regardless of the respondent's age, but any action regarding a minor PPO after the respondent's 18th birthday is no longer subject to the Juvenile Code. MCL 712A.2a(3). "Proceedings to enforce a . . . minor personal protection order still in effect when the

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[3] See Section 13.12 for discussion of foreign protection orders.

[4] MCL 600.2950(26)(c) and MCL 600.2950a(27)(c) also prohibit issuing a PPO against a respondent less than 10 years of age.

[5] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

respondent is 18 or older[] are governed by [MCR 3.708 (governing adult PPO proceedings)]." MCR 3.708(A)(2).

For a respondent who is 17 years old and allegedly violates a PPO, the enforcement *procedures* for minor respondents apply, see MCR 3.708(A)(2) and MCR 3.982(B), but he or she is subject to adult *penalties*, see MCL 600.2950(11)(a)(*i*), MCL 600.2950a(11)(a)(*i*), and MCR 3.988(D).

MCL 764.15b(6) provides that the Family Division has jurisdiction to conduct contempt proceedings based upon a violation of a PPO:

> "The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued under . . . [MCL 712A.2(h)][] by the family division of circuit court in any county of this state or a valid foreign protection order issued against a respondent who is less than 18 years of age at the time of the alleged violation of the foreign protection order in this state."

However, courts lack legal authority to try individuals for criminal contempt of court on the basis of a violation of a PPO "unless the action [is] prosecuted by a prosecuting attorney or an attorney retained by [the petitioner]" pursuant to MCL 764.15b(7) and MCR 3.708(G). *In re LT*, 342 Mich App 126, 139 (2022). In *In re LT*, "the trial court denied [the respondent] the right to a fair hearing before a neutral judge because the court allowed the petitioner to prosecute the contempt proceedings unrepresented by counsel, assisted petitioner with the presentation of his case, and otherwise rendered a verdict tainted by the court's prior involvement with the parties." *Id*. at 138. The Court of Appeals concluded that the "absence of a proper prosecutor constituted a jurisdictional defect rendering [the respondent's] conviction void." *Id*. at 139.

13.3 Venue

A. Issuance

Venue for the issuance of a minor PPO is proper in the county of residence of either the petitioner or respondent. MCL 712A.2(h); MCR 3.703(E)(2). If the respondent does not live in Michigan, venue for the issuance of a minor PPO is proper in the petitioner's county of residence. MCL 712A.2(h); MCR 3.703(E)(2).

If a change of venue is ordered, "after the change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none[]" and may not "entertain any further proceedings[.]" *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658 (2012) (holding that "because the

trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration[]" of the trial court's order changing venue).

B. Enforcement

When a minor allegedly violates a PPO and is apprehended in a county other than the county in which the PPO was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request transfer of the minor to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E). If the apprehending jurisdiction conducts the preliminary hearing for the respondent, it must (if it has not already done so pursuant to MCR 3.984[E]) notify the issuing jurisdiction that it may request transfer of the case for enforcement proceedings. MCR 3.985(H).

Although the agency that must provide the notification is not specified in the court rules, MCL 764.15b(6) (providing Family Division with jurisdiction over minor PPO contempt proceedings) states that the court must provide the notification:

> "The family division of circuit court that conducts the preliminary inquiry shall notify the court that issued the personal protection order or foreign protection order that the issuing court may request that the respondent be returned to that county for violating the personal protection order or foreign protection order. If the court that issued the personal protection order or foreign protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county."

13.4 Prohibited Types of PPOs

A. Parent-Child Relationship

A PPO may not be issued if the petitioner and respondent have a parent-child relationship, and the child is an unemancipated minor. MCL 600.2950(26); MCL 600.2950a(27).[6]

[6] "Given the definitions provided by MCL 722.1, . . . 'emancipated minor' as it relates to MCL 600.2950(26)(b) applies to a minor child where the parental rights of one or both parents have been terminated." *SP v BEK*, 339 Mich App 171, 180 (2021) (holding that "[t]he trial court did not err when it concluded that MCL 600.2950(26)(b) did not preclude it from issuing the PPOs against respondent" father, whose parental rights had been terminated even though the non-respondent mother's rights had not been terminated).

Alternative remedies may be available in these situations. For example, if an unemancipated minor under 18 years old violates a criminal law or ordinance, jurisdiction may be proper under MCL 712A.2(a)(1).[7] Jurisdiction may also be proper under MCL 712A.2(a)(3) if the minor is under 18 years old and "is repeatedly disobedient to the reasonable and lawful commands of his or her parents, guardian, or custodian, and the court finds on the record by clear and convincing evidence that court-accessed services are necessary."[8]

B. Mutual PPOs

The court must not issue mutual personal protection orders. MCL 600.2950(8); MCL 600.2950a(8); MCR 3.706(B). However, correlative separate orders are permitted if both parties properly petition the court under MCL 600.2950(1), and the court makes separate findings that support an order against each party. MCL 600.2950(8); MCL 600.2950a(8); MCR 3.706(B).

C. Respondents Under Age 10

A PPO may not be issued against a minor child under age 10. MCL 600.2950(26)(c); MCL 600.2950a(27)(c); MCL 712A.2(h).

13.5 Required Procedures Where Prior Orders or Judgments Affect the Parties

If a PPO petition is filed in the same court where a pending action was filed or a prior order or judgment involving the same parties was entered, the PPO petition must be assigned to the same judge. MCR 3.703(D)(1)(a).

If a PPO petition is filed in one court, and another court has a pending action, orders already entered, or judgments already entered affecting the parties, the court in which the PPO petition was filed should contact the other court, if practicable, to determine any relevant information. MCR 3.703(D)(1)(b).

If a prior court action resulted in an order providing for continuing jurisdiction of a minor, and the petition requests relief with regard to the minor, the court considering the PPO petition must comply with the notice requirements of MCR 3.205(B)(2)(a)-(b) ("the plaintiff or other initiating party must send notice of proceedings in the subsequent court

[7] See Section 2.4 for discussion of jurisdiction over delinquency cases.

[8] See Section 2.3 for discussion of jurisdiction over status offenses.

to . . . the clerk or register of the prior court, and . . . the appropriate official of the prior court"). MCR 3.703(D)(2).[9]

13.6 Types of PPOs

The Legislature has created the following types of personal protection orders:

- "Domestic relationship PPOs" under MCL 600.2950 are available to restrain behavior that interferes with the petitioner's personal liberty, or that causes a reasonable apprehension of violence, if the respondent is or was involved in certain domestic relationships with the petitioner (spouse, former spouse, parties have a child in common, parties are involved in or have had a dating relationship, or parties are residing or have resided in the same household).

- "Non-domestic stalking PPOs" under MCL 600.2950a(1) are available to restrain a person, regardless of that person's relationship with the petitioner, from engaging in stalking (MCL 750.411h), aggravated stalking (MCL 750.411i), or cyberstalking (MCL 750.411s).

- "Non-domestic sexual assault PPOs" under MCL 600.2950a(2) are available to victims of sexual assault, victims who have received obscene material under MCL 750.142, and petitioners who have been placed in reasonable apprehension of sexual assault by the respondent. The respondent may be enjoined from any of the conduct listed in MCL 600.2950a(3).

For more information on substantive issues regarding the types of PPOs available, see the Michigan Judicial Institute's *Domestic Violence Benchbook*.

13.7 Initiation of Proceedings to Enforce a Minor PPO[10]

A. Supplemental Petition

Requests for court action to enforce a minor PPO should be in writing by way of a supplemental petition containing a specific description of

[9] See Section 2.16 for discussion of MCR 3.205.

[10] For information on the issuance, modification, or dismissal of a minor PPO, see the Michigan Judicial Institute's *Domestic Violence Benchbook*. Except as otherwise provided within a specific court rule, these issues are governed by the same court rules that govern adult PPOs.

the facts constituting the alleged violation. MCR 3.983(A). The supplemental petition may be submitted by the original petitioner, a law enforcement officer, a prosecuting attorney, a probation officer, or a caseworker. *Id.*

Upon receipt of the supplemental petition, the court must either:

- schedule a preliminary hearing on the petition as soon as practicable, and issue a summons to appear; or
- issue an apprehension order against the respondent. MCR 3.983(B)(1)-(2).

B. Notice of Preliminary Hearing[11]

If, under MCR 3.983(B)(1), the court sets a date for a preliminary hearing, the petitioner must serve a copy of the supplemental petition and a summons on the respondent and, if the relevant addresses are known or easily ascertainable upon diligent inquiry, on the respondent's parent(s), guardian, or custodian. MCR 3.983(C). See also MCR 3.920(B)(2)(c) (requiring a summons to be served on a minor respondent and his or her parent[s], guardian, or custodian, if their whereabouts are known). Service must be made at least seven days before the preliminary hearing, in the manner provided in MCR 3.920.[12] MCR 3.983(C).

C. Apprehension of the Respondent

1. Generally

"The court must designate a judge, referee or other person who may be contacted by the officer taking a minor under 17 into custody when the court is not open. In each county there must be a designated facility open at all times at which an officer may obtain the name of the person to be contacted for permission to detain the minor pending preliminary hearing." MCR 3.984(D).

While awaiting appearance in court or the arrival of the parent(s), guardian, or custodian, a minor respondent under 17 years of age must be maintained separately from adult prisoners to prevent any verbal, visual, or physical contact with an adult prisoner. MCR 3.984(C).

If a respondent is apprehended for an alleged violation of a minor PPO in a jurisdiction other than the one in which the PPO

[11] See Section 13.8 for more information on preliminary hearings in minor PPO enforcement proceedings.

[12] See Section 5.4 for discussion of the requirements for service of a summons.

was issued, the apprehending jurisdiction may notify the issuing jurisdiction that it may request the respondent's return to the issuing jurisdiction for enforcement proceedings. MCR 3.984(E). If notification is not made at this time, the apprehending jurisdiction must make this notification immediately following the preliminary hearing. MCR 3.985(H).

MCR 3.984(E) does not specify which agency within the apprehending jurisdiction is responsible for providing notice after a minor respondent is apprehended and before a preliminary hearing is held. However, once the preliminary hearing has been held, MCL 764.15b(6) places this responsibility upon the court. In addition, MCR 3.984(E) and MCR 3.985(H) make no mention of which jurisdiction bears the costs of transportation if the issuing jurisdiction requests the respondent's return from the jurisdiction where he or she was apprehended. However, MCL 764.15b(6) states that where notice to the issuing jurisdiction is provided by the court in the county where the minor was apprehended and his or her preliminary hearing was conducted, the jurisdiction requesting the minor's transport bears this expense.

2. Apprehension With a Court Order

MCL 712A.2c authorizes a court to issue an apprehension order for a minor who allegedly violates a PPO:

> "The court may issue an order authorizing a peace officer or other person designated by the court to apprehend a juvenile who is . . . alleged to have violated a personal protection order issued under [MCL 712A.2(h)][] or is alleged to have violated a valid foreign protection order. The order shall set forth specifically the identity of the juvenile sought and the house, building, or other location or place where there is probable cause to believe the juvenile is to be found. A person who interferes with the lawful attempt to execute an order issued under this section 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." See also MCR 3.983(B)(2).

If the court issues an apprehension order against the respondent, the order may include authorization to:

> "(a) enter specified premises as required to bring the minor before the court, and

> "(b) detain the minor pending preliminary hearing if it appears there is a substantial likelihood of retaliation or continued violation." MCR 3.983(D)(1).

If an officer apprehends a minor respondent under a court order requiring that the minor be brought directly to court, the officer must immediately do the following:

- Inform the minor respondent's parent(s), guardian, or custodian (if their whereabouts are known) of the respondent's apprehension and whereabouts, and of the need for the minor's parent(s), guardian, or custodian to be present at the preliminary hearing. MCR 3.984(B)(1).

- Take the respondent before the court for a preliminary hearing, or to a court-designated location pending the scheduling of a preliminary hearing. MCR 3.984(B)(2).

- Prepare a custody statement for submission to the court. The statement must include (1) the grounds for detaining the minor and the time and location of his or her detention, and (2) the names of the persons notified and the times of their notification, or the reason that notification failed. MCR 3.984(B)(3).

- Make sure that a supplemental petition is prepared, and that the petition is filed with the court. MCR 3.984(B)(4).

3. Apprehension Without a Court Order

MCL 712A.14(1) authorizes apprehension of a minor respondent for an alleged violation of a PPO without a court order:

> "Any local police officer, sheriff or deputy sheriff, state police officer, county agent or probation officer of any court of record may, without the order of the court, immediately take into custody any child . . . for whom there is reasonable cause to believe is violating or has violated a personal protection order issued under [MCL 712A.2(h)] by the court under . . . MCL 600.2950 [or] MCL 600.2950a, or for whom there is reasonable cause to believe is violating or has violated a valid foreign protection order."

When responding to an alleged violation of a PPO where a respondent has not been served with the PPO, MCL 600.2950(22)

and MCL 600.2950a(22) require the responding law enforcement agency or officer to provide the respondent with a true copy of the PPO or "advise the [respondent about] the existence of the personal protection order, the specific conduct enjoined, the penalties for violating the order, and where the [respondent] may obtain a copy of the order." Upon receiving notice, the respondent must immediately comply with the provisions of the PPO or be subject to arrest. MCL 600.2950(22); MCL 600.2950a(22). See *Kampf v Kampf*, 237 Mich App 377, 385 (1999) ("[A]lthough a PPO is effective at the time it is signed by a judge, a respondent can avoid arrest for a first violation if the respondent lacks notice and ceases the behavior that violates the order."). Although MCL 712A.14 (applicable to minor respondents who allegedly violate a PPO) does not mention the notice requirement, MCR 3.982(A) states that "[a] minor personal protection order is enforceable under MCL 600.2950(22), [MCL 600.2950](25), [MCL] 600.2950a(22), [MCL] 600.2950a(25), [MCL] 764.15b, and [MCL] 600.1701 *et seq.*" Therefore, it appears consistent with due process to apply the notice provisions of MCL 600.2950(22) and MCL 600.2950a(22) in cases involving minor respondents.

Once a minor respondent has been apprehended without a court order, the apprehending officer may warn and release the minor; release the minor to his or her parent, guardian, or custodian; or take the minor into custody. MCR 3.984(A); MCR 3.984(B).

In order to release the minor into the custody of his or her parent, guardian, or custodian, the officer must obtain a written promise from that person to bring the minor back to court. MCR 3.984(A). See also MCL 712A.14(1).

The minor may be taken into custody if the officer fails to obtain a written promise from the minor's parent, guardian, or custodian, or if the officer believes "there is a substantial likelihood of retaliation or violation by the minor[.]" MCR 3.984(B). See also MCL 712A.15(2)(e). If the minor respondent is taken into custody, MCR 3.984(B) requires the officer to immediately do the following:

- Inform the minor respondent's parent(s), guardian, or custodian (if their whereabouts are known) of the respondent's apprehension and whereabouts, and of the need for the minor's parent(s), guardian, or custodian to be present at the preliminary hearing. MCR 3.984(B)(1).

- Take the respondent before the court for a preliminary hearing, or to a court-designated location

pending the scheduling of a preliminary hearing. MCR 3.984(B)(2).

- Prepare a custody statement for submission to the court. The statement must include (1) the grounds for detaining the minor and the time and location of his or her detention, and (2) the names of the persons notified and the times of their notification, or the reason that notification failed. MCR 3.984(B)(3).

- Make sure that a supplemental petition is prepared, and that the petition is filed with the court. MCR 3.984(B)(4).

13.8 Preliminary Hearings[13]

A. Location of Hearing

A preliminary hearing on an alleged PPO violation may take place in either the issuing jurisdiction or the jurisdiction in which a minor respondent was apprehended:

> "The family division of circuit court has jurisdiction to conduct contempt proceedings based upon a violation of a personal protection order issued under . . . [MCL 712A.2(h)][] by the family division of circuit court in any county of this state or a valid foreign protection order issued against a respondent who is less than 18 years of age at the time of the alleged violation of the foreign protection order in this state. The family division of circuit court that conducts the preliminary inquiry shall notify the court that issued the personal protection order or foreign protection order that the issuing court may request that the respondent be returned to that county for violating the personal protection order or foreign protection order. If the court that issued the personal protection order or foreign protection order requests that the respondent be returned to that court to stand trial, the county of the requesting court shall bear the cost of transporting the respondent to that county." MCL 764.15b(6).

[13] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

See also MCR 3.985(H), which provides that when a minor respondent has allegedly violated a PPO and is apprehended in a jurisdiction other than the one in which the PPO was issued and the apprehending jurisdiction conducts the minor respondent's preliminary hearing, the apprehending jurisdiction must notify the issuing jurisdiction that it may request the respondent's return for enforcement proceedings immediately after the preliminary hearing, if the apprehending jurisdiction has not previously done so.[14]

B. Time Requirements

If the minor respondent was apprehended with or without a court order for an alleged PPO violation and was taken into court custody or jailed, "the preliminary hearing must commence no later than 24 hours after the minor was apprehended or arrested, excluding Sundays and holidays, as defined in MCR 8.110(D)(2), or the minor must be released." MCR 3.985(A)(1).

If the minor respondent was not taken into court custody or jailed for an alleged PPO violation, "the preliminary hearing must commence as soon as practicable after the apprehension or arrest, or the submission of a supplemental petition." MCR 3.985(A)(1).

The preliminary hearing may be adjourned for up to 14 days to secure the attendance of witnesses or the attendance of the minor's parent, guardian, or custodian, or for other good cause shown. MCR 3.985(A)(2).

C. Procedural Issues

1. Videoconferencing Technology

MCR 3.904(A)(1) provides that courts may use videoconferencing technology when conducting preliminary hearings under MCR 3.935(A)(1), preliminary examinations under MCR 3.953 and MCR 3.985.[15] MCR 3.904(A)(3). See Section 1.4 for discussion of videoconferencing technology.

2. Presence of Parent

The court must determine whether the minor respondent's parent, guardian, or custodian has been notified and is present at the preliminary hearing. MCR 3.985(B)(1). The preliminary

[14] A similar optional notice provision applies at the time the minor is apprehended. See MCR 3.984(E).

[15] Although MCR 3.904(A)(1) refers to a "preliminary *examination*[] under . . . MCR 3.985," MCR 3.985 refers to this proceeding as a "preliminary *hearing*" (emphases added).

hearing may be conducted without the presence of a parent, guardian, or custodian if a guardian ad litem or attorney appears with the minor. *Id.*

3. Notice of Alleged Violation

"Unless waived by the respondent, the court shall read the allegations in the supplemental petition, and ensure that the respondent has received written notice of the alleged violation." MCR 3.985(B)(2).

4. Advising Respondent of Certain Rights

Immediately after reading the allegations in the supplemental petition, the court shall, on the record and in plain language, advise the minor respondent of the following rights:

- The right to contest the allegations at a violation hearing.
- The right to an attorney at every stage in the proceedings. If the court determines that it might sentence the respondent to jail or place the respondent in secure detention, the court will appoint a lawyer at public expense if the respondent wants one and is financially unable to retain one.
- The right to a nonjury trial. A referee may be assigned to hear the case unless demand for a judge is filed in accordance with MCR 3.912.[16]
- The right to have witnesses against him or her appear at a violation hearing, and the right to question the witnesses.
- The right to have the court order any defense witnesses to appear at the hearing.
- The right to remain silent; the right to not have the respondent's silence used against him or her; and notice that any statement the respondent makes may be used against him or her. MCR 3.985(B)(3).

5. Authorization of Supplemental Petition

At the preliminary hearing, "[t]he court must decide whether to authorize the filing of the supplemental petition and proceed

[16] See Section 2.18 for discussion of judges and referees in juvenile proceedings.

formally, or to dismiss the supplemental petition." MCR 3.985(B)(4).

If the court authorizes filing of the supplemental petition, MCR 3.985(B)(6) requires the court to:

- "(a) set a date and time for the violation hearing, or, if the court accepts a plea of admission or no contest, either enter a dispositional order or set the matter for dispositional hearing; and
- "(b) either release the respondent pursuant to [MCR 3.985(E)] or order detention of the respondent as provided in [MCR 3.985(F)]."[17]

"At the preliminary hearing the court must state the reasons for its decision to release or detain the minor on the record or in a written memorandum." MCR 3.985(G).

6. Opportunity to Deny or Plead to Allegations

The court must allow a respondent the opportunity to deny or plead to the allegations in the supplemental petition. MCR 3.985(B)(5). If the respondent wants to enter a plea of admission or of no contest, the court must follow MCR 3.986. MCR 3.985(B)(5).[18]

If the respondent denies the allegations in the supplemental petition, the court must provide the following notices after the preliminary hearing:

- Notify the prosecuting attorney of the scheduled violation hearing. MCR 3.985(C)(1).
- Notify the respondent, his or her attorney, if any, and the respondent's parent(s), guardian, or custodian of the scheduled violation hearing, and direct the parties to appear at the hearing and give evidence on the contempt charges. MCR 3.985(C)(2).

Notice must be given by personal service or ordinary mail at least seven days before the violation hearing, unless the respondent is detained. MCR 3.985(C). If the respondent is detained, notice must be served at least 24 hours before the hearing. *Id.*

[17] See Section 13.8(D) for discussion of release or detention of the respondent under MCR 3.985(E)-(F).

[18] See Section 13.9 for discussion of pleas of admission and of no contest during PPO enforcement proceedings.

D. Determining Whether to Release or Detain Respondent

When determining whether to release or detain a minor respondent pending a violation hearing, the court must follow MCR 3.985(F)(1), which prohibits removal of a minor from his or her parent, guardian, or custodian pending a PPO violation hearing or further court order unless the following circumstances exist:

> "(a) probable cause exists to believe the minor violated the minor personal protection order;[19] and
>
> (b) at the preliminary hearing the court finds one or more of the following circumstances to be present:
>
> > (*i*) there is a substantial likelihood of retaliation or continued violation by the minor who allegedly violated the minor personal protection order;
> >
> > (*ii*) there is a substantial likelihood that if the minor is released to the parent, with or without conditions, the minor will fail to appear at the next court proceeding; or
> >
> > (*iii*) detention pending violation hearing is otherwise specifically authorized by law."

See also MCL 712A.15(2), which states in relevant part that custody, pending hearing, is available to a juvenile "who ha[s] allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation."

"At the preliminary hearing the minor respondent may contest the sufficiency of evidence to support detention by cross-examination of witnesses, presentation of defense witnesses, or by other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses. A finding of probable cause under [MCR 3.985(F)(1)(a)] may be based on hearsay evidence which possesses adequate guarantees of trustworthiness." MCR 3.985(F)(3).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[20]

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[19] "A minor respondent in custody may waive the probable cause phase of a detention determination only if the minor is represented by an attorney." MCR 3.985(F)(2).

[20] See Section 10.11 for additional information on MCR 3.937.

1. Conditional Release Pending Violation Hearing

If a respondent is released pending the resumption of the preliminary hearing or pending the violation hearing, the court must consider available information on the following factors in setting the conditions for release:

> "(a) family ties and relationships,
>
> (b) the minor's prior juvenile delinquency or minor personal protection order record, if any,
>
> (c) the minor's record of appearance or nonappearance at court proceedings,
>
> (d) the violent nature of the alleged violation,
>
> (e) the minor's prior history of committing acts that resulted in bodily injury to others,
>
> (f) the minor's character and mental condition,
>
> (g) the court's ability to supervise the minor if placed with a parent or relative,
>
> (h) the likelihood of retaliation or violation of the order by the respondent, and
>
> (i) any other factors indicating the minor's ties to the community, the risk of nonappearance, and the danger to the respondent or the original petitioner if the respondent is released." MCR 3.985(E)(1).

Bail procedure is the same as in juvenile delinquency proceedings.[21] MCR 3.985(E)(2).

2. Detention Pending Violation Hearing[22]

A respondent who is detained must be placed in the least restrictive environment[23] that will meet the needs of the respondent and the public, and that will conform to the

[21] See Section 6.3(I) for discussion of bail procedure in delinquency cases.

[22] Michigan adopted "Raise the Age" legislation prohibiting arrest and imprisonment of persons under the age of 18, effective October 1, 2021. However, MCL 600.2950 has not been amended to reflect this change and appears to include contradictory language.

[23] "'Least restrictive environment' means a supervised community placement, preferably a placement with the juvenile's parent, guardian, relative, or a facility or conditions of treatment that is a residential or institutional placement only utilized as a last resort based on the best interest of the juvenile or for reasons of public safety." MCL 712A.1(1)(j).

requirements of MCL 712A.15 and MCL 712A.16. MCR 3.985(F)(4).

Minors not less than age 18.[24] A minor not under the age of 18 who is under the court's jurisdiction pursuant to a supplemental petition under MCL 712A.2(h) (governing minor PPOs) may be taken into custody and "detained in a cell or other secure area of a secure facility[25] designed to incarcerate adults[.]" MCL 712A.15(6)(b).

Minors under the age of 18. The detention environment for minors under the age of 18 who have allegedly violated a PPO is described in MCL 712A.16:

> "(1) If a juvenile who is less than 18 years of age is taken into custody or detained, the juvenile must not be confined in a police station, prison, jail, lock-up, or reformatory or transported with, or compelled or permitted to associate or mingle with, criminal or dissolute persons. Except as otherwise provided in [MCL 712A.15], the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process."[26]

MCL 712A.15(4) states:

> "If a juvenile is taken into custody for violating a court order under [MCL 712A.2(a)(2)-(4) (governing status offenses)] and is detained in a secure facility, the petitioner shall ensure that an appropriately trained, licensed, or certified mental health or substance abuse professional interviews the juvenile in person within 24 hours to assess the

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[24] Respondents who are under the jurisdiction of the court pursuant to a supplemental petition under MCL 712A.2(h) (governing minor PPOs) but who are 18 years of age or older are subject to adult penalties and adult detention conditions. MCL 600.2950(23); MCL 600.2950a(23); MCL 712A.15(6)(b).

[25] *Secure facility* "means any public or private licensed child caring institution identified by the [Department of Health and Human Services] as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

[26] See also MCL 764.27a(2) (juveniles confined in a jail or other adult place of detention must be in a room or ward out of sight and sound of adults).

> immediate mental health and substance abuse needs of the juvenile. The assessment may alternatively be done upon filing the petition, before an order for placement in a secure facility. Within 48 hours of the placement in the secure facility, the petitioner shall submit the assessment to the court and the court shall conduct a hearing to determine both of the following:
>
> (a) If there is reasonable cause to believe that the juvenile violated the court order.
>
> (b) The appropriate placement of the juvenile pending the disposition of the alleged violation, including if the juvenile should be placed in a secure facility."

The court or court-approved agency may arrange for the boarding of minor PPO respondents in any of the following:

- "A child caring institution or child placing agency licensed by the department to receive for care juveniles within the court's jurisdiction." MCL 712A.16(2)(b).
- "If in a room or ward separate and apart from adult criminals, the county jail for juveniles over 17 years of age within the court's jurisdiction." MCL 712A.16(2)(c).[27]

E. Respondent Fails to Appear at Preliminary Hearing

If the respondent was notified of the preliminary hearing and fails to appear for it, the court may issue an order to apprehend the respondent. MCR 3.985(D). This order is to be issued in accordance with MCR 3.983(D).[28] MCR 3.985(D) further provides that:

- "If the respondent is under 17 years of age, the court may order the respondent *detained* pending a hearing on the apprehension order; if the court releases the respondent it *may* set bond for the respondent's appearance at the violation hearing." MCR 3.985(D)(1) (emphases added).

[27] MCL 712A.16(2)(a) is inapplicable to minor PPO enforcement proceedings. That provision applies to juveniles under the court's jurisdiction pursuant to MCL 712A.2(a) (juvenile delinquency) or MCL 712A.2(b) (abuse and neglect).

[28] See Section 13.7(C) for discussion of MCR 3.983(D).

- "If the respondent is 17 years of age, the court may order the respondent *confined to jail* pending a hearing on the apprehension order. If the court releases the respondent it *must* set bond for the respondent's appearance at the violation hearing." MCR 3.985(D)(2) (emphases added).

13.9 Pleas of Admission or No Contest

With the court's consent, a minor respondent may offer a plea of admission or of no contest to violating a minor PPO. MCR 3.986(A). "The court shall not accept a plea to a violation unless the court is satisfied that the plea is accurate, voluntary, and understanding." MCR 3.986(A). "The court may accept a plea of admission or of no contest conditioned on preservation of an issue for appellate review." MCR 3.986(B).

The court must inquire of the parents, guardian, custodian, or guardian ad litem whether he or she knows any reason why the court should not accept the minor's plea. MCR 3.986(C). Any agreement or objection by the parent, guardian, custodian, or guardian ad litem to a minor's plea must be placed on the record if that person is present. *Id.*

"The court may take a plea of admission or of no contest under advisement. Before the court accepts the plea, the minor may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the minor to withdraw the plea." MCR 3.986(D).

13.10 Required Procedures at Violation Hearings[29]

A. Time Requirements

"Upon completion of the preliminary hearing, the court shall set a date and time for the violation hearing if the respondent denies the allegations in the supplemental petition." MCR 3.987(A). This rule further provides the following limits for holding the violation hearing:

- If the respondent is detained, the hearing must be held within 72 hours of apprehension, excluding Sundays and holidays.

[29] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

- If the respondent is not detained, the hearing must be held within 21 days of apprehension.

B. Role of Prosecuting Attorney at Violation Hearing

"The prosecuting attorney shall prosecute criminal contempt proceedings as provided in MCR 3.987(B)." MCR 3.914(E).

If a criminal contempt proceeding is commenced under MCL 764.15b, the prosecuting attorney must prosecute the proceeding unless the petitioner retains an attorney to do so. MCR 3.987(B). "If the prosecuting attorney determines that the personal protection order was not violated or that it would not be in the interest of justice to prosecute the criminal contempt violation, the prosecuting attorney need not prosecute the proceeding." *Id.*

C. Preliminary Matters

There is no right to a jury trial at minor PPO violation hearings. MCR 3.987(D).

"The respondent has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses." MCR 3.987(E).

At the violation hearing, the court must determine whether all parties have been notified and are present. MCR 3.987(C)(1). The following people have the right to be present at the violation hearing:

- the respondent,
- the respondent's parents, guardian, or custodian,
- a guardian ad litem and attorney for the respondent, and
- the original petitioner. MCR 3.987(C)(1)(a); MCR 3.987(C)(1)(c).

"The court may proceed in the absence of a parent properly noticed to appear, provided the respondent is represented by an attorney." MCR 3.987(C)(1)(b).

The court must also do the following at the violation hearing:

- Read the allegations in the supplemental petition, unless waived. MCR 3.987(C)(2).
- Inform the respondent of the right to the assistance of an attorney, unless legal counsel appears with the respondent. MCR 3.987(C)(3).

- Inform the respondent that "if the court determines that it might sentence the respondent to jail or place the respondent in secure detention, the court will appoint an attorney at public expense if the respondent wants one and is financially unable to retain one." MCR 3.987(C)(3). If the respondent requests to proceed without an attorney, the court must advise him or her of the dangers and disadvantages of self-representation, and make sure the respondent is literate and competent to conduct the defense. *Id.*

D. Rules of Evidence and Burden of Proof

"The rules of evidence apply to both criminal and civil contempt proceedings. The petitioner or the prosecuting attorney has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt and the respondent's guilt of civil contempt by a preponderance of the evidence."[30] MCR 3.987(F).

E. Findings of Fact and Conclusions of Law

"At the conclusion of the [violation] hearing, the court must make specific findings of fact, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record." MCR 3.987(G).

13.11 Dispositional Hearings[31]

A. Time Requirements

If the minor respondent is being detained, the time between the entry of a judgment finding a violation of the minor PPO and any disposition may not exceed 14 days, except for good cause; if the minor respondent is not being detained, the time between these two events may not exceed 35 days. MCR 3.988(A).

[30] For more information on civil and criminal contempt proceedings see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

[31] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

B. Required Procedures

Both the petitioner and the respondent have the right to be present at the dispositional hearing. MCR 3.988(B). The respondent must attend the dispositional hearing unless excused for good cause, and he or she must be present when the disposition is announced. MCR 3.988(B)(1).

At the dispositional hearing, the court may receive and rely on all relevant and material evidence, as long as it has probative value. MCR 3.988(C)(1). This includes oral and written reports and evidence that may not have been admissible at the violation hearing. *Id.* No assertion of an evidentiary privilege, other than the attorney-client privilege, must prevent the receipt and use of material prepared pursuant to a court-ordered examination, interview, or course of treatment. MCR 3.988(C)(3).

The respondent or his or her attorney and the petitioner must be given an opportunity to examine and controvert written reports received by the court. MCR 3.988(C)(2). In the court's discretion, these individuals may also be allowed to cross-examine individuals making reports when such individuals are reasonably available. *Id.*

C. Possible Sentences or Juvenile Dispositions

Respondents involved in minor PPO actions are subject to the contempt powers of the court. See MCL 712A.26, which provides that "[t]he court shall have the power to punish for contempt of court under [MCL 600.1701 to MCL 600.1745][] any person who willfully violates, neglects, or refuses to obey and perform any order or process the court has made or issued to enforce [the Juvenile Code]." See also MCR 3.988(D)(2)(a) (authorizing a fine or imprisonment under MCL 600.1715 and MCL 600.1721 for a minor respondent at least 17 years of age who pleads or is found guilty of *civil* contempt).[32] "A party charged with criminal contempt is presumed innocent, enjoys the right against self-incrimination, and *the contempt must be proven beyond a reasonable doubt*." *In re SB*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). "Thus, [i]n order to find a defendant guilty of criminal contempt, a willful disregard or disobedience of a court order must be clearly and unequivocally shown and proven beyond a reasonable doubt." *Id*. at ___ (quotation marks and citation omitted; alteration in original).

[32] MCR 3.988(D)(1) authorizes up to 93 days of incarceration and a maximum fine of $500 for a minor respondent at least 17 years of age who pleads or is found guilty of *criminal* contempt for violating a PPO. MCR 3.988(D)(2)(b) authorizes dispositional alternatives under MCL 712A.18 for a minor respondent under 17 years of age who pleads or is found guilty of *civil* contempt.

"In addition to the sentence [for violating the order], the court may impose other conditions to the minor personal protection order." MCR 3.988(D)(3). For example, "a PPO's duration is one such 'condition' to the PPO." *In re SB*, ___ Mich App at ___ (construing MCR 3.708(H)(5), containing substantially similar language, "as permitting the trial court to modify or extend the PPO sua sponte under its authority to impose 'other conditions' *as part of sentencing in connection with a violation of the PPO*").

"MCR 3.708(H)(5) explicitly provides different punishments for criminal-contempt cases involving a PPO violation and civil-contempt cases involving a PPO violation . . . ." *LAC v GLS*, ___ Mich App ___, ___ (2024). "In the case of civil contempt, [MCR 3.708(H)(5)(b)] explicitly adopts the sanctions provided in MCL 600.1715 and MCL 600.1721." *LAC*, ___ Mich App at ___ (quotation marks and citation omitted). "The sanctions provided for criminal contempt are exclusive of the statutory sanctions referenced for civil contempt." *Id*. at ___ (quotation marks and citation omitted). "For criminal contempt, the sanctions [under MCR 3.708(H)(5)(a)] are limited to a sentence of 93 days and a fine of $500, with no reference to the statutory sanctioning scheme." *LAC*, ___ Mich App at ___ (quotation marks and citation omitted). "Both statute and court rule provide a specific punishment for a PPO violation that does *not* include the assessment of attorney fees." *Id*. at ___ (noting that "only MCR 3.708(H)(5)(b) permitted the award of costs as set forth in MCL 600.1715 and MCL 600.1721 for civil contempt"). "Taxation of costs is generally not allowed absent authority flowing from a statute or court rule." *LAC*, ___ Mich App at ___ (quotation marks and citation omitted). "There is nothing in the sentencing scheme in MCR 3.708(H)(5) that expresses an abrogation of this general rule in the case of contempt as a result of a PPO violation." *LAC*, ___ Mich App at ___ (quotation marks and citation omitted). "Therefore, criminal contempt sanctions under [MCR 3.708(H)(5)(a)] do not include the indemnification provisions of MCL 600.1721." *LAC*, ___ Mich App at ___ (quotation marks and citation omitted).

1. Respondent 17 Years of Age or Older[33]

Criminal contempt sanctions are required when a respondent who is 17 years of age or older and is subject to a minor PPO violates the order. MCL 600.2950(23) states:

> "An individual who is 17 years of age or older and who refuses or fails to comply with a personal

[33]Michigan adopted "Raise the Age" legislation prohibiting arrest and imprisonment of persons under the age of 18, effective October 1, 2021. However, MCL 600.2950 has not been amended to reflect this change and appears to include contradictory language.

> protection order under this section is subject to the criminal contempt powers of the court and, if found guilty, must[34] be imprisoned for not more than 93 days and may be fined not more than $500.00. . . . The criminal penalty provided under this section may be imposed in addition to a penalty that may be imposed for another criminal offense arising from the same conduct." [See also MCL 600.2950a(23) and MCR 3.988(D)(1), which contain the same or substantially similar provisions.]

"In a proceeding under [MCL 712A.2(h)[35]], [MCL 712A.18] only applies to a disposition for a violation of a personal protection order and subsequent proceedings." MCL 712A.18(21).

> **Note**: A juvenile about whom "a complaint has been made or a petition has been filed under [MCL 712A.1 *et seq*.]," may be detained pending hearing "in a facility as the court designates," MCL 712A.15(1), provided the child meets at least one of the conditions in MCL 712A.15(2): specifically, "[t]hose who have allegedly violated a [PPO] and for whom it appears there is a substantial likelihood of retaliation or continued violation," MCL 712A.15(2)(e). "Before a juvenile may be detained in a secure facility[36] pending hearing, an individual or agency designated by the court shall use a detention screening tool on the juvenile," and "shall consult the results of the detention screening tool and follow any rules regarding its use that are promulgated by the supreme court." MCL 712A.15(3).
>
> "A juvenile taken into custody under [MCL 712A.2(a)(2)-(4)] must not be detained in a cell or other secure area of a secure facility designed to incarcerate adults unless . . . the juvenile is not less than 18 years of age and is under the jurisdiction of

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[34] MCR 3.988(D)(1) states that the court "*may*" incarcerate a respondent for up to 93 days.

[35] MCL 712A.2(h) gives the Family Division of Circuit Court jurisdiction over PPO proceedings under MCL 600.2950 and MCL 600.2950a in which the respondent is under age 18.

[36] *Secure facility* "means any public or private licensed child caring institution identified by the [Department of Health and Human Services] as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

> the court under a supplemental petition under [MCL 712A.2(h)]." MCL 712A.15(6)(b).

If the court finds that the juvenile has violated an order under MCL 712A.2(a)(2)-(4), it may order the juvenile placed in a secure facility. MCL 712A.18(1)(k). The court order "must state all of the following:

> (*i*) The court order the juvenile violated.
>
> (*ii*) The factual basis for determining that there was reasonable cause to believe that the juvenile violated the court order.
>
> (*iii*) The court's finding of fact to support a determination that there is no appropriate less restrictive alternative placement available considering the best interests of the juvenile.
>
> (*iv*) The length of time, not to exceed 7 days, that the juvenile may remain in the secure facility and the plan for the juvenile's release from the facility.
>
> (*v*) That the order may not be renewed or extended." MCL 712A.18(1)(k).

The court may issue a subsequent order under MCL 712A.18(1)(k) for a second or subsequent violation of a court order under MCL 712A.2(a)(2)-(4), "but only if the court finds both of the following:

> (*i*) The juvenile violated a court order after the date that the court issued the first order under [MCL 712A.18(1)(k)].
>
> (*ii*) The court has procedures in place to ensure that a juvenile held in a secure facility by a court order is not in custody more than 7 days or the length of time authorized by the court, whichever is shorter." MCL 712A.18(1)(*l*).

If a respondent who is subject to a minor PPO and is 17 years of age or older pleads to or is found guilty of *civil* contempt, the court must "impose a fine or imprisonment as specified in MCL 600.1715 and [MCL] 600.1721 . . . ." MCR 3.988(D)(2)(a).[37]

[37] For a thorough discussion of the court's contempt powers, see the Michigan Judicial Institute's *Contempt of Court Benchbook*, Chapter 1.

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[38]

2. Respondent Under Age 17[39]

A respondent who is under 17 years of age and refuses or fails to comply with a minor PPO issued under MCL 600.2950 or MCL 600.2950a is subject to the dispositions listed in MCL 712A.18.[40] MCL 600.2950(23); MCL 600.2950a(23).

MCR 3.988(D) makes no provision for *criminal* contempt sanctions against a minor respondent under age 17.

MCR 3.988(D)(2)(b) subjects respondents under age 17 to the dispositions listed in MCL 712A.18 if the respondent pleads to or is found guilty of *civil* contempt. "In a proceeding under [MCL 712A.2(h)[41]], [MCL 712A.18] only applies to a disposition for a violation of a personal protection order and subsequent proceedings." MCL 712A.18(21).

Among other dispositions available in MCL 712A.18, MCL 712A.18(1)(c) provides a disposition specifically applicable to minors who violate a PPO (placement in "a suitable foster care home subject to the court's supervision"). Conversely, by their express language, certain other dispositions in MCL 712A.18 do not apply to minors in violation of a PPO. See, e.g., MCL 712A.18(1)(m) and MCL 712A.18(1)(n) (applying only "[i]f a juvenile is within the court's jurisdiction under [MCL 712A.2(a)(1) (violations of law and ordinance)]") and MCL 712A.18(1)(o) (applying only "[i]f the court entered a judgment of conviction under [MCL 712A.2d (governing designated cases)]").

If the court finds that the juvenile has violated an order under MCL 712A.2(a)(2)-(4), it may order the juvenile placed in a secure facility. MCL 712A.18(1)(k). The court order "must state all of the following:

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[38] See Section 10.11 for additional information on MCR 3.937.

[39] Michigan adopted "Raise the Age" legislation prohibiting arrest and imprisonment of persons under the age of 18, effective October 1, 2021. However, MCL 600.2950 has not been amended to reflect this change and appears to include contradictory language.

[40] See Section 10.10 for detailed discussion of dispositional options. For discussion of the costs of disposition and orders for reimbursement, see Chapter 18.

[41] MCL 712A.2(h) gives the Family Division of Circuit Court jurisdiction over PPO proceedings under MCL 600.2950 and MCL 600.2950a in which the respondent is under age 18.

(*i*) The court order the juvenile violated.

(*ii*) The factual basis for determining that there was reasonable cause to believe that the juvenile violated the court order.

(*iii*) The court's finding of fact to support a determination that there is no appropriate less restrictive alternative placement available considering the best interests of the juvenile.

(*iv*) The length of time, not to exceed 7 days, that the juvenile may remain in the secure facility and the plan for the juvenile's release from the facility.

(*v*) That the order may not be renewed or extended." MCL 712A.18(1)(k).

The court may issue a subsequent order under MCL 712A.18(1)(k) for a second or subsequent violation of a court order under MCL 712A.2(a)(2)-(4), "but only if the court finds both of the following:

(*i*) The juvenile violated a court order after the date that the court issued the first order under [MCL 712A.18(1)(k)].

(*ii*) The court has procedures in place to ensure that a juvenile held in a secure facility by a court order is not in custody more than 7 days or the length of time authorized by the court, whichever is shorter." MCL 712A.18(1)(*l*).

Note: A juvenile about whom "a complaint has been made or a petition has been filed under [MCL 712A.1 *et seq*.]," may be detained pending hearing "in a facility as the court designates," MCL 712A.15(1), provided the child meets at least one of the conditions in MCL 712A.15(2): specifically, "[t]hose who have allegedly violated a [PPO] and for whom it appears there is a substantial likelihood of retaliation or continued violation," MCL 712A.15(2)(e). "Before a juvenile may be detained in a secure facility[42] pending hearing, an individual or agency designated by the court shall use a detention screening tool on the juvenile," and "shall consult the results of the detention screening tool and follow any rules regarding

its use that are promulgated by the supreme court." MCL 712A.15(3).

> "Except as otherwise provided in [MCL 712A.15], the court may order a juvenile 15 years of age or older whose habits or conduct are considered a menace to other juveniles, or who may not otherwise be safely detained, placed in a jail or other place of detention for adults, but in a room or ward separate from adults and for not more than 30 days, unless longer detention is necessary for the service of process." MCL 712A.16(1).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[43]

3. Probation Violations

When a minor who was placed on probation for violating a minor PPO allegedly violates a condition of probation, the court must follow the procedures for supplemental disposition provided in MCR 3.944.[44] MCR 3.989.

13.12 Procedures for Enforcing Foreign Protection Orders (FPOs)

The Family Division has jurisdiction over enforcement proceedings involving a valid FPO issued against a respondent who is less than 18 years old. MCL 712A.2(h); MCL 764.15b(6). Law enforcement officers, prosecuting attorneys, and courts must enforce an FPO using the same procedures used to enforce a PPO issued in Michigan. MCL 600.2950*l*(1). An FPO is:

> "an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against,

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[42] *Secure facility* "means any public or private licensed child caring institution identified by the [Department of Health and Human Services] as designed to physically restrict the movements and activities of the alleged or adjudicated juvenile offender that has the primary purpose of serving juveniles who have been alleged or adjudicated delinquent, other than a juvenile alleged or adjudicated under [MCL 712A.2(a)(2)-(4)]." MCL 712A.1(1)(t).

[43] See Section 10.11 for additional information on MCR 3.937.

[44] See Chapter 11 for discussion of probation violations.

> harassment of, contact with, communication with, or physical proximity to another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection." MCL 600.2950h(a). See also MCL 712A.1(1)(g) (defining "[f]oreign protection order[,]" as used in the Juvenile Code, as "that term as defined in . . . MCL 600.2950h[]").

To be valid, an FPO must satisfy the conditions set out in MCL 600.2950i. MCL 712A.1(1)(v). The following conditions must be met for an FPO to be valid:

> "(a) The issuing court had jurisdiction over the parties and subject matter under the laws of the issuing state, tribe, or territory.
>
> (b) Reasonable notice and opportunity to be heard is given to the respondent sufficient to protect the respondent's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided to the respondent within the time required by state or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights." MCL 600.2950i(1).

A valid FPO must be afforded full faith and credit and is subject to the same enforcement procedures and penalties as a PPO issued in Michigan. MCL 600.2950j(1). The invalidity of an FPO may be raised as an affirmative defense in an enforcement proceeding. MCL 600.2950i(2).

A mutual FPO is entitled to full faith and credit and is enforceable against the respondent. MCL 600.2950k(1). However, a mutual FPO is not enforceable against the person who petitioned for the order unless the petitioner's "spouse or intimate partner"[45] (the respondent) filed a separate written pleading seeking the FPO, and the issuing court made specific findings supporting relief for both parties. MCL 600.2950k(2)(a)-(b).

[45] See MCL 600.2950k(3)(a)-(e) for the relevant definition of "spouse or intimate partner."

Chapter 14: Traditional Waiver Proceedings

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In this chapter . . .

This chapter discusses the requirements for traditional waiver proceedings. In traditional waiver proceedings, the prosecuting attorney files a motion asking the Family Division to waive its delinquency jurisdiction over a juvenile who is 14, 15, or 16 years old. The motion may be filed with or subsequent to the filing of a delinquency petition. The court then conducts a two-phase hearing to determine whether there is

probable cause that the juvenile committed a felony, and whether it is in the best interests of the juvenile and public to waive or retain jurisdiction over the juvenile. A prosecuting attorney may choose to utilize the traditional waiver proceeding, rather than automatic waiver or prosecutor-designated case proceedings, when it desires the assistance of the court in determining whether to proceed against a juvenile as though he or she were an adult, or where the court must make the waiver decision because a specified juvenile violation is not alleged.

For related topics, see the following:

- Comparison of waiver and designated case proceedings, Section 1.11;
- Detention of juveniles subject to traditional waiver proceedings, Section 3.9;
- Admissibility of confessions, Section 7.7;
- Ordering a medical or psychological examination of a juvenile, Section 7.9;
- Determining a juvenile's competency, Section 7.10;
- Appointment of counsel under the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*, Chapter 17;
- Selected issues regarding adult sentencing, Chapter 19; and
- Appeals, Section 20.6.

14.1 Initiating Traditional Waiver Proceedings by Filing Motion to Waive Jurisdiction

MCL 712A.4(1) sets out the requirements for initiating a traditional waiver proceeding:

> "If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of [the] circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense."[1]

MCR 3.950(C) sets out the requirements for the prosecuting attorney's motion:[2]

> "A motion by the prosecuting attorney requesting that the family division waive its jurisdiction to a court of general criminal jurisdiction must be in writing and must clearly indicate the charges and that if the motion is granted the juvenile will be prosecuted as though an adult."[3]

For purposes of traditional waiver, a felony is "an offense punishable by imprisonment for more than [one] year or an offense designated by law as a felony." MCL 712A.4(11); MCR 3.950(B).

14.2 Waiver Proceedings When Juvenile Is Over 18 Years of Age at Time of Waiver Hearing[4]

MCL 712A.3 states:

> "(1) For an offense occurring before October 1, 2021, ifduring the pendency of a criminal charge against an individual in any other court it is ascertained that the person was under the age of 17 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the individual resides. For an offense occurring on or after

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[1] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

[2] See SCAO Form JC 18, *Motion to Waive Jurisdiction and Notice*.

[3] The Court of Appeals has held that if the prosecuting attorney files a motion to waive Family Division jurisdiction under MCL 712A.4, that election constitutes a waiver of the alternative option of authorizing a complaint and warrant under the automatic waiver statutes. *In re Fultz*, 211 Mich App 299, 311-312 (1995), rev'd on other grounds by *People v Fultz*, 453 Mich 937 (1996). However, the Michigan Supreme Court has ordered that the Court of Appeals' opinion on this "election of forum" issue is to be accorded no precedential force or effect. *Fultz*, 453 Mich 937 (1996). For more information on the precedential value of an opinion with negative subsequent history, see our note.

[4] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

> October 1, 2021, if during the pendency of a criminal charge against an individual in any other court it is ascertained that the individual was under the age of 18 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the individual resides.[5]
>
> (2) The court making the transfer shall order the individual to be taken promptly to the place of detention designated by the family division of the circuit court or to that court itself or release the juvenile in the custody of some suitable person to appear before the court at a time designated. The court shall then hear and dispose of the case in the same manner as if it had been originally instituted in that court."

Thus, if it is discovered during the pendency of a criminal charge occurring on or after October 1, 2021, that a juvenile was under 18 years of age when the offense was committed but 18 years of age or older when charged with the offense, the court of general criminal jurisdiction must transfer the case to the Family Division.[6] MCL 712A.3.

The Family Division "does not have jurisdiction over an individual after he or she attains the age of 19 years, except as provided in [MCL 712A.2a]," which governs continuing jurisdiction.[7] MCL 712A.5. Where the juvenile was under age 18 at the time of the offense but is 18 years old or older at the time of being charged, and the case is transferred back to the Family Division under MCL 712A.3, the Family Division has jurisdiction for the limited purpose of holding a waiver hearing pursuant to MCL 712A.4. *In re Seay*, 335 Mich App 715, 721 (2021), citing *People v Schneider*, 119 Mich App 480, 484-487 (1982).[8] If the Family Division declines to waive its jurisdiction, the case must be dismissed. *Seay*, 335 Mich App at 723, citing *Schneider*, 119 Mich App at 487.

"[T]he procedures described in MCL 712A.3 and MCL 712A.4 contemplate scenarios in which a criminal charge has already been filed against a person in the circuit court and it is thereafter determined that

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[5] See also MCL 764.27, a criminal statute that contains substantially similar language.

[6] However, "[a] circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013) (quoting *People v Lown*, 488 Mich 242, 268 (2011), and holding that because "'[a] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction,'" the juvenile defendant, "by entering a guilty plea in the circuit court, and failing to contest the circuit court's jurisdiction, . . . implicitly consented to that court's exercise of personal jurisdiction").

[7] See Section 12.2 for discussion of continuing jurisdiction over a juvenile.

[8] At the time *Seay* was decided, MCL 712A.3 and MCL 712A.4 applied to juveniles under the age of 17 at the time the crime occurred. Effective October 1, 2021, the age was raised to 18. See 2019 PA 109.

the person committed the offense when he was under the age of [18]." *Seay*, 335 Mich App at 723. In *Seay*, "respondent was 24 years old when [the] petition was filed in the family court regarding acts he allegedly committed when he was 15 or 16 years old." *Id*. "At the time of filing the petition, petitioner knew that respondent was under the age of [18] when he committed the alleged offense, and, accordingly, filed the petition [and motion to waive jurisdiction] in the family division." *Id*. at 723-724. "Without holding a hearing, the referee reviewed the petition and recommended that the petition not be authorized and the case be dismissed" finding that "the family division did not have jurisdiction over respondent because he was 24 years old." *Id*. at 724. The *Seay* Court "[did] not take issue with a petitioner filing a petition in the family division against a person [who] has reached the age of 18 regarding acts he committed as a juvenile when it is known before the petition was filed that the person was a juvenile when he committed the acts." *Id*. at 724-725. "Therefore, the family division erred (1) when it concluded that petitioner had to initially file [the] action in the circuit court for the circuit court to then transfer the case to the family division for a waiver hearing, and (2) by not authorizing the petition and dismissing the case without holding a waiver hearing." *Id*. at 725.

14.3 Time Requirements for Filing Motion to Waive Jurisdiction

A motion to waive jurisdiction must be filed within 14 days after the petition has been authorized to be filed. MCR 3.950(C)(1). "Absent a timely motion and good cause shown, the juvenile shall no longer be subject to waiver of jurisdiction on the charges." *Id*.

If a petition and motion to waive jurisdiction are dismissed for lack of timeliness in commencing the waiver hearing under MCR 3.950(D)(1)(a),[9] the prosecutor may file a second petition, which, barring a due process violation or prosecutorial bad faith, resets the 14-day time limit set out in MCR 3.950(C)(1) for filing a motion to waive jurisdiction. *People v McCoy*, 189 Mich App 201, 203-205 (1991), citing *People v Weston*, 413 Mich 371, 376 (1982).

14.4 Notice of Hearing and Service of Process

MCL 712A.4(2) states:

> "Before conducting a hearing on the motion to waive jurisdiction, the court shall give notice of the hearing in the

[9] See Section 14.7(A) for discussion of MCR 3.950(D)(1)(a).

> manner provided by supreme court rule to the juvenile and the prosecuting attorney and, if addresses are known, to the juvenile's parents or guardians. The notice must state clearly that a waiver of jurisdiction to a court of general criminal jurisdiction has been requested and that, if granted, the juvenile can be prosecuted for the alleged offense as though the juvenile were an adult."

A. Personal Service of Waiver Motion

"A copy of the motion seeking waiver must be personally served on the juvenile and the parent, guardian, or legal custodian of the juvenile, if their addresses or whereabouts are known or can be determined by the exercise of due diligence." MCR 3.950(C)(2).

B. Notice of Hearing

MCR 3.950(D) explains that a traditional waiver proceeding consists of two phases and provides that "[n]otice of the date, time, and place of the hearings may be given either on the record directly to the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual."

C. Victim's Right to be Present During Proceedings

MCL 780.789 states:

> "The victim has the right to be present throughout the entire contested adjudicative hearing or waiver hearing of the juvenile, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court, for good cause shown, may order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies."[10]

14.5 Judge Must Preside Over Traditional Waiver Proceedings

MCL 712A.4(1) provides that a *judge* of the Family Division in the county in which the offense is alleged to have been committed may waive jurisdiction over the juvenile. MCR 3.950(A) states that "[o]nly a judge assigned to hear cases in the family division of the circuit court of the county where the offense is alleged to have been committed may waive

[10] See Section 9.9 for further discussion of sequestration of victims and witnesses.

jurisdiction pursuant to MCL 712A.4." See also MCR 3.912(A)(2) (providing that a judge, not a referee, must preside over traditional waiver proceedings conducted pursuant to MCR 3.950).

14.6 Right to Counsel in Traditional Waiver Proceedings

A. Right to Appointed Counsel Under the Juvenile Code

MCL 712A.4(6) states:

> "If legal counsel has not been retained or appointed to represent the juvenile, the court shall advise the juvenile and the juvenile's parents, guardian, custodian, or guardian ad litem of the juvenile's right to representation and appoint legal counsel. If the court appoints legal counsel, the judge may assess the cost of providing legal counsel as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply."

B. Right to Appointed Counsel Under the Michigan Indigent Defense Commission Act

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*, creating the Michigan Indigent Defense Commission (MIDC)[11] and establishing a system for the appointment of defense counsel for indigent defendants, applies to juveniles who are charged with felony offenses in traditional waiver proceedings. See MCL 780.983(a)(*ii*)(A).In traditional waiver proceedings, the requirements of the MIDCA are applicable both "[d]uring consideration of a petition filed under . . . MCL 712A.4[] to waive jurisdiction . . . and upon granting a waiver of jurisdiction." MCL 780.983(a)(*ii*)(A).

The MIDCA authorizes the MIDC to set out minimum standards for attorneys who represent indigent criminal defendants. MCL 780.989(1)(a). Although the MIDC is within the executive branch (and not the judicial branch), the MIDCA does not violate the separation of powers doctrine of the Michigan Constitution because "any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary." *Oakland Co v State of Michigan*, 325 Mich App 247, 262 (2018). The MIDCA "does not directly regulate trial

[11] The MIDC is within the Department of Licensing and Regulatory Affairs (LARA). MCL 780.985(1); MCL 780.983(c).

courts or attorneys." *Id*. Instead, it "regulates 'indigent criminal defense system[s],' statutorily defined as funding units, rather than trial courts themselves." *Id.* at 262-263. In addition, it "repeatedly recognizes the Michigan Supreme Court's constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts." *Id*. at 263. Further, "the [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the [MIDCA] purport to control what happens in court." *Id*. at 264. Accordingly, the MIDCA is not facially unconstitutional. *Id*. at 265.

Among other requirements, the MIDCA requires the court to advise the accused of the right to counsel and requires that the accused be screened for eligibility for appointed counsel. MCL 780.991(1)(c) provides:

> "Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults,[12] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services."

"A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . must be made as determined by the indigent criminal defense system[13] not later than at the defendant's first appearance in court." MCL 780.991(3)(a).[14] The "trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the [Michigan Supreme Court.]" *Id*.[15] Furthermore, nothing in the MIDCA "prevents a court from making a

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[12] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*).

[13] An *indigent criminal defense system* is "[t]he local unit of government that funds a trial court." MCL 780.983(h)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an *indigent criminal defense system* is "those local units of government, collectively." MCL 780.983(h)(*ii*)

[14] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

determination of indigency for any purpose consistent with" Const 1963, art 6. MCL 780.991(3)(a).

Counsel must be assigned as soon as the defendant has been determined as eligible for indigent criminal defense services, and counsel must be appointed "as soon as the defendant's liberty is subject to restriction by a magistrate or judge." MIDC Standard 4. "Representation includes but is not limited to the arraignment on the complaint and warrant."[16] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

For further discussion of the MIDCA, see Chapter 17.

C. Defense Counsel Access to Records and Reports

MCL 712A.4(7) states:

> "Legal counsel shall have access to records or reports provided and received by the judge as a basis for decision in proceedings for waiver of jurisdiction. A continuance must be granted at legal counsel's request if any report, information, or recommendation not previously available is introduced or developed at the hearing and the interests of justice require a continuance."

[15] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265. See Chapter 17 for more information on the constitutionality of the MIDCA.

[16] The requirement that counsel be appointed at arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269 (although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

14.7 First-Phase ("Probable Cause" or "Adjudicative") Hearing[17]

The first phase of the two-part traditional waiver proceeding is a probable cause hearing, which is the equivalent of a preliminary examination in a criminal trial.[18] MCL 712A.4(10); MCR 3.950(D)(1).

MCL 712A.4(3) states in relevant part:

> "Before the court waives jurisdiction, the court shall determine on the record if there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony[19] and if there is probable cause to believe that the juvenile committed the offense."

See also MCR 3.950(D)(1), which provides:

> "The first-phase hearing is to determine whether there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony, and that there is probable cause to believe that the juvenile who is 14 years of age or older committed the offense."

A. Time Requirements for Conducting First-Phase Hearing

"The probable cause hearing must be commenced within 28 days after the authorization of the petition unless adjourned for good cause." MCR 3.950(D)(1)(a).

If a petition and motion to waive jurisdiction are dismissed for lack of timeliness under the 28-day rule, the prosecutor may file a second petition, which, barring a due process violation or prosecutorial bad faith, resets the 14-day time limit set out in MCR 3.950(C)(1)[20] for

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[17] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[18] MCL 766.4(1) requires the court, "*[e]xcept as provided in . . . MCL 712A.4*," to schedule, at arraignment for a felony charge, "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." (Emphasis supplied.). See also MCR 6.104(E)(4). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

[19] "'[F]elony' means an offense punishable by imprisonment for more than 1 year or an offense designated by law as a felony." MCL 712A.4(11).

[20] See Section 14.3.

filing a motion to waive jurisdiction. *People v McCoy*, 189 Mich App 201, 203-205 (1991), citing *People v Weston*, 413 Mich 371, 376 (1982).

B. Right to Appointed Counsel

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., authorizes the Michigan Indigent Defense Commission (MIDC)[21] to set out minimum standards for attorneys who represent indigent criminal defendants. Although the MIDC is within the executive branch (and not the judicial branch), the MIDCA does not violate the separation of powers doctrine of the Michigan Constitution because "any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary." *Oakland Co v State of Michigan*, 325 Mich App 247, 262 (2018). The MIDCA "does not directly regulate trial courts or attorneys." *Id*. Instead, it "regulates 'indigent criminal defense system[s],' statutorily defined as funding units, rather than trial courts themselves." *Id.* at 262-263. In addition, it "repeatedly recognizes the Michigan Supreme Court's constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts." *Id*. at 263. Further, "the [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the [MIDCA] purport to control what happens in court." *Id*. at 264. Accordingly, the MIDCA is not facially unconstitutional. *Id*. at 265.

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the court to advise the accused of the right to counsel and requires that the accused be screened for eligibility for appointed counsel.[22] MCL 780.991(1)(c) provides:

> "Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults,[23] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is

[21] The MIDC is within the Department of Licensing and Regulatory Affairs (LARA). MCL 780.985(1); MCL 780.983(c).

[22] The MIDCA applies to juveniles in traditional waiver proceedings, both "[d]uring consideration of a petition filed under . . . MCL 712A.4[] to waive jurisdiction . . . and upon granting a waiver of jurisdiction." MCL 780.983(a)(*ii*)(A) (defining *adult*, for purposes of the MIDCA, to include these juveniles).

[23] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*).

> determined to be eligible for indigent criminal defense services."

"A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . must be made as determined by the indigent criminal defense system[24] not later than at the defendant's first appearance in court." MCL 780.991(3)(a).[25] The "trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the [Michigan Supreme Court.]" *Id*.[26] Furthermore, nothing in the MIDCA "prevents a court from making a determination of indigency for any purpose consistent with" Const 1963, art 6. MCL 780.991(3)(a).

Counsel must be assigned as soon as the defendant has been determined as eligible for indigent criminal defense services, and counsel must be appointed "as soon as the defendant's liberty is subject to restriction by a magistrate or judge." MIDC Standard 4. "Representation includes but is not limited to the arraignment on the complaint and warrant."[27] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

For further discussion of the MIDCA, see Chapter 17.

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[24] An *indigent criminal defense system* is "[t]he local unit of government that funds a trial court." MCL 780.983(h)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an *indigent criminal defense system* is "those local units of government, collectively." MCL 780.983(h)(*ii*).

[25] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

[26] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265. See Chapter 17 for more information on the constitutionality of the MIDCA.

[27] The requirement that counsel be appointed at arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269 (although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

C. Probable-Cause Standard

The first-phase hearing is "the equivalent of[] the preliminary examination" required in a criminal proceeding. MCL 712A.4(10).[28] Thus, because "a preliminary examination is not the proper forum to prove guilt or innocence beyond a reasonable doubt[,]" a court conducting a first-phase waiver hearing must determine only whether there is probable cause that the juvenile committed the charged offense. *People v Burdin*, 171 Mich App 520, 524-525 (1988). "'[P]robable cause requires a quantum of evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" of the accused's guilt.'" *People v Plunkett*, 485 Mich 50, 57 (2010), quoting *People v Yost*, 468 Mich 122, 126 (2003) (internal citation omitted).

D. Burden of Proof and Rules of Evidence at First-Phase Hearing

"[T]he prosecuting attorney has the burden to present legally admissible evidence to establish each element of the offense and to establish probable cause that the juvenile committed the offense." MCR 3.950(D)(1)(b). MCR 3.903(A)(15) defines "[l]egally admissible evidence" as "evidence admissible under the Michigan Rules of Evidence." See also *People v Hana*, 443 Mich 202, 222, 225 n 62 (1993) (noting that the rules of evidence apply during the first-phase ["adjudicative"] hearing, but not the second-phase ["dispositional"] hearing).[29]

E. Constitutional Protections

A finding of probable cause during a first-phase hearing "satisfies the requirements of" the preliminary examination required in a criminal proceeding. MCL 712A.4(10). Accordingly, a juvenile must be afforded the same constitutional protections during a first-phase hearing as an adult facing a preliminary examination, including the

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[28] Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, "*[e]xcept as provided in . . . MCL 712A.4*," to schedule, at arraignment for a felony charge, "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1) (emphasis supplied); see also 2014 PA 123, enacting section 1. See also MCR 6.104(E)(4), as amended by ADM File No. 2014-42, effective January 1, 2015. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

[29] MCR 3.950(D)(2) also states that the rules of evidence, other than those pertaining to privileges, do not apply to the second-phase hearing. See Section 14.8(D) for discussion of rules of evidence in the second-phase hearing.

right to counsel and the right to a hearing regarding the voluntariness of any statements (i.e., a *Walker*[30] hearing). *Hana,* 443 Mich at 225 n 62.

F. Special Circumstances Where First-Phase Hearing is Not Required

1. Probable Cause Established at a Preliminary Hearing

The court need not conduct a probable cause hearing if the court found the requisite probable cause during the pretrial detention determination at a preliminary hearing under MCR 3.935(D)(1), "provided that at the earlier hearing only legally admissible evidence was used to establish probable cause that the offense was committed and probable cause that the juvenile committed the offense[.]" MCR 3.950(D)(1)(c)(*i*).[31]

2. First-Phase Hearing Waived

The court need not conduct a probable cause hearing if the juvenile waives the hearing after being informed by the court on the record that the probable cause hearing is equivalent to and held in place of a preliminary examination in district court, and that a waiver of the probable cause hearing also waives the preliminary examination.[32] MCL 712A.4(3); MCR 3.950(D)(1)(c)(*ii*). "The court must determine that the waiver of hearing is freely, voluntarily, and understandingly given and that the juvenile knows there will be no preliminary examination in district court if the [Family Division] waives jurisdiction." MCR 3.950(D)(1)(c)(*ii*).

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[30] *People v Walker (On Rehearing)*, 374 Mich 331 (1965).

[31] See Section 6.3(H) for discussion of MCR 3.935(D)(1).

[32] Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, "*[e]xcept as provided in . . . MCL 712A.4*," to schedule, at arraignment for a felony charge, "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1) (emphasis supplied); see also 2014 PA 123, enacting section 1. See also MCR 6.104(E)(4). 2014 PA 123 also amended MCL 766.7 to provide that the defendant may waive the preliminary examination only "with the consent of the prosecuting attorney[]" (see also MCR 6.110(A)); it is unclear whether this consent requirement would apply in a traditional waiver proceeding under MCL 712A.4. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

14.8 Second-Phase ("Best Interests" or "Dispositional") Hearing[33]

"Upon a showing of probable cause . . . , the court shall conduct a hearing to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction." MCL 712A.4(4). See also MCR 3.950(D)(2) ("If the court finds the requisite probable cause at the first-phase hearing, or if there is no hearing pursuant to [MCR 3.950(D)(1)(c)],[34] the second-phase hearing must be held to determine whether the interests of the juvenile and the public would best be served by granting the motion [for waiver of jurisdiction].").

A. Time Requirements for Conducting Second-Phase Hearing

The second-phase hearing must commence within 28 days after the conclusion of the first-phase hearing, or within 35 days after the authorization of the petition if there was no first-phase hearing under MCR 3.950(D)(1)(c),[35] unless adjourned for good cause. MCR 3.950(D)(2)(a).

B. Criteria to Consider at Second-Phase Hearing

In making the best-interests determination under MCL 712A.4(4), "the court shall consider all of the following criteria, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria:

> "(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines and the use of a firearm or other dangerous weapon.
>
> (b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or

[33] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[34] See Section 14.7(F).

[35] See Section 14.7(F) for discussion of establishing probable cause at the preliminary hearing and waiver of the first-phase hearing.

> mitigating factors recognized by the sentencing guidelines.
>
> (c) The juvenile's prior record of delinquency that would be a crime if committed by an adult.
>
> (d) The juvenile's programming history, including, but not limited to, any out-of-home placement or treatment and the juvenile's past willingness to participate meaningfully in available programming;
>
> (e) The adequacy of the programming available to rehabilitate and hold accountable the juvenile in the juvenile justice system and the juvenile's amenability to treatment.
>
> (f) The dispositional options available for the juvenile.
>
> (g) The juvenile's developmental maturity, emotional health, and mental health.
>
> (h) If the juvenile is a member of a federally recognized Indian tribe, culturally honoring traditional values of the juvenile's tribe.
>
> (i) The impact on any victim." MCL 712A.4(4)(*a*)-(*i*). See also MCR 3.950(D)(2)(d)(i)-(ix), which contains substantially similar language.

Before 1997, MCL 712A.4(4) provided that each of the second-phase criteria was to be "giv[en] . . . weight as appropriate to the circumstances." See *People v Whitfield (After Remand)*, 228 Mich App 659, 661-662 (1998). Effective January 1, 1997, 1996 PA 262 amended MCL 712A.4(4) to require the court to assign greater weight to the seriousness of the offense and the juvenile's prior delinquency record than to the other factors.

In a case decided under the pre-1997 version of the statute, the Michigan Supreme Court held that no single factor was to be accorded "'preeminence over other factors to be assessed[,]'" and that the seriousness of the offense did not, standing alone, justify waiving jurisdiction over a juvenile. *People v Dunbar*, 423 Mich 380, 387-388, 393 (1985), quoting *People v Schumacher*, 75 Mich App 505, 512 (1977). In light of the amendments to MCL 712A.4(4) that now require the court to assign greater weight to this factor (as well as to the juvenile's prior delinquency record), *Dunbar*'s continued validity on this point is uncertain.

Although the court must consider the criteria in MCL 712A.4(4) and MCR 3.950(D)(2)(d) when deciding whether to waive jurisdiction

over a juvenile, the court generally "retains the discretion to make the ultimate decision whether to waive jurisdiction over the juvenile." *People v Williams*, 245 Mich App 427, 432 (2001), citing *In re Le Blanc*, 171 Mich App 405, 412 (1988). However, if the court finds that (1) pursuant to a first-phase hearing, probable cause exists, and (2) the juvenile has previously been subject to the circuit court's jurisdiction under MCL 712A.4 (traditional waiver), MCL 600.606 (automatic waiver), or former MCL 725.10a (waiver to the former Recorder's Court),[36] the court *must* waive jurisdiction. MCL 712A.4(5); *Williams*, 245 Mich App at 432.[37]

In determining whether to waive jurisdiction, the court may consider any stipulation by the defense to a finding that the best interests of the juvenile and the public support waiver. MCR 3.950(D)(2)(e).

During the second phase of a waiver hearing, a court cannot accept a plea of admission from a juvenile to a lesser-included offense, thereby assuming jurisdiction over the juvenile as a delinquent, without the concurrence of the prosecutor. *In re Wilson*, 113 Mich App 113, 122-123 (1982). The court must allow the prosecuting attorney to present evidence supporting the motion for waiver and determine whether the best interests of the juvenile and public support waiver. *Id.* at 121-123 (1982), citing *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672 (1972), and *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115 (1974) (in criminal cases, acceptance of plea to an offense not charged in the information or to a lesser-included offense over prosecutor's objection violates separation of powers doctrine).

C. Findings at Second-Phase Hearing

MCR 3.950(D)(2)(d) requires the court to consider and *make findings on* all of the criteria listed in MCL 712A.4(4)(*a*)-(*i*). In determining whether to waive the juvenile to the court having general criminal jurisdiction, the court "must consider and *make findings on the following criteria*, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria:

> "(i) the seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines and the use of a firearm or other dangerous weapon;

[36] MCL 725.10a has been repealed.

[37] See Section 14.8(E) for discussion of MCL 712A.4(5).

> (ii) the culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines;
>
> (iii) the juvenile's prior record of delinquency that would be a crime if committed by an adult;
>
> (iv) the juvenile's programming history, including, but not limited to, any out-of-home placement or treatment and the juvenile's past willingness to participate meaningfully in available programming;
>
> (v) the adequacy of the programming available to rehabilitate and hold accountable the juvenile in the juvenile justice system and the juvenile's amenability to treatment;
>
> (vi) the dispositional options available for the juvenile;
>
> (vii) the juvenile's developmental maturity, emotional health, and mental health;
>
> (viii) if the juvenile is a member of a federally-recognized Indian tribe, culturally honoring traditional values of the juvenile's tribe; and
>
> (ix) the impact on any victim." MCR 3.950(D)(2)(d) (emphasis added). See also MCL 712A.4(4)(*a*)-(*i*), which contains substantially similar language but only requires the court to consider all of the criteria listed in the statute.

The United States Court of Appeals for the Sixth Circuit has rejected a habeas petitioner's contention that the state court had violated his due process rights by waiving jurisdiction to the adult court without making specific findings on the record regarding all of the second-phase statutory criteria for waiving jurisdiction over a juvenile:

> "[O]ur concern today is whether petitioner received due process as required by *Kent* [*v United States*, 383 US 541 (1966)], not whether the state court meticulously complied with [the applicable juvenile court rule]. We find that minimum due process requirements were met. Petitioner was represented by counsel and a hearing was held on the record. Whether the Michigan court's waiver of jurisdiction and transfer to adult court contain sufficient indicia under state law is a question for the

> Michigan courts, which have held that it was valid. Accordingly, despite the lack of specific findings on the record concerning the listed criteria, we cannot say that the judge did not consider all the criteria before making his decision or that the hearing did not comport with minimum due process." *Spytma v Howes*, 313 F3d 363, 369-370 (CA 6, 2002).[38]

D. Burden of Proof and Rules of Evidence at Second-Phase Hearing

"The prosecuting attorney has the burden of establishing by a preponderance of the evidence that the best interests of the juvenile and the public would be served by waiver." MCR 3.950(D)(2)(c).

"The Michigan Rules of Evidence, other than those with respect to privileges, do not apply to the second phase of the waiver hearing." MCR 3.950(D)(2)(b). See also MRE 1101(b)(7), providing that the Michigan Rules of Evidence, other than those with respect to privileges, do not apply in proceedings in the Family Division "whenever MCR subchapter 3.900 states that the Michigan Rules of Evidence do not apply."

Inadmissible evidence, including records containing hearsay information and evidence of a juvenile's prior criminal acts not resulting in conviction, may be introduced at the second-phase hearing, as long as the evidence is relevant and material and the juvenile has an opportunity for refutation. *People v Williams*, 111 Mich App 818, 825-826 (1981). See also *People v Hana*, 443 Mich 202, 223 (1993) (noting that "the public policy underlying [second-phase] hearings requires relaxed evidentiary standards so as to ensure a 'full investigation'" into the interests of the juvenile and the public [internal citation omitted]).

E. Special Circumstances Where No Second-Phase Hearing Is Required

When a juvenile has previously been subject to the general criminal jurisdiction of the circuit court as the result of a traditional or

[38] See also *People v Petty*, 469 Mich 108, 113-119 (2003), addressing the degree of analysis required under former MCL 712A.18(1)(n) (now MCL 712A.18[1][o]), which required the Family Division to consider criteria that are nearly identical to those under MCL 712A.4(4) when deciding whether to impose an adult sentence or juvenile disposition in a designated case. The *Petty* Court, repudiating the "command to create a mechanical list of factual findings for each criterion" that was announced in *People v Thenghkam*, 240 Mich App 29 (2000), held that "[a] trial court need not engage in a lengthy 'laundry list' recitation of the [relevant] factors;" rather, the court must simply "acknowledge its discretion" to choose between the available sentencing and dispositional options and "consider the enunciated factors . . . to *assist* it in choosing one option over the others." *Petty*, 469 Mich at 117, 121.

automatic waiver, the court, after making a finding of probable cause, must waive jurisdiction without conducting a second-phase hearing:

> "If the court determines that there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony and that the juvenile committed the offense, the court *shall* waive jurisdiction of the juvenile if the court finds that the juvenile has previously been subject to the jurisdiction of the circuit court under [MCL 712A.4 (traditional waiver) or MCL 600.606 (automatic waiver)]."[39] MCL 712A.4(5). (Emphasis added.)

See also MCR 3.950(D)(2), which provides that "if the juvenile has been previously subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 or [MCL] 600.606, the court must waive jurisdiction of the juvenile to the court of general criminal jurisdiction without holding the second-phase hearing." (Emphasis added.) In effect, "[t]his mandatory waiver language makes the best interests determination conducted in a phase-two hearing irrelevant to a family court's decision to waive jurisdiction over a juvenile to the circuit court." *People v Williams*, 245 Mich App 427, 432-433 (2001).

When a court of general criminal jurisdiction acquires jurisdiction over a juvenile pursuant to MCL 712A.4(5), it must impose an adult sentence. *Williams*, 245 Mich App at 436, citing *People v Thenghkam*, 240 Mich App 29, 38-39 (2000), abrogated in part on other grounds by *People v Petty*, 469 Mich 108 (2003).[40, 41]

14.9 Court Procedures When Waiver Is Denied

If the court does not waive jurisdiction, the court must enter an appropriate order and make written findings of fact and conclusions of law or place them on the record. MCL 712A.4(8); MCR 3.950(F). A transcript of the court's findings or a copy of the written opinion "must be sent to the prosecuting attorney and the juvenile, or juvenile's attorney, upon request." MCR 3.950(F). See also MCL 712A.4(9), which contains substantially similar language.

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[39] See Section 2.6 and Chapter 16 for further discussion of automatic waiver cases.

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

[41] An adult sentence is required for *all* juveniles convicted following traditional waiver, not only for those waived without a second-phase hearing under MCL 712A.4(5). See Section 14.14 for additional discussion of sentencing following traditional waiver.

"If the juvenile is detained and the trial of the matter in the family division has not started within 28 days after entry of the order denying the waiver motion, and the delay is not attributable to the defense, the court shall forthwith order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter." MCR 3.950(F).

MCR 3.942(A) provides that all trials in juvenile court must be held within six months after the authorization of the petition, unless adjourned for good cause.

14.10 Court Procedures When Waiver Is Ordered

If the court determines that it is in the best interests of the juvenile and the public to waive jurisdiction over the juvenile, the court must:

- "[e]nter a written order granting the motion to waive jurisdiction and transferring the matter to the appropriate court having general criminal jurisdiction for arraignment of the juvenile on an information[;]"
- in a written opinion or on the record, make findings of fact and conclusions of law forming the basis for entry of the waiver order;
- advise the juvenile of his or her right to appeal the court's decision to the Court of Appeals within 21 days and his or her right to appointed appellate counsel if the juvenile is financially unable to retain one;[42] and
- send a copy of the order waiving jurisdiction and the transcript of the court's findings or a copy of the written opinion to the court of general criminal jurisdiction. MCR 3.950(E)(1)(a)-(d). See also MCL 712A.4(8).

14.11 Notice of Juvenile's Right to Appeal

If the court waives jurisdiction over the juvenile, the court must advise the juvenile, orally or in writing, that:

> "(i) the juvenile is entitled to appellate review of the decision to waive jurisdiction,

[42] See Section 14.11 for more information on a juvenile's right to appeal an order waiving jurisdiction.

> "(ii) the juvenile must seek review of the decision in the Court of Appeals within 21 days of the order to preserve the appeal of right, and
>
> "(iii) if the juvenile is financially unable to retain an attorney, the court will appoint one to represent the juvenile on appeal in accordance with MCR 3.993(D)(5)." MCR 3.950(E)(1)(c).

Where a juvenile appeals the decision to waive jurisdiction immediately after waiver, a subsequent guilty plea by the juvenile in the circuit court does not render the appeal of the decision to waive jurisdiction moot. *People v Rader,* 169 Mich App 293, 299-300 (1988).

14.12 Transfer to Adult Criminal Justice System

"Upon the grant of a waiver motion, a juvenile must be transferred to the adult criminal justice system and is subject to the same procedures used for adult criminal defendants. Juveniles waived pursuant to this rule are required to be kept separate and apart from adult prisoners as required by MCL 764.27a." MCR 3.950(E)(2).

If the Family Division waives jurisdiction, the juvenile must be arraigned on an information filed by the prosecutor in the court of general criminal jurisdiction. MCL 712A.4(10). If the juvenile "appears before a magistrate without counsel," the magistrate must advise him or her of the right to appointed counsel and must appoint counsel if the juvenile is eligible under the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*. MCL 775.16.[43] The probable cause finding in the first-phase waiver hearing satisfies the requirements of, and is the equivalent of, the preliminary examination required by the Code of Criminal Procedure. Thus, the juvenile is not entitled to a preliminary examination in district court following traditional waiver. *Id*.[44]

A juvenile defendant over whom jurisdiction was waived for an offense cannot be charged with a greater offense in the circuit court. *People v*

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[43] See Chapter 17 for discussion of the right to appointed counsel under the MIDCA.

[44] Before MCL 712A.4 was amended to include the preliminary examination provision that is now contained in subsection (10), the juvenile was entitled to a preliminary examination in district court upon demand. See *People v Phillips,* 416 Mich 63, 66-75 (1982); *People v Dunigan,* 409 Mich 765, 769-772 (1980).

Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, "*[e]xcept as provided in . . . MCL 712A.4*," to schedule, at arraignment for a felony charge, "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1) (emphasis supplied); see also 2014 PA 123, enacting section 1; MCR 6.104(E)(4). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

Hoerle, 3 Mich App 693, 698 (1966). However, a plea of guilty or conviction of a lesser-included offense in the adult court, even if that offense was not considered at the waiver hearing, is not precluded. *People v Veling*, 443 Mich 23, 40-41 n 21 (1993), citing *People v Smith (Jimmie)*, 35 Mich App 597, 598 (1971). See also *People v Peters*, 397 Mich 360 (1976) (adult court had jurisdiction to accept defendant's plea of guilty of second-degree murder after waiver on charge of first-degree murder).

The Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., applies to juveniles over whom jurisdiction has been waived in a traditional waiver proceeding. MCL 762.15. Application of the HYTA to traditionally waived juveniles is rare, and a discussion of that act is beyond the scope of this benchbook.

14.13 Use of Evidence and Testimony at Criminal Trials

A. Testimony Derived From a Waiver Proceeding

MCL 712A.23 restricts the use of evidence from juvenile proceedings in subsequent civil or criminal proceedings:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]."

MCL 712A.23 does not affect the admissibility at trial of physical evidence offered during a traditional waiver proceeding:

> "It is our conclusion that the intent of the statute is to proscribe the actual testimony taken at the juvenile proceedings. It is not meant to preclude the physical evidence, nor is it meant to exclude a witness who testified at the juvenile proceedings from testifying on the same subject matter at a subsequent trial for the same offense. What is forbidden is the use of testimonial evidence from the juvenile hearing either as substantive evidence or to impeach at a subsequent trial." *People v Hammond*, 27 Mich App 490, 494 (1970).

See also *People v Pennington*, 113 Mich App 688, 697-698 (1982), holding that the trial court did not err in allowing the admission of the waiver-hearing testimony of an accomplice as substantive evidence, where the accomplice asserted his Fifth Amendment

privilege against self-incrimination at trial. "The waiver hearing serves to determine if there is cause to try the juvenile as an adult. It is not a disposition of a case against a juvenile." *Id.* at 697.

B. Psychiatric Testimony at Criminal Trial Following Court-Ordered Examination for Waiver Hearing

MCR 3.950(G) states as follows:

> "(1) A psychiatrist, psychologist, or certified social worker who conducts a court-ordered examination for the purpose of a waiver hearing may not testify at a subsequent criminal proceeding involving the juvenile without the juvenile's written consent.
>
> (2) The juvenile's consent may only be given:
>
> > "(a) in the presence of an attorney representing the juvenile or, if no attorney represents the juvenile, in the presence of a parent, guardian, or legal custodian;
> >
> > (b) after the juvenile has had an opportunity to read the report of the psychiatrist, psychologist, or certified social worker; and
> >
> > (c) after the waiver decision is rendered.
>
> (3) Consent to testimony by the psychiatrist, psychologist, or certified social worker does not waive the juvenile's privilege against self-incrimination."

14.14 Sentencing Following Traditional Waiver[45]

A juvenile who has been tried as an adult following traditional waiver to the court of general criminal jurisdiction generally must be sentenced as an adult.[46] *People v Veling*, 443 Mich 23, 39 (1993), citing *People v Cosby*, 189 Mich App 461, 464 (1991); MCR 6.901(B) (providing that the court rules applicable to juveniles subject to automatic waiver for specified offenses, including the requirement of a juvenile sentencing hearing ("waiver back"), do not apply to cases in which the Family Division waived jurisdiction under MCL 712A.4). See also *People v Williams*, 245 Mich App 427, 432 (2001).[47]

[45] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

However, an offender who was under the age of 18 at the time of the commission of an offense is not subject to the imposition of a mandatory sentence of life imprisonment without the possibility of parole. *Miller v Alabama*, 567 US 460, 465, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense).

A juvenile convicted of an offense carrying a mandatory life-without-parole sentence may be subject to the sentencing requirements set out in MCL 769.25 or MCL 769.25a. Under circumstances in which MCL 769.25 or MCL 769.25a applies to an offender, the prosecuting attorney must file a motion if he or she intends to seek imposition of a life sentence without the possibility of parole. MCL 769.25(3); MCL 769.25a(4)(b).

"[T]here is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and . . . it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing." *People v Taylor*, 510 Mich 112, 129 (2022). "MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence." *Taylor*, 510 Mich at 135. "The trial court . . . must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP." *Id*. at 136.

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[46] Certain felonies and repeat offenses are generally punishable by mandatory life imprisonment without the possibility of parole. See MCL 791.234(6) (removing from parole eligibility offenders serving life sentences for certain enumerated offenses, including first-degree murder). However, a mandatory sentence of life imprisonment without the possibility of parole may be inconsistent with the Eighth Amendment if imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 465, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). MCL 769.25 and MCL 769.25a effectively eliminate the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Mandatory life imprisonment without parole sentences are discussed in Section 7.5(B). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)). For additional discussion of the constitutionality of sentencing juveniles and late adolescents to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see Section 16.11(B)(2) and Section 19.4(C). For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

"This is an exercise in discretion, not a fact-finding mission." *Id*. at 136 (noting that "our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence").

"[T]he Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like other older adults." *People v Parks*, 510 Mich 225, 244 (2022).[48] In *Parks*, the Michigan Supreme Court held that "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under Const 1963, art 1, § 16." *Parks*, 510 Mich at 255 (holding that an 18-year-old defendant "must be resentenced" because he "was sentenced without consideration of the attributes of youth").

People v Bullock, 440 Mich 15, 30, 33-34 (1992), "set forth criteria to apply in a challenge to a statutory sentence: (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation." *People v Nard*, ___ Mich App ___, ___ (2025). "There is no requirement that a trial court reduce its sentence out of consideration for a defendant's youth." *Id*. at ___. "Instead, recent caselaw requires only that the attributes of youth be taken into consideration." *Id*. at ___. "There is no authority that imposes a higher standard of articulation regarding youth beyond [the] general requirement that a trial court must

[47] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for discussion of the sentencing and post-sentencing procedures applicable in adult proceedings and the legislative sentencing guidelines applicable to felonies.

[48] Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)). Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review").

adequately explain its sentence on the record in order to facilitate appellate review." *Id*. at ___ (cleaned up).

"[T]he decision whether to impose a sentence of life without parole [is properly decided] by a judge, rather than by a jury beyond a reasonable doubt."[49] *People v Skinner (Skinner II)*, 502 Mich 89, 107-108 (2018) (holding that MCL 769.25 does not violate the Sixth or Eighth Amendments "because neither [MCL 769.25] nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead life without parole is authorized by the jury's verdict alone"), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). See Section 19.4(C) for discussion of juvenile life-without-parole sentences.

In *Williams,* 245 Mich App at 429-430, the juvenile defendant had previously been tried for an offense as an adult in circuit court. Accordingly, the Family Division waived jurisdiction pursuant to MCL 712A.4(5) without holding a second-phase waiver hearing.[50] *Williams,* 245 Mich App at 430. On appeal from his conviction and adult sentence, the juvenile argued that because the Family Division did not conduct a second-phase hearing before waiving jurisdiction, he was entitled to a "juvenile sentencing hearing" under MCL 769.1(3) and MCR 6.931 (governing sentencing following automatic waiver for specified offenses). The Court of Appeals disagreed, holding that the plain language of MCR 6.901(B) precludes a juvenile sentencing hearing pursuant to MCR 6.931 in all traditional waiver proceedings. *Williams*, 245 Mich App at 433-435. The Court noted that since MCL 712A.4(5) does not require that a juvenile be *convicted* in the previous proceeding, application of that provision in a subsequent proceeding where an adult sentence is mandatory may lead to unfair results, putting them "in the same sentencing category as juveniles who are tried and convicted of the most heinous crimes under the modern automatic waiver statute." *Williams,* 245 Mich App at 437. The Court allowed for the possibility that the Legislature and Michigan Supreme Court intended to preclude a juvenile sentencing hearing only where the juvenile was previously *convicted* of an offense as an adult, but the Court concluded that the plain language of the relevant statute and court rules did not provide for such a procedure. *Id.* at 437-438.

The *Williams* Court additionally noted that the panel in *People v Thenghkam,* 240 Mich App 29, 38-39 (2000), abrogated in part on other grounds by *People v Petty*, 469 Mich 108 (2003),[51] had erroneously stated, in dicta, that the circuit court retains discretion to impose a juvenile

[49] A trial court's decision whether to sentence a juvenile to life without parole is reviewed under the abuse of discretion standard. *Skinner*, 502 Mich at 137.

[50] See Section 14.8(E) for discussion of MCL 712A.4(5).

sentence following traditional waiver proceedings and conviction. *Williams*, 245 Mich App at 435-436. The *Thenghkam* dicta also contradicts MCR 6.901(B), *Veling*, 443 Mich at 39, and *Cosby*, 189 Mich App at 464.

Time of Sentence. "The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law." MCR 6.425(D)(1). The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution." *Betterman v Montana*, 578 US 437, 439-441 (2016) ("[h]olding that the Clause does not apply to delayed sentencing"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id*. at 439.

Incarceration for Failure to Pay Court-Ordered Financial Obligations. Before incarcerating a defendant for failure to pay a court-ordered financial obligation, the court must determine the defendant's ability to pay without manifest hardship. MCR 6.425(D)(3)(a). MCR 6.425(D)(3)(c) sets out criteria the court must consider in determining manifest hardship. See Section 19.2 for discussion of MCR 6.425(D)(3).

14.15 Due Process Requirements Applicable to Traditional Waiver Proceedings

"[T]he waiver of jurisdiction [over a juvenile] is a 'critically important' action determining vitally important statutory rights of the juvenile[,]" with consequences including the possibility of a lengthy prison sentence. *Kent v United States*, 383 US 541, 556-557 (1966) (internal citation omitted). Accordingly, although a waiver hearing need not "conform with all of the requirements of a criminal trial[,]" it "must measure up to the essentials of due process and fair treatment[,]" including access to records and reports, a statement of reasons for the decision on the motion, and the effective assistance of counsel. *Id.* at 561-563.

A. Effective Assistance of Counsel[52]

A juvenile has a federal constitutional right to be represented by counsel at a waiver hearing. *Kent*, 383 US at 553-554. A juvenile also

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

[52] See Section 14.6 for discussion of the statutory right to appointed counsel in traditional waiver proceedings.

has the right to proper notification of the right to counsel at waiver proceedings and the right to the appointment of counsel in appropriate cases. *In re Gault,* 387 US 1, 41 (1967); see also *People v Hana,* 443 Mich 202, 219, 225-226 (1993) (holding that the "full panoply of constitutional rights" afforded by *Kent* and *Gault* applies only to the first-phase, "adjudicative," portion of the waiver hearing, and not to the second-phase, "dispositional," phase of the waiver hearing[53]). See also *People v Whitfield,* 214 Mich App 348, 353-355 (1995) (juvenile did not receive effective assistance of counsel where juvenile's attorney failed to appeal the decision to waive jurisdiction over the juvenile).

B. Voluntariness of a Confession[54]

The voluntariness of a juvenile's confession must be established before it may be admitted during the first phase of a waiver hearing. *Hana*, 443 Mich at 225 n 62, citing *People v Good,* 186 Mich App 180 (1990).[55]

C. Privilege Against Self-Incrimination

The Fifth Amendment privilege against self-incrimination does not apply to a juvenile defendant's prior statements or confessions admitted during the second phase of a traditional waiver hearing. *Hana,* 443 Mich at 225-226. In *Hana,* the juvenile defendant, following his arrest on drug charges, made incriminating statements to police officers and a youth officer despite receiving and acknowledging that he understood his *Miranda* rights. *Id.* at 205-207. The police officers, the youth officer, and a court psychologist who examined the defendant testified at the second-phase hearing concerning the incriminating statements. *Id.* at 207-208. Relying on *Gault,* 387 US 1, the Court of Appeals held that the constitutional protections

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[53] Note, however, that a juvenile may have the right to appointed counsel during a second-phase hearing under the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., which applies both "[d]uring consideration of a petition filed under . . . MCL 712A.4[] to waive jurisdiction . . . and upon granting a waiver of jurisdiction[,]" MCL 780.983(a)(*ii*)(A). See Chapter 17 for discussion of the MIDCA.

[54] See Section 7.7 for discussion of the admissibility of confessions.

[55] "A law enforcement official interrogating an individual in custodial detention regarding the individual's involvement in the commission of a major felony" must capture the entire interrogation, including notification of a defendant's *Miranda* rights, in a time-stamped, audiovisual recording. MCL 763.8(2). However, if the defendant's "statement is otherwise admissible[,]" a law enforcement officer may "testify[] in court as to the circumstances and content of the . . . statement" even if the recording requirements of MCL 763.8 are not fulfilled. MCL 763.9. In such a situation, "unless the individual objected to having the interrogation recorded and that objection was properly documented under [MCL 763.8(3)], the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9. See Section 7.7(A) for discussion of major felony recordings.

applicable to criminal trials, including the privilege against self-incrimination, applied to the second phase of traditional waiver proceedings. *Hana,* 443 Mich at 209. The Supreme Court reversed, holding as follows:

> "We conclude that the constitutional protections extended to juvenile proceedings in cases such as *Kent* and *Gault* apply in full force to the adjudicative phase of a juvenile waiver hearing. We also find that the statutes and court rules concerning phase I hearings, when properly applied, afford the appropriate protection. Thus, because none of the alleged confessions or admissions were introduced at the phase I adjudicative phase of the waiver hearing, there was no constitutional violation. We conclude further that the full panoply of constitutional rights asserted by defendant does not apply to the dispositional phase of a waiver hearing. The United States Supreme Court has confined its extension of Fifth and Sixth Amendment rights to the adjudicative and not the dispositional phase of waiver proceedings. Use of defendant's alleged statements to the police and the court psychologist at the phase II dispositional hearing, therefore, did not violate any constitutional provisions." *Hana,* 443 Mich at 225-226 (footnotes omitted).

D. Double Jeopardy

Jeopardy attaches to a delinquency proceeding when a juvenile court, sitting as trier of fact, begins to hear evidence in the adjudicatory stage of the proceeding. *Breed v Jones,* 421 US 519, 531 (1975). Therefore, a decision to waive jurisdiction must occur before any adjudication of guilt or innocence. *Id.* at 537-538, 538 n 18. See also *People v Saxton,* 118 Mich App 681, 688-689 (1982) (Michigan's traditional waiver procedure does not include an adjudication of guilt or innocence; thus, a criminal trial following waiver does not place a juvenile defendant twice in jeopardy).

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In this chapter. . .

In designated proceedings, a juvenile is tried in the Family Division in the same manner as an adult. If a petition alleges a specified juvenile violation, the prosecutor may designate the case for trial in the same manner as an adult. If the petition alleges an offense that is not a specified juvenile violation, the prosecutor may request that the Family Division conduct a hearing to determine if the best interests of the juvenile and the public would be served by trying the juvenile in the same manner as an adult. A plea of guilty or nolo contendere, or a verdict of guilty, results in a criminal conviction. Following conviction in a designated proceeding, the court may enter a juvenile disposition; impose any sentence that could be imposed upon an adult convicted of the same offense, if the court determines that the best interests of the public would be served by imposing such a sentence; or delay imposing a sentence of imprisonment and place the juvenile on probation. If the court delays sentencing and orders probation, review and probation violation hearing and revocation requirements apply.

Part A of this chapter provides an overview of designated proceedings and discusses the procedural requirements for initiating a designated case.

Part B discusses the procedural requirements for arraignments, designation hearings, and preliminary examinations in designated proceedings.

Part C briefly discusses the procedural requirements for pleas and trials in designated proceedings. With a few exceptions, which are noted in this chapter, the procedural requirements for pleas and trials in designated proceedings are the same as those in adult criminal proceedings. However, a complete discussion of those requirements is beyond the scope of this benchbook. For a thorough discussion of pleas and trials in criminal cases, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapters 6 and 12.

Part D discusses the court's options following conviction in a designated proceeding. Following conviction, a Family Division judge may impose a juvenile disposition, an adult sentence, or an order of disposition delaying imposition of a sentence of imprisonment. Different procedural rules apply depending upon the court's decision.

Part E discusses the review requirements that are applicable when the court delays sentencing and places the juvenile on probation rather than entering a juvenile disposition or imposing an adult sentence in a designated proceeding.

Part F discusses probation violation hearing and revocation requirements when probation is ordered in a designated proceeding. For information regarding probation violation when adult sentence is imposed, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2.

Related issues are discussed in the following portions of this benchbook:

- Comparison of waiver and designated case proceedings, Section 1.11;
- Jurisdiction, Section 2.8;

- Pretrial detention, Section 3.7;
- Amending a petition to designate a case, Section 6.1(F);
- Pretrial motions, including motions to suppress evidence, Chapter 7;
- Plea agreements in delinquency proceedings, Section 8.6;
- Plea withdrawal, Section 8.7;
- Infancy defense, Section 9.1(C);
- Rules governing juvenile dispositions, Chapter 10;
- Prosecutorial charging discretion with respect to specified juvenile violations, Section 16.4(A);
- Sentencing, review, and probation violation procedures in automatic waiver proceedings, Chapter 16, Parts C, D, and E;
- Imposition of adult sentences upon juveniles, Chapter 19;
- Probation violation procedures in delinquency cases, Chapter 11;
- Review of referee's recommendations and appeals, Section 2.19;
- Appointment of counsel under the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*, Chapter 17; and
- Collection of biometric data, including fingerprints, and recordkeeping requirements, Chapter 21.

Part A—Overview of Designated Proceedings

15.1 Initiation of Designated Proceedings

A. General Overview and Jurisdiction

A juvenile of any age who is subject to the jurisdiction of the Family Division[1] for committing an offense may be tried in the same manner as an adult in a *designated proceeding*. A designated proceeding is "a proceeding in which the prosecuting attorney has designated, or has requested the [Family Division] to designate, the case for trial in the [Family Division] in the same manner as an adult." MCR 3.903(A)(6).[2]

Only the prosecuting attorney may designate a case or request leave to amend a petition to designate a case in which the petition alleges a specified juvenile violation, and only the prosecuting attorney may request the court to designate a case in which the petition alleges an offense other than a specified juvenile violation. MCR 3.914(D). Although the prosecuting attorney initiates both types of designated cases, if a specified juvenile violation is not alleged, the court must hold a hearing to determine whether to designate the case. MCL 712A.2d(2).[3]

The proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction." MCL 712A.2d(7). A plea of guilty or nolo contendere, or a verdict of guilty, results in the entry of a judgment of conviction, which has the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction. *Id*.; see also MCR 3.903(D)(9).

MCL 712A.2d(1) and MCR 3.951(A) outline the procedures for initiating prosecutor-designated cases for specified juvenile

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[1] As used in the Juvenile Code, the term *juvenile* generally refers to a person who is less than 18 years of age. See MCL 712A.1(1)(i); MCL 712A.2(a). Prior to October 1, 2021, the term *juvenile* generally referred to a person less than 17 years of age. MCL 712A.1(1)(i). See also 2019 PA 113, amending MCL 712A.2(a) effective October 1, 2021."[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 497 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

[2] "A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013) (quoting *People v Lown*, 488 Mich 242, 268 (2011), and holding that because "'[a] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction[,]'" the juvenile defendant, "by entering a guilty plea in the circuit court[] and failing to contest the circuit court's jurisdiction, . . . implicitly consented to that court's exercise of personal jurisdiction[]").

[3] See Section 15.8 for discussion of designation hearings.

violations, while MCL 712A.2d(2) and MCR 3.951(B) govern the initiation of court-designated cases for non-specified offenses. The procedures differ slightly depending upon whether the case is a prosecutor-designated case or a court-designated case, and whether the juvenile is in custody (or custody is requested) or the juvenile is not in custody (and custody is not requested).

B. Prosecutor-Designated Cases

MCL 712A.2d(1) grants the prosecuting attorney the discretion to initiate a designated proceeding for an alleged specified juvenile violation without the requirement of a designation hearing. That provision states:

> "In a petition or amended petition alleging that a juvenile is within the court's jurisdiction under [MCL 712A.2(a)(1)] for a specified juvenile violation, the prosecuting attorney may designate the case as a case in which the juvenile is to be tried in the same manner as an adult. An amended petition making a designation under this subsection must be filed only by leave of the court."[4]

See also MCR 3.903(D)(6), which defines "[p]rosecutor-designated case" as "a case in which the prosecuting attorney has endorsed a petition charging a juvenile with a specified juvenile violation with the designation that the juvenile is to be tried in the same manner as an adult in the [Family Division]."

The specified juvenile violations, as enumerated in MCL 712A.2d(9)(a)-(i) and MCR 3.903(D)(8)(a)-(r), are as follows:

- first-degree arson, MCL 750.72;
- assault with intent to commit murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;

[4] However, see MCR 3.951(A)(3), which permits the prosecuting attorney to amend a petition *by right* to designate the case during the preliminary hearing. See Section 6.1(F).

- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- robbery of a bank, safe, or vault, MCL 750.531;
- assault with intent to do great bodily harm or assault by strangulation or suffocation, MCL 750.84, if armed with a dangerous weapon[5];
- first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;
- escape or attempted escape from a medium- or high-security facility operated by the Department of Health and Human Services (DHHS) or a county juvenile agency,[6] or from a high-security facility operated by a private agency under contract with the DHHS or a county juvenile agency, MCL 750.186a;
- possession of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7403(2)(a)(*i*);
- manufacture, creation, or delivery of, or possession with intent to manufacture, create, or deliver, 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(*i*);
- an attempt, MCL 750.92, to commit any of the above crimes;
- conspiracy, MCL 750.157a, to commit any of the above crimes;
- solicitation, MCL 750.157b, to commit any of the above crimes;

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[5] MCL 712A.2d(9)(b) defines "dangerous weapon," as used in the context of a specified juvenile violation, as any 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*)."

[6] See Section 16.1(B) and Section 18.1(C) for discussion of county juvenile agencies.

- any lesser-included offense of a specified juvenile violation, if the petition alleges that the juvenile committed a specified juvenile violation; and

- any other offense arising out of the same transaction as a specified juvenile violation, if the petition alleges that the juvenile committed a specified juvenile violation.

C. Court-Designated Cases

MCL 712A.2d(2) states, in relevant part:

> "In a petition alleging that a juvenile is within the court's jurisdiction under [MCL 712A.2(a)(1)] for an offense other than a specified juvenile violation, the prosecuting attorney may request that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult. The court may designate the case following a hearing if it determines that the best interests of the juvenile and the public would be served by the juvenile being tried in the same manner as an adult."

See also MCR 3.903(D)(2), which defines "[c]ourt-designated case" as "a case in which the court, pursuant to a request by the prosecuting attorney, has decided according to the factors set forth in MCR 3.952(C)(3) that the juvenile is to be tried in the [Family Division] in the same manner as an adult for an offense other than a specified juvenile violation."

As required by MCL 712A.2d(2), when the prosecutor requests designation for an offense other than a specified juvenile offense, the court must conduct a hearing to determine whether to designate the case. MCR 3.903(D)(4) defines "[d]esignation hearing" as "a hearing on the prosecuting attorney's request that the court designate the case for trial in the same manner as an adult in the [Family Division]."[7]

15.2 Amendment of Petition for Purposes of Designating Case

"The prosecuting attorney may, by right,[8] amend the petition . . . during the preliminary hearing[]" to designate the case (if the petition alleges a

[7] See Section 15.8 for discussion of designation hearings.

[8] However, see MCL 712A.2d(1), which states that "[a]n amended petition making a designation [for trial in the same manner as an adult for an alleged specified juvenile violation] must be filed only by leave of the court." See Section 6.1(F) and Section (A).

specified juvenile violation) or to request the court to designate the case (if the petition alleges an offense other than a specified juvenile violation). MCR 3.951(A)(3)(a); MCR 3.951(B)(3)(a).

If the prosecuting attorney does not amend the petition during the preliminary hearing, he or she "may request leave of the court to amend the petition to designate [or to request the court to designate] the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay." MCR 3.951(A)(3)(b); MCR 3.951(B)(3)(b). The court may permit the prosecutor to amend the petition to designate the case or to request the court to designate the case "as the interests of justice require." MCR 3.951(A)(3)(b); MCR 3.951(B)(3)(b).

15.3 Right to Counsel in Designated Proceedings

A. Right to Counsel Under the Juvenile Code

At the arraignment in a designated case, the court must advise the juvenile of the right to an attorney pursuant to MCR 3.915(A)(1).[9] MCR 3.951(A)(2)(b)(i); MCR 3.951(B)(2)(b)(i).[10]

"[A] criminal defendant's initial appearance before a judicial officer, where he [or she] learns the charge against him [or her] and his [or her] liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel[,]" irrespective of the prosecution's involvement in, or awareness of, the proceeding. *Rothgery v Gillespie Co*, 554 US 191, 194-195, 213 (2008).

B. Right to Counsel Under the Michigan Indigent Defense Commission Act

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., creating the Michigan Indigent Defense Commission (MIDC)[11] and establishing a system for the appointment of defense counsel for indigent defendants, applies to certain juveniles who are charged with felony offenses in designated proceedings. MCL 780.983(a)(*ii*)(B)-(C). The requirements of the MIDCA are applicable

[9] MCR 3.915(A)(1) provides, in relevant part, that if a juvenile is not represented by an attorney, "the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar[.]"

[10] See Section 6.1(C) for further discussion of a juvenile's right to counsel.

[11] The MIDC is within the Department of Licensing and Regulatory Affairs (LARA). MCL 780.985(1); MCL 780.983(c).

in all stages of a prosecutor-designated case under MCL 712A.2d(1),[12] as well as "[d]uring consideration of a request by the prosecuting attorney under . . . [MCL 712A.2d(2)[13]] that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult." MCL 780.983(a)(*ii*)(B)-(C).[14]

The MIDCA authorizes the MIDC to set out minimum standards for attorneys who represent indigent criminal defendants. MCL 780.989(1)(a). Although the MIDC is within the executive branch (and not the judicial branch), the MIDCA does not violate the separation of powers doctrine of the Michigan Constitution because "any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary." *Oakland Co v State of Michigan*, 325 Mich App 247, 262 (2018). The MIDCA "does not directly regulate trial courts or attorneys." *Id*. Instead, it "regulates 'indigent criminal defense system[s],' statutorily defined as funding units, rather than trial courts themselves." *Id.* at 262-263. In addition, it "repeatedly recognizes the Michigan Supreme Court's constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts." *Id*. at 263. Further, "the [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the [MIDCA] purport to control what happens in court." *Id*. at 264. Accordingly, the MIDCA is not facially unconstitutional. *Id*. at 265.

Among other requirements, the MIDCA requires the court to advise the accused of the right to counsel and requires that the accused be screened for eligibility for appointed counsel. MCL 780.991(1)(c) provides:

> "Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults,[15] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is

[12] See Section 15.1(A).

[13] See Section 15.1(C).

[14] Note that although the MIDCA applies to *all* stages of a *prosecutor*-designated case, MCL 780.983(a)(*ii*)(B), it is apparently inapplicable to *court*-designated cases following designation of the case by the court for trial in the same manner as an adult. See MCL 780.983(a)(*ii*)(C). It is unclear whether this distinction between prosecutor-designated and court-designated cases was intentional or an oversight.

[15] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*). Note that the MIDCA does not appear to apply to *court*-designated cases after designation. See MCL 780.983(a)(*ii*)(C).

> determined to be eligible for indigent criminal defense services."

"A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . must be made as determined by the indigent criminal defense system[16] not later than at the defendant's first appearance in court." MCL 780.991(3)(a).[17] The "trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the [Michigan Supreme Court.]" *Id*.[18] Furthermore, nothing in the MIDCA "prevents a court from making a determination of indigency for any purpose consistent with" Const 1963, art 6. MCL 780.991(3)(a).

Counsel must be assigned as soon as the defendant has been determined as eligible for indigent criminal defense services, and counsel must be appointed "as soon as the defendant's liberty is subject to restriction by a magistrate or judge." MIDC Standard 4. "Representation includes but is not limited to the arraignment on the complaint and warrant."[19] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

For further discussion of the MIDCA, see Chapter 17.

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[16] An *indigent criminal defense system* is "[t]he local unit of government that funds a trial court." MCL 780.983(h)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an *indigent criminal defense system* is "those local units of government, collectively." MCL 780.983(h)(*ii*).

[17] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

[18] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265. See Chapter 17 for more information on the constitutionality of the MIDCA.

[19] The requirement that counsel be appointed at arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269 (although the United States Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution).

15.4 Venue in Designated Proceedings

MCR 3.926(G) states:

> "Designated cases are to be filed in the county in which the offense is alleged to have occurred. Other than a change of venue for the purpose of trial, a designated case may not be transferred to any other county, except, after conviction, a designated case may be transferred to the juvenile's county of residence for entry of a juvenile disposition only. Sentencing of a juvenile, including delayed imposition of sentence, may only be done in the county in which the offense occurred."

See also MCL 712A.2(d), which states, in relevant part:

> "A [designated case] may be transferred for venue or for juvenile disposition, but must not be transferred on grounds of residency. If the case is not transferred, the court having jurisdiction of the offense shall try the case."

Accordingly, other than (1) a change of venue for the purpose of trial or (2) a transfer to the juvenile's county of residence for entry of a juvenile disposition following conviction, designated proceedings must take place in the county in which the offense is alleged to have occurred.

"[A]fter [a] change of venue becomes effective, the transferee court has full jurisdiction of the action [under MCL 600.1653]; consequently, the transferor court has none[]" and may not "entertain any further proceedings[.]" *Frankfurth v Detroit Med Ctr*, 297 Mich App 654, 656, 658 (2012) (holding that "because the trial court had entered an order changing . . . venue, it lost jurisdiction to entertain . . . [the plaintiff's] motion for reconsideration[]" of the trial court's order changing venue).

15.5 Use of Videoconferencing Technology

The use of videoconferencing technology in designated proceedings is governed by MCR 3.904(A). See Section 1.4 for discussion of videoconferencing technology.

15.6 Constitutionality of Designated Proceedings

The prosecution of a juvenile defendant as an adult under MCL 712A.2d is not unconstitutionally violative of due process. *People v Abraham*, 256 Mich App 265, 279-283 (2003).

In *Abraham*, 256 Mich App at 267-268, a 12-year-old juvenile defendant was convicted of second-degree murder in a prosecutor-designated case

under MCL 712A.2d(1). The Court of Appeals rejected the defendant's contention that MCL 712A.2d violates due process because it permits a prosecuting attorney to criminally charge a juvenile without a prior hearing. *Abraham,* 256 Mich App at 279-282. Noting that juveniles are not constitutionally entitled to more procedural protections than adults receive in criminal courts, *id.* at 280, citing *People v Conat*, 238 Mich App 134, 158 (1999), the Court concluded that the defendant was not denied due process of law as a juvenile subjected to a criminal proceeding:

> "[The] [d]efendant was tried in an ordinary criminal trial in the [Family Division] and received all due-process protections to which any defendant is entitled: notice of the charges against him by way of an indictment; a preliminary examination determining whether the evidence was sufficient for bindover; initial counsel provided by the state . . . ; and a fair, albeit imperfect trial." *Abraham*, 256 Mich App at 281.

The Court also rejected the defendant's assertion that MCL 712A.2d is unconstitutional because it fails to specify a minimum age under which a juvenile may *not* be charged and tried as an adult:

> "In addition to the other reasons stated above for sustaining the statute at issue, we reiterate that the wisdom or humanity of MCL 712A.2d is not within the authority of this Court to determine where children have no constitutional right to juvenile prosecution in this state. . . . It is properly within the prosecution's discretion to determine whether the state can prove the criminal intent of a child at any particular age." *Abraham*, 256 Mich App at 282 (internal citations omitted).

Finally, the Court dismissed the defendant's argument that MCL 712A.2d unconstitutionally provides the prosecutor with "unfettered charging discretion":

> "'[T]his argument ignores the commonplace interaction between all three branches of government in determining what punishment is given to criminal offenders; namely, that the Legislature defines the sentences, the court fashions and imposes individual sentences within the legislatively defined parameters, and the prosecutor brings charges against defendants that inevitably affect which sentences are available for the court to impose.
>
> 'The judicial power to hear and determine controversies includes the power to exercise discretion in imposing sentences. However, this sentencing discretion is limited by the Legislature, which has the power to establish sentences. For example, the Legislature may set a minimum and a

> maximum sentence for a particular offense. Courts have no sentencing discretion unless it be conferred upon them by law. In other words, the Legislature has the exclusive power to determine the sentence prescribed by law for a crime, and the function of the court is only to impose a sentence under and in accord with the statute.'" *Abraham*, 256 Mich App at 283, quoting *Conat*, 238 Mich App at 147.

Part B—Arraignments, Designation Hearings, and Preliminary Examinations

15.7 Arraignment[20]

An arraignment, in the context of a designated case, is the first hearing at which:

> "(a) the juvenile is informed of the allegations, the juvenile's rights, and the potential consequences of the proceeding;
>
> (b) the matter is set for a probable cause or designation hearing; and,
>
> (c) if the juvenile is in custody or custody is requested pending trial, a decision is made regarding custody pursuant to MCR 3.935(C).[21]" MCR 3.903(D)(1)(a)-(c).

A. Referees

A referee may conduct an arraignment in a designated case, and the referee need not be a licensed attorney. MCR 3.912(A); MCR 3.913(A)(1); see also MCR 3.913(A)(2)(c) (referee who conducts a designation hearing or a hearing to amend a petition to designate a case must be licensed to practice law in Michigan).[22]

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[20] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[21] See Section 6.1(G) for a discussion of MCR 3.935(C), which sets out factors that the Family Division, at the preliminary hearing in a delinquency case, must consider when determining whether to release or detain the juvenile.

[22] See the Michigan Judicial Institute's table summarizing which proceedings must be conducted by a judge and which proceedings may be conducted by an attorney referee or a nonattorney referee.

B. Time Requirements for Arraignment

1. When Juvenile is in Custody or Custody is Requested

In both prosecutor-designated and court-designated cases,

> "[i]f the juvenile is in custody or custody is requested, the arraignment must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays as defined by MCR 8.110(D)(2), or the juvenile must be released. The court may adjourn the arraignment for up to 7 days to secure the attendance of the juvenile's parent, guardian, or legal custodian or of a witness, or for other good cause shown." MCR 3.951(A)(1)(a); MCR 3.951(B)(1)(a).

2. When Juvenile is Not in Custody and Custody is Not Requested

In both prosecutor-designated and court-designated cases,

> "[i]f the juvenile is not in custody and custody is not requested, the juvenile must be brought before the court for an arraignment as soon as the juvenile's attendance can be secured." MCR 3.951(A)(1)(b); MCR 3.951(B)(1)(b).

C. Required Procedures at Arraignment

1. Preliminary Procedures

MCR 3.951(A)(2) and MCR 3.951(B)(2), which set out the procedure for conducting an arraignment, provide in part that:

> "(a) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile. Attorney appointments, even if just for the arraignment, are to be done by the court's local funding unit's appointment authority.
>
> (b) The court shall read the allegations in the petition[.]"

2. Advice of Rights in Prosecutor-Designated Cases

MCR 3.951(A)(2)(b) states that in a prosecutor-designated case, the court must advise the juvenile on the record in plain language:

> "(*i*) of the right to an attorney at all court proceedings, including the arraignment;[23]
>
> (*ii*) of the right to trial by judge or jury on the allegations in the petition;
>
> (*iii*) of the right to remain silent and that any statement made by the juvenile may be used against the juvenile;
>
> (*iv*) of the right to have a preliminary examination within 14 days;[24]
>
> (*v*) that the case has been designated for trial in the same manner as an adult and, if the prosecuting attorney proves that there is probable cause to believe an offense was committed and there is probable cause to believe that the juvenile committed the offense, the juvenile will be afforded all the rights of an adult charged with the same crime and that upon conviction the juvenile may be sentenced as an adult; and
>
> (*vi*) of the maximum possible prison sentence and any mandatory minimum sentence required by law."

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[23] MCR 3.915(A)(1) provides, in relevant part, that if a juvenile is not represented by an attorney, "the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar[.]" Additionally, the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the court to advise the juvenile of the right to counsel, MCL 780.991(1)(c), and establishes additional requirements regarding screening the juvenile for eligibility for appointed counsel. See Chapter 17.

[24] At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), these requirements under MCL 766.4(1) may apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect these requirements; therefore, it is unclear to what extent the statutory and court rule requirements apply to designated cases (with the exception of MCR 6.110, which, under MCR 3.953(E), specifically applies to designated proceedings). See Section 15.9 for additional discussion of MCL 766.4; see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

3. Advice of Rights in Court-Designated Cases

MCR 3.951(B)(2)(b) states that in a court-designated case, the court must advise the juvenile on the record in plain language:

> "(*i*) of the right to an attorney at all court proceedings, including the arraignment;[25]
>
> (*ii*) of the right to trial by judge or jury on the allegations in the petition;
>
> (*iii*) of the right to remain silent and that any statement made by the juvenile may be used against the juvenile;
>
> (*iv*) of the right to have a designation hearing within 14 days;
>
> (*v*) of the right to have a preliminary examination within 14 days after the case is designated if the juvenile is charged with a felony or offense for which an adult could be imprisoned for more than one year;[26]
>
> (*vi*) that if the case is designated by the court for trial in the same manner as an adult and, if a preliminary examination is required by law, the prosecuting attorney proves that there is probable cause to believe that an offense was committed and there is probable cause to believe that the juvenile committed the offense, the juvenile will be

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[25] MCR 3.915(A)(1) provides, in relevant part, that if a juvenile is not represented by an attorney, "the court shall advise the juvenile of the right to the assistance of an attorney at each stage of the proceedings on the formal calendar[.]" Additionally, the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the court to advise the juvenile of the right to counsel, MCL 780.991(1)(c), and establishes additional requirements regarding screening the juvenile for eligibility for appointed counsel. However, the MIDCA applies to court-designated proceedings only "[d]uring consideration of a request by a prosecuting attorney . . . that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult." MCL 780.983(a)(*ii*)(C). See Chapter 17 for discussion of the MIDCA.

[26] At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), these requirements under MCL 766.4(1) may apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect these requirements; therefore, it is unclear to what extent the statutory and court rule requirements apply to designated cases (with the exception of MCR 6.110, which, under MCR 3.953(E), specifically applies to designated proceedings). See Section 15.9 for additional discussion of MCL 766.4; see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

> afforded all the rights of an adult charged with the same crime and that upon conviction the juvenile may be sentenced as an adult; [and]
>
> (*vii*) of the maximum possible prison sentence and any mandatory minimum sentence required by law."

4. Right to Appointed Counsel[27]

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*, requires the court to advise the accused of the right to counsel and requires that the accused be screened for eligibility for appointed counsel.[28] MCL 780.991(1)(c) provides:

> "Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults,[29] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services."

"A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . must be made as determined by the indigent criminal defense system[30] not later than at the defendant's first appearance in court." MCL 780.991(3)(a).[31] The "trial court may play a role in this

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[27] See Chapter 17 for additional discussion of requirements under the MIDCA.

[28] The MIDCA applies to juveniles in prosecutor- and court-designated proceedings. See MCL 780.983(a)(*ii*)(B)-(C) (defining *adult*, for purposes of the MIDCA, to include these juveniles).

[29] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*). Note that the MIDCA does not appear to apply to court-designated cases after designation. It is unclear whether this was intentional or an oversight.

[30] An *indigent criminal defense system* is "[t]he local unit of government that funds a trial court." MCL 780.983(h)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an *indigent criminal defense system* is "those local units of government, collectively." MCL 780.983(h)(*ii*).

[31] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the [Michigan Supreme Court.]" *Id*.[32] Furthermore, nothing in the MIDCA "prevents a court from making a determination of indigency for any purpose consistent with" Const 1963, art 6. MCL 780.991(3)(a).

Counsel must be assigned as soon as the defendant has been determined as eligible for indigent criminal defense services, and counsel must be appointed "as soon as the defendant's liberty is subject to restriction by a magistrate or judge." MIDC Standard 4. "Representation includes but is not limited to the arraignment on the complaint and warrant."[33] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

For further discussion of the MIDCA, see Chapter 17.

D. Authorization of Petition by Court at Arraignment

"Unless the arraignment is adjourned, the court must decide whether to authorize the petition to be filed." MCR 3.951(A)(2)(c); MCR 3.951(B)(2)(c).

MCR 3.951(A)(2)(c)(*i*)-(*iii*) and MCR 3.951(B)(2)(c)(*i*)-(*iii*) provide that if the court authorizes the filing of the petition, it must:

- determine if biometric data must be collected pursuant to MCR 3.936,[34]
- schedule a preliminary examination (in a prosecutor-designated case, MCR 3.951(A)(2)(c)(*ii*)) or a designation hearing (in a court-designated case, MCR 3.951(B)(2)(c)(*ii*)),[35] and

[32] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265. See Chapter 17 for more information on the constitutionality of the MIDCA.

[33] The requirement that counsel be appointed for arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269. "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

[34] See Section 21.10 for discussion of biometric data collection requirements.

- if the juvenile is in custody or custody is requested, determine whether to detain or release the juvenile as provided in MCR 3.935(C).[36]

Additionally, "[i]f the juvenile is in custody or custody is requested, the juvenile may be detained pending the completion of the arraignment if it appears to the court that one of the circumstances in MCR 3.935(D)(1)[37] is present." MCR 3.951(A)(2)(d); MCR 3.951(B)(2)(d).

E. Scheduling of Preliminary Examination or Designation Hearing

1. Prosecutor-Designated Cases

In a prosecutor-designated case, if the petition is authorized for filing at the arraignment, the court must "schedule a preliminary examination within 14 days[38] before a judge other than the judge who would conduct the trial[.]" MCR 3.951(A)(2)(c)(*ii*).[39]

2. Court-Designated Cases

If the court authorizes the filing of a petition requesting the court to designate the case, the court must schedule a designation hearing within 14 days of the arraignment. MCR 3.951(B)(2)(c)(*ii*).

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[35] See Section 15.1(E) for more information on scheduling these hearings.

MCL 766.4 previously provided that, in a court of general criminal jurisdiction, the preliminary examination was to be scheduled for a date "not exceeding 14 days after the arraignment." Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 amended MCL 766.4 to require the court, at arraignment for a felony charge, to schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1. Effective January 1, 2015, ADM File No. 2014-42 amended MCR 6.110 (governing preliminary examinations) and added MCR 6.108 (governing probable cause conferences) to correspond to these statutory changes.

Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), these new requirements under amended MCL 766.4(1) may apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect these changes; therefore, it is unclear to what extent the new statutory and court rule requirements apply to designated cases (with the exception of MCR 6.110, which, under MCR 3.953(E), specifically applies to designated proceedings). See Section 15.9 for additional discussion of MCL 766.4; see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

15.8 Designation Hearing[40]

If the court authorizes the filing of a petition requesting the court to designate the case, the court must conduct a hearing to determine whether designation is in the best interests of the juvenile and the public. MCL 712A.2d(2).

A. Referees

A referee licensed to practice law in Michigan may preside at a hearing to designate a case and may make recommended findings and conclusions. MCR 3.913(A)(2)(c).[41]

B. Time and Notice Requirements for Designation Hearing

"The designation hearing shall be commenced within 14 days after the arraignment, unless adjourned for good cause." MCR 3.952(A).

MCR 3.952(B) provides:

> "(1) A copy of the petition or a copy of the petition and separate written request for court designation must be personally served on the juvenile and the juvenile's parent, guardian, or legal custodian, if the address or whereabouts of the juvenile's parent, guardian, or custodian is known or can be determined by the exercise of due diligence.

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[36] See Section 6.1(G) for discussion of MCR 3.935(C), which sets out factors that the Family Division, at the preliminary hearing in a delinquency case, must consider in determining whether to release or detain the juvenile.

[37] See Section 6.1(H) for discussion of MCR 3.935(D)(1), which sets out conditions for the pretrial detention of a juvenile.

[38] At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), these requirements under MCL 766.4(1) may apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect these requirements; therefore, it is unclear to what extent the statutory and court rule requirements apply to designated cases (with the exception of MCR 6.110, which, under MCR 3.953(E), specifically applies to designated proceedings). See Section 15.9 for additional discussion of MCL 766.4; see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

[39] See also MCR 3.912(C)(1), which provides, in part, that "[t]he judge who presides at the preliminary examination may not preside at the trial of the same designated case unless a determination of probable cause is waived."

> "(2) Notice of the date, time, and place of the designation hearing must be given to the juvenile, the juvenile's parent, guardian, or legal custodian, the attorney for the juvenile, if any, and the prosecuting attorney. The notice may be given either orally on the record or in writing, served on each individual by mail, or given in another manner reasonably calculated to provide notice."

C. Rules of Evidence and Burden of Proof at Designation Hearing

MCR 3.952(C)(1)-(2) state:

> "(1) The Michigan Rules of Evidence, other than those with respect to privileges, do not apply.
>
> (2) The prosecuting attorney has the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by designation."

D. Factors to Consider in Determining Whether to Designate the Case

"The court may designate the case following a hearing if it determines that the best interests of the juvenile and the public would be served by the juvenile being tried in the same manner as an adult." MCL 712A.2d(2). In making this determination, "the court shall consider all of the following factors, giving greater weight to the seriousness of the alleged offense and the juvenile's prior delinquency record than to the other factors:

> "(a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines and the use of a firearm or other dangerous weapon.

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[40] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[41] See Section 2.18 for further discussion of referees' authority. See Section 2.19 for discussion of requirements for the review of referees' recommended findings and conclusions. See the Michigan Judicial Institute's table for a table summarizing which proceedings must be conducted by a judge and which proceedings may be conducted by an attorney referee or a nonattorney referee.

> (b) The juvenile's culpability in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
>
> (c) The juvenile's prior record of delinquency that would be a crime if committed by an adult.
>
> (d) The juvenile's programming history, including, but not limited to, any out-of-home placement or treatment and the juvenile's past willingness to participate meaningfully in available programming.
>
> (e) The adequacy of the programming available to rehabilitate and hold accountable the juvenile in the juvenile justice system and the juvenile's amenability to treatment.
>
> (f) The dispositional options available for the juvenile.
>
> (g) The juvenile's developmental maturity, emotional health, and mental health.
>
> (h) If the juvenile is a member of a federally recognized Indian tribe, culturally honoring traditional values of the juvenile's tribe.
>
> (i) The impact on any victim." *Id*.

See also MCR 3.952(C)(3), which contains substantially similar language.

E. Required Procedures Following Designation Hearing

1. If Case is Designated

MCL 712A.2d(3) provides that if the case is designated, "the case must be set for trial in the same manner as the trial of an adult in a court of general criminal jurisdiction unless a probable cause hearing[42] is required under [MCL 712A.2d(4)]."

MCL 712A.2d(4) provides that a probable cause hearing is required if the petition "alleges an offense that if committed by

[42] The Michigan Court Rules refer to this "probable cause hearing" as the "preliminary examination." See, e.g., MCR 3.952(D)(1)(a)(*i*). The probable cause hearing required under MCL 712A.2d(4) should not be confused with the *probable cause conference* that is required, in addition to the preliminary examination, in courts of general criminal jurisdiction under MCL 766.4(1).

an adult would be a felony or punishable by imprisonment for more than 1 year," and that the probable cause hearing "is the equivalent of the preliminary examination in a court of general criminal jurisdiction and satisfies the requirement for that hearing."[43]

If the court decides to designate a case, it must:

> "(a) Enter a written order granting the request for court designation and
>
> > (*i*) schedule a preliminary examination within 14 days[44] if the juvenile is charged with a felony or an offense for which an adult could be imprisoned for more than one year,[45] or
> >
> > (*ii*) schedule the matter for trial or pretrial hearing if the juvenile is charged with a misdemeanor.
>
> "(b) Make findings of fact and conclusions of law forming the basis for entry of the order designating the petition. The findings and conclusions may be incorporated in a written opinion or stated on the record." MCR 3.952(D)(1).

2. If Case is Not Designated

If the court denies a request to designate a case, "the court shall make written findings or place them on the record. Further proceedings shall be conducted pursuant to MCR 3.941–[MCR] 3.944[,]" rules governing delinquency proceedings. MCR 3.952(E).

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[43] At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), these requirements under MCL 766.4(1) may apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect these requirements; therefore, it is unclear to what extent the statutory and court rule requirements apply to designated cases (with the exception of MCR 6.110, which, under MCR 3.953(E), specifically applies to designated proceedings). See Section 15.9 for additional discussion of MCL 766.4; see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

F. Combined Designation Hearing and Preliminary Examination

If a preliminary examination is required, it may be combined with the designation hearing for an offense other than a specified juvenile offense. MCL 712A.2d(4).

If the designation hearing and preliminary examination are combined, "the Michigan Rules of Evidence, except as otherwise provided by law, apply only to the preliminary examination phase of the combined hearing." MCR 3.953(C).

Although a referee may preside at a designation hearing, MCR 3.913(A)(2)(c), only a judge may preside at a preliminary examination, MCR 3.912(A)(3). Thus, a judge must preside at a combined hearing.

15.9 Preliminary Examination[46]

A. Introduction

MCL 712A.2d(4) provides, in relevant part:

> "If the petition in a case designated under this section alleges an offense that if committed by an adult would be a felony or punishable by imprisonment for more than 1 year, the court shall conduct a probable cause hearing not later than 14 days after the case is designated to determine whether there is probable cause to believe the offense was committed and whether there is probable cause to believe the juvenile committed the offense . . . A probable cause hearing under this section is the equivalent of the preliminary

[44] At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), these requirements under MCL 766.4(1) may apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect these requirements; therefore, it is unclear to what extent the statutory and court rule requirements apply to designated cases (with the exception of MCR 6.110, which, under MCR 3.953(E), specifically applies to designated proceedings). See Section 15.9 for additional discussion of MCL 766.4; see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

[45] The preliminary examination must be scheduled before a judge other than the judge who would conduct the trial. MCL 712A.2d(4); MCR 3.912(C)(1); see also MCR 3.951(A)(2)(c)(*ii*) (governing prosecutor-designated cases).

> examination in a court of general criminal jurisdiction and satisfies the requirement for that hearing. A probable cause hearing shall be conducted by a judge other than the judge who will try the case if the juvenile is tried in the same manner as an adult."

The Michigan Court Rules refer to the probable cause hearing required under MCL 712A.2d(4) as the "preliminary examination." See MCR 3.903(D)(5); MCR 3.953(A).[47]

> **Note:** At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1. Because the proceedings in a designated case "are criminal proceedings and shall afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction[,]" MCL 712A.2d(7), these requirements under MCL 766.4(1) may apply to designated proceedings; however, MCL 712A.2d and the court rules governing designated proceedings have not been amended to reflect these requirements.[48]

MCL 766.4 provides, in part:

> "(1) Except as provided in . . . MCL 712A.4,[49] the [judge] before whom any person is arraigned on a

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[46] A complete discussion of the statutory and procedural requirements for preliminary examinations is beyond the scope of this benchbook. For a thorough discussion of these requirements, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7. "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[47] The probable cause hearing (preliminary examination) required under MCL 712A.2d(4) should not be confused with the *probable cause conference* that is required, in addition to the preliminary examination, in courts of general criminal jurisdiction under MCL 766.4(1). Additionally, the MCL 712A.2d(4) preliminary examination should be distinguished from the probable cause hearing required under MCR 3.935(D), MCR 3.951(A)(2)(d), and MCR 3.951(B)(2)(d) for the pretrial detention of a juvenile. See Section 6.1(H) and Section 15.1(D).

[48] In any event, Family Division judges *must* comply with the requirements of MCR 6.110 in conducting the preliminary examination. See MCR 3.953(E).

[49] MCL 712A.4 governs traditional waiver of Family Division jurisdiction over a juvenile between the ages of 14 and 17 who is accused of an act that if committed by an adult would be a felony. See Chapter 14 for discussion of traditional waiver.

charge of having committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment. The probable cause conference shall include the following:

> (a) Discussions as to a possible plea agreement among the prosecuting attorney, the defendant, and the attorney for the defendant.
>
> (b) Discussions regarding bail and the opportunity for the defendant to petition the [judge] for a bond modification.
>
> (c) Discussions regarding stipulations and procedural aspects of the case.
>
> (d) Discussions regarding any other matters relevant to the case as agreed upon by both parties.

(2) The probable cause conference may be waived by agreement between the prosecuting attorney and the attorney for the defendant. The parties shall notify the court of the waiver agreement and whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea.

* * *

(4) If a plea agreement is not reached and if the preliminary examination is not waived by the defendant with the consent of the prosecuting attorney, a preliminary examination shall be held as scheduled unless adjourned or waived under [MCL 766.7[50]]. The parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference. Upon the request of the prosecuting attorney, however, the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this

> subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, the [judge] shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause."

It is unclear to what extent these requirements apply to designated proceedings[51]; however, unless and until MCL 712A.2d and the court rules governing designated proceedings are amended to address these requirements, Family Division judges conducting designated proceedings may wish to comply with the requirements of MCL 766.4.[52] For a thorough discussion of these requirements, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7.

B. Procedural Requirements for Preliminary Examination

The preliminary examination in a designated proceeding "must be conducted in accordance with MCR 6.110." MCR 3.953(E). MCR 6.110 contains the procedural requirements for preliminary examinations in criminal cases.[53] The statutory requirements for preliminary examinations in criminal cases are contained in MCL 766.1 *et seq*.[54]

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[50] MCL 766.7 provides:

> "A [judge] may adjourn a preliminary examination for a felony to a place in the county as the [judge] determines is necessary. The defendant may in the meantime be committed either to the county jail or to the custody of the officer by whom he or she was arrested or to any other officer; or, unless the defendant is charged with treason or murder, the defendant may be admitted to bail. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. An adjournment, continuance, or delay of a preliminary examination may be granted by a [judge] without the consent of the defendant or the prosecuting attorney for good cause shown. A [judge] may adjourn, continue, or delay the examination of any cause with the consent of the defendant and prosecuting attorney. An action on the part of the [judge] in adjourning or continuing any case does not cause the [judge] to lose jurisdiction of the case."

[51] In any event, Family Division judges *must* comply with the requirements of MCR 6.110 in conducting the preliminary examination. See MCR 3.953(E).

[52] Note, however, that 2014 PA 123 "applies to cases in which the defendant is arraigned *in district court or municipal court* on or after January 1, 2015." 2014 PA 123, enacting section 1 (emphasis supplied).

[53] See Section 15.9(A).

C. Waiver of Preliminary Examination

"The juvenile may waive the preliminary examination if the juvenile is represented by an attorney and the waiver is made and signed by the juvenile in open court. The judge shall find and place on the record that the waiver was freely, understandingly, and voluntarily given." MCR 3.953(B). The prosecuting attorney must consent to the waiver. MCL 766.7; MCR 6.110(A).[55]

If a defendant waives the statutory right to a preliminary examination without having the benefit of counsel at the time of waiver, the trial court may remand the case for a preliminary examination, upon timely motion before trial or a guilty plea. MCL 767.42(1).

D. Consolidation of Preliminary Examination for Codefendants

MCL 766.4(5) provides:

> "If 1 or more defendants have been charged on complaints listing codefendants with a felony or felonies, the probable cause conference[56] and preliminary examination for those defendants who have been arrested and arraigned at least 72 hours before that conference on those charges shall be consolidated, and only 1 joint conference or 1 joint preliminary examination shall be held unless the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing."

Similarly, MCR 6.110(A), which is applicable to designated proceedings,[57] provides, in part:

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[54] A complete discussion of the statutory and procedural requirements for preliminary examinations is beyond the scope of this benchbook. For a thorough discussion of these requirements, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7.

[55] The preliminary examination in a designated proceeding "must be conducted in accordance with MCR 6.110." MCR 3.953(E).

[56] Because the proceedings in a designated case "are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction," MCL 712A.2d(7), these requirements under MCL 766.4(1) may apply to designated proceedings. However, MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.951, have not been amended to reflect these requirements; therefore, it is unclear to what extent the statutory and court rule requirements apply to designated cases (with the exception of MCR 6.110, which, under MCR 3.953(E), specifically applies to designated proceedings). See Section 15.9 for additional discussion of MCL 766.4; see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7, for discussion of probable cause conferences and preliminary examinations.

> "The preliminary examination for codefendants shall be consolidated and only one joint preliminary examination shall be held unless the prosecuting attorney consents to the severance, a defendant seeks severance by motion and it is granted, or one of the defendants is unavailable and does not appear at the hearing."

E. Time Requirements for Preliminary Examination

1. Commencement of Examination

MCR 3.953(D) provides that "[t]he preliminary examination must commence within 14 days of the arraignment in a prosecutor-designated case or within 14 days after court-ordered designation of a petition, unless the preliminary examination was combined with the designation hearing."

However, see MCL 766.4(1), which provides, in relevant part:

> "[T]he [judge] before whom any person is arraigned on a charge of having committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment."[58]

See also MCL 766.4(4), which provides, in part:

> "If a plea agreement is not reached and if the preliminary examination is not waived by the defendant with the consent of the prosecuting attorney, a preliminary examination shall be held as scheduled unless adjourned or waived under [MCL 766.7]. The parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference."

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[57] See MCR 3.953(E).

[58] MCL 712A.2d and the court rules governing designated proceedings, including MCR 3.953, have not been amended to reflect the requirements of the preliminary examination procedure, and it is therefore unclear to what extent these requirements apply to designated proceedings.

2. Immediate Commencement of Preliminary Examination to Preserve Victim's Testimony

MCL 766.4(4) provides, in part:

> "Upon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, the [judge] shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause."

Similarly, MCR 6.110(B)(2), which is applicable to designated proceedings,[59] provides:

> "Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of the victim, if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present. If victim testimony is taken as provided under this rule, the preliminary examination will be continued at the date originally set for that event."

3. Adjournment

The judge may adjourn, continue, or delay the preliminary examination with the consent of the defendant and prosecuting attorney without a showing of good cause. MCR 6.110(B)(1); see also MCL 766.7. "If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment." MCR 6.110(B)(1); see also MCL 766.7. However, "[a] violation of [MCR 6.110(B)(1)] is

[59] See MCR 3.953(E).

deemed to be harmless error unless the defendant demonstrates actual prejudice." MCR 6.110(B)(1).

Dismissal based on a failure to timely hold the preliminary examination is precluded unless the issue is raised before the preliminary examination. *People v Crawford*, 429 Mich 151, 156-157 (1987).

F. Judge Must Conduct Preliminary Examination

A judge must preside at a preliminary examination in a designated case. MCR 3.912(A)(3).[60] Furthermore, the judge who presides at the preliminary examination may not preside at the trial of the same designated case unless a determination of probable cause is waived.[61] MCR 3.912(C)(1). See also MCL 712A.2d(4). However, the judge who presides at the preliminary examination may accept a plea in a designated case. MCR 3.912(C)(1).[62]

G. Evidence at Preliminary Examination

"A verbatim record must be made of the preliminary examination. The court shall allow the prosecutor and the defendant to subpoena and call witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. The court must conduct the examination in accordance with the Michigan Rules of Evidence." MCR 6.110(C).

1. Scope of Examination

"At the preliminary examination, [the judge] shall examine the complainant and the witnesses in support of the prosecution[] . . . concerning the offense charged and in regard to any other matters connected with the charge that the [judge] considers pertinent." MCL 766.4(6). See also *People v Hunt*, 442 Mich 359, 363 (1993), citing *People v Dochstader*, 274 Mich 238, 243 (1936) (examining judge "may examine not only the truth of the charge in the complaint, but also other pertinent matters related to the charge[]"); *People v Crippen*, 242 Mich App 278, 282 (2000) (court's inquiry at preliminary examination "is not limited to whether the prosecution has presented sufficient evidence on each element of the offense, but extends to whether probable

[60] See the Michigan Judicial Institute's table summarizing which proceedings must be conducted by a judge and which proceedings may be conducted by an attorney referee or a nonattorney referee.

[61] See Section 15.1(C) regarding waiver of preliminary examination.

[62] See Part C of this chapter for discussion of pleas in designated cases.

cause exists after an examination of the entire matter based on legally admissible evidence[]").

2. Testimony by Telephonic, Voice, or Videoconferencing

MCL 766.11a provides:

> "On motion of either party, the [judge] shall permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law enforcement officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephonic, voice, or video conferencing. The testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law."

Further, "[c]ourts may use videoconferencing technology when conducting preliminary hearings under MCR 3.935(A)(1), preliminary examinations under MCR 3.953 and MCR 3.985, dispositional hearings, and postdispositional progress reviews." MCR 3.904(A)(1). "Except as otherwise provided, . . . as long as the juvenile is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or a person at another location in any delinquency, designated, or personal protection violation proceeding under this subchapter." MCR 3.904(A)(2). "At trial, the court may use videoconferencing technology with the consent of the parties." MCR 3.904(A)(3). "A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting." *Id*. See Section 1.4 for discussion of videoconferencing technology.

3. Rules of Evidence and Admissible Hearsay

MCL 766.11b provides:

> "(1) The rules of evidence apply at the preliminary examination except that the following are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:

> (a) A report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance.
>
> (b) A certified copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any court or governmental agency of this state.
>
> (c) A report other than a law enforcement report that is made or kept in the ordinary course of business.
>
> (d) Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Reports permitted under this subdivision include, but are not limited to, a report of the findings of a technician of the division of the department of state police concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, and an autopsy report.
>
> (2) The [judge] shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under [MCL 766.11b] on a satisfactory showing to the [judge] that live testimony will be relevant to the [judge's] decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony.[63]
>
> (3) As used in this section, 'controlled substance' means that term as defined under . . . MCL 333.7104."[64]

See also MRE 1101(b)(8), providing that "[a]t a preliminary examination in a criminal case, during which hearsay is admissible to prove the ownership, value, or possession of – or right to use or enter – property."

MCR 6.110(D)(2) provides:

[63] See also MCR 6.110(D)(1), which provides that "[t]he court shall allow the prosecutor and defendant to subpoena and call witnesses from whom hearsay testimony was introduced on a satisfactory showing that live testimony will be relevant."

> "If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of
>
> (a) a prior evidentiary hearing, or
>
> (b) a prior evidentiary hearing supplemented with a hearing before the trial court, or
>
> (c) if there was no prior evidentiary hearing, a new evidentiary hearing."

H. Probable Cause Determination

At the preliminary examination, the prosecution must demonstrate that probable cause exists to believe that a crime has been committed and that the juvenile committed the alleged crime. MCL 712A.2d(4); MCL 766.13; MCR 3.953(F); MCR 6.110(E). "Probable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." *People v Yost*, 468 Mich 122, 126 (2003), quoting *People v Justice (After Remand)*, 454 Mich 334, 344 (1997). While guilt need not be established beyond a reasonable doubt, the prosecution must make out a prima facie case by presenting "evidence of each element of the crime charged, or evidence from which the elements may be inferred." *People v Abraham*, 234 Mich App 640, 656 (1999).

[64] MCL 766.11b irreconcilably conflicts with MCR 6.110(C) (providing that the Michigan Rules of Evidence apply at preliminary examinations) because it permits the admission of evidence that would be excluded under the Michigan Rules of Evidence; however, because "MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one[,] . . . the specific hearsay exception in MCL 766.11b takes precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110(C)." *People v Parker*, 319 Mich App 664, 674 (2017) (holding that "[t]he district court properly admitted the laboratory report [of the defendant's blood draw at his preliminary examination on a charge of operating while intoxicated] pursuant to the statutory hearsay exception in MCL 766.11b[,]" and "[t]he circuit court abused its discretion by remanding [the] defendant's case to the district court for continuation of the preliminary examination[]").

1. Finding of Probable Cause Regarding Alleged Offense

If the court determines that there is probable cause to believe the offense alleged in the petition was committed and that the juvenile committed the offense, the court may schedule the matter for trial or a pretrial hearing in the same manner as the trial of an adult in a court of general criminal jurisdiction. MCL 712A.2d(5); MCR 3.953(F)(1). See also MCR 6.110(E).

2. Finding of No Probable Cause

If the court does not find that there is probable cause to believe that the alleged offense was committed or does not find that there is probable cause to believe that the juvenile committed the offense, the court must dismiss the petition unless it finds that there is probable cause to believe that the juvenile committed a lesser included offense. MCL 712A.2d(6); MCR 3.953(F)(2). See MCR 6.110(F) (requiring the judge to either "discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony[]"); see also MCL 766.13.

3. Finding of Probable Cause Regarding Lesser Included Offense

MCL 712A.2d(6) provides, in relevant part:

> "If the court determines there is probable cause to believe another offense was committed and there is probable cause to believe the juvenile committed that offense, the court may further determine whether the case should be designated as a case in which the juvenile should be tried in the same manner as an adult as provided in [MCL 712A.2d(2)].[65] If the court designates the case, the case must be set for trial in the same manner as the trial of an adult in a court of general criminal jurisdiction."

MCR 3.953(F)(3) restates this provision as follows:

> "If the court finds there is probable cause to believe that a lesser included offense[66] was committed

[65] See Section 15.8 for discussion of designation hearings.

and probable cause to believe the juvenile committed that offense, the court may, as provided in MCR 3.952,[67] further determine whether the case should be designated as a case in which the juvenile should be tried in the same manner as an adult. If the court designates the case following the determination of probable cause under this subrule, the court may schedule the matter for trial or a pretrial hearing."

4. Amendment of Petition and Subsequent Prosecution

MCL 712A.11(6) provides that a petition "may be amended at any stage of the proceedings as the ends of justice require." See also *People v Hunt*, 442 Mich 359, 364-365 (1993) (where sufficient proofs are presented at preliminary examination to support bindover of criminal defendant for an offense other than that charged, prosecutor may move to amend complaint and warrant to add the charge if the defendant would not be prejudiced because of unfair surprise, inadequate notice, or insufficient opportunity to defend).

MCR 6.110(F) provides that if probable cause is lacking, "the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony."[68] If a subsequent prosecution is initiated, "[e]xcept as provided in MCR 8.111(C),[69] the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge." MCR 6.110(F).

I. Procedural Protections and Guarantees at Preliminary Examination

If a case is designated, "the proceedings are criminal proceedings and must afford all procedural protections and guarantees to which the

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[66] Note that MCL 712A.2d(6) refers to "another offense," whereas MCR 3.953(F)(3) refers more specifically to "a lesser included offense."

[67] See Section 15.8 for discussion of designation hearings.

[68] Note, however, that MCR 3.953(F)(2) requires the court to dismiss the petition if probable cause is lacking. It does not contemplate a "subsequent prosecution."

[69] MCR 8.111(C)(1) provides for reassignment in the case of a judge's disqualification or inability to undertake an assigned case. MCR 8.111(C)(2) governs reassignment under a concurrent jurisdiction plan or a family court plan.

juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction." MCL 712A.2d(7). These protections and guarantees include:

- The right to a preliminary examination, if the offense charged, if committed by an adult, would be a felony or would be punishable by imprisonment for more than one year. MCL 712A.2d(4); MCL 767.42.

- A prompt examination. MCR 3.953(D) requires commencement of the preliminary examination within 14 days of arraignment in a prosecutor-designated case or within 14 days after court-ordered designation. However, MCL 766.4(1) provides that a probable cause conference must be scheduled for "not less than 7 days or more than 14 days after the date of the arraignment," and that the preliminary examination must be scheduled for a date "not less than 5 days or more than 7 days after the date of the probable cause conference."[70]

- Questioning of the complainant and prosecution witnesses in the presence of the accused "in regard to the offense charged and in regard to any other matters connected with the charge that the [judge] considers pertinent." MCL 766.4.[71]

- The calling and examination of defense witnesses, with the assistance of counsel. MCL 766.12; see also MCR 6.110(C).

- A determination of the admissibility of evidence during the preliminary examination. MCR 6.110(D)(2).[72]

- A showing by the prosecution that probable cause exists to believe that a crime has been committed and that the accused committed the alleged crime. MCL 712A.2d(4); MCL 766.13; MCR 3.953(F); MCR 6.110(E)-(F); *People v Harlan,* 258 Mich App 137, 145-146 (2003).[73]

- Appellate review of the probable cause determination, and reversal if the determination constitutes an abuse of discretion. *People v Yost*, 468 Mich 122, 126-127 (2003).

[70] See also MCR 6.104(E)(4). See Section 15.1(E) for additional discussion.

[71] See Section 15.1(G).

[72] See Section 15.1(G).

[73] See Section 15.1(H).

Part C—Pleas and Trials

15.10 Rules Governing Pleas and Trials in Designated Proceedings

MCL 712A.2d(7) provides, in part:

> "If a case is designated under this section, the proceedings are criminal proceedings and must afford all procedural protections and guarantees to which the juvenile would be entitled if being tried for the offense in a court of general criminal jurisdiction."

A. Pleas

"Pleas in designated cases are governed by subchapter 6.300 [of the Michigan Court Rules]." MCR 3.954.[74] A plea of guilty or nolo contendere "must result in entry of a judgment of conviction," which "must have the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7).

B. Trials

"Trials of designated cases are governed by Subchapter 6.400 [of the Michigan Court Rules], except for MCR 6.402(A).[75]" MCR 3.954. A verdict of guilty in a designated proceeding "must result in entry of a judgment of conviction," which "must have the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7).

MCR 3.911(C)(4) provides that jury procedure in a designated case is governed by MCR 6.401–MCR 6.420. In addition, MCL 712A.17(2) provides that "[t]he jury shall be summoned and impaneled in accordance with . . . MCL 600.1300 to [MCL] 600.1376, and . . . as provided in . . . MCL 768.1 to [MCL] 768.36."[76]

As provided in MCR 3.904(A)(2), "as long as the juvenile is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use

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[74] For a complete discussion of pleas under MCR 6.301 *et seq.*, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 6.

[75] MCR 6.402(A) governs the timing of a waiver of jury trial by a criminal defendant. See Section 15.12 for discussion of waiver of jury trial in designated cases.

[76] For a complete discussion of criminal trial proceedings, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 12.

videoconferencing technology to take testimony from an expert witnesses or a person at another location in any delinquency, designated, or personal protection violation proceeding under [subchapter 3.900 of the Michigan Court Rules]." MCR 3.904(A)(2). "At trial, the court may use videoconferencing technology with the consent of the parties." MCR 3.904(A)(3). "A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting." *Id*. See Section 1.4 for discussion of videoconferencing technology.

15.11 Judges Who May Accept Pleas and Conduct Trials[77]

A. Pleas

"The judge who presides at a preliminary examination may accept a plea in the designated case." MCR 3.912(C)(1).

B. Trials

MCR 3.912(A)(3) requires a judge to preside at a jury or nonjury trial in a designated case. Furthermore, "[t]he judge who presides at the preliminary examination may not preside at the trial of the same designated case unless a determination of probable cause is waived." MCR 3.912(C)(1).

15.12 Waiver of Jury Trial

A. No Constitutional Right to Waive Trial by Jury

A criminal defendant has a constitutional right to trial by jury. US Const, Am VI; Const 1963, art 1, § 20. Under the Michigan Constitution, the right to a jury trial applies in both felony and misdemeanor cases. *People v Antkoviak*, 242 Mich App 424, 481-482 (2000).

A defendant may, with the consent of the prosecutor and approval by the court, waive the right to trial by a jury and elect to be tried before the court without a jury. MCL 763.3(1); MCR 6.401–MCR 6.403. However, a criminal defendant has no constitutional or substantive right to insist upon a nonjury trial. *People v Kirby*, 440 Mich 485, 494-

[77] See the Michigan Judicial Institute's table summarizing which proceedings must be conducted by a judge and which proceedings may be conducted by an attorney referee or a nonattorney referee.

495 (1992) (requirement of MCL 763.3(1) that a defendant obtain prosecutor's consent to waive jury trial does not violate due process).

B. Waiver Procedure

In designated cases, "[t]he court may not accept a waiver of trial by jury until after the juvenile has been offered an opportunity to consult with a lawyer." MCR 3.954.

MCR 6.402(B) provides:

> "Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding."

MCL 763.3(1) further provides:

> "Except in cases of minor offenses,[78] the waiver and election by a defendant shall be in writing signed by the defendant and filed in the case and made a part of the record. The waiver and election shall be entitled in the court and case, and in substance as follows: 'I, _____, defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury.'"

C. Violation of Procedural Waiver Requirements

Where a trial court fails to follow the procedural requirements of 6.402(B), and where there is otherwise no record evidence that the defendant understandingly and voluntarily chose to waive his or her right to trial by jury, the defendant's constitutional right to a jury trial is violated, and the court is without authority to proceed with a bench trial. *People v Cook (Robert)*, 285 Mich App 420, 424-427 (2009). In *Cook*, 285 Mich App at 424, the Court of Appeals held that defense counsel's statement that the defendant had agreed to waive his right to a jury

[78] As used in the Code of Criminal Procedure, MCL 760.1 *et seq*., "'[m]inor offense' means a misdemeanor or ordinance violation for which the maximum permissible imprisonment does not exceed 92 days and the maximum permissible fine does not exceed $1,000.00." MCL 761.1(m).

trial, together with a written waiver signed only by counsel, did not constitute a valid waiver. Furthermore, the trial court's failure to meet the minimum constitutional requirements for a jury waiver, by fully informing the defendant of his right to a jury trial and ascertaining that he voluntarily chose to waive that right, constituted a structural error requiring automatic reversal of the defendant's convictions. *Id*. at 424-427.

15.13 Jurors

A jury that decides a case generally must consist of 12 jurors. MCR 6.410(A). However, before a verdict is returned, the parties may stipulate to have the case decided by a lesser number of jurors. *Id*. The court has discretion in deciding whether to accept the stipulation; if it refuses to do so, it must state its reasons on the record. *Id.* "The stipulation and procedure described in [MCR 6.410(A)] must take place in open court and a verbatim record must be made." *Id.*

Criminal defendants are constitutionally guaranteed a unanimous jury verdict, Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511 (1994), and the trial court must properly instruct the jury regarding the unanimity requirement, *id.* at 511. See also MCR 6.410(B) ("A jury verdict must be unanimous.").

15.14 Rules of Evidence and Standard of Proof

The Michigan Rules of Evidence apply to criminal proceedings. MRE 1101(a). The prosecuting attorney must prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged. *In re Winship*, 397 US 358, 361-364 (1970); *People v Wolfe (Lemiel)*, 440 Mich 508, 513-516 (1992), amended 441 Mich 1201 (1992).

15.15 Verdicts

A. Not Guilty

"If the court finds that a juvenile concerning whom a petition is filed is not within [the provisions of the Juvenile Code, MCL 712A.1 *et seq*.], the court shall enter an order dismissing the petition." MCL 712A.18(1).

B. Guilty

A verdict of guilty in a designated proceeding results in entry of a judgment of conviction, which has "the same effect and liabilities as if

it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7).

If a judgment of conviction is entered in a designated proceeding, the court may enter a juvenile disposition as provided in MCL 712A.18, impose any sentence that could be imposed upon an adult convicted of the same offense if it would serve the best interests of the public, or impose a *blended* or *delayed* sentence. MCL 712A.18(1)(o); MCR 3.955(A).[79]

15.16 Crime Victim's Rights Act

Article 2 (the "Juvenile Article") of the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq*., applies to felonies and certain serious misdemeanors committed by juveniles. MCL 780.781(1)(g). For purposes of Article 2, a "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).[80]

"The court shall not order a juvenile within the court's jurisdiction under [MCL 712A.2(a)(1)] or [MCL 712A.2(f)] or the juvenile's parent, guardian, or legal custodian to reimburse the court for any fine, fees, or costs related to the juvenile's court case." MCL 712A.29a(1). "Beginning October 1, 2024, the court shall not collect the balance of any court-ordered fines, fees, or costs previously assessed to a juvenile under [MCL 712A.29], or former [MCL 712A.18m], and only the portion of any court order that imposed those fines, fees, or costs is vacated and unenforceable." MCL 712A.29a(2).

Part D—Sentencing and Dispositional Options

15.17 Court's Options Following Conviction in Designated Proceedings

Following entry of a judgment of conviction in a designated case, the court must enter a disposition or impose a sentence under MCL 712A.18(1)(o). MCL 712A.2d(8); MCR 3.955(A). MCR 3.955(A)

[79] See Part D of this chapter for a discussion of sentencing and dispositional options in designated proceedings.

[80] For a thorough discussion of the applicability of the CVRA to juvenile offenders, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

additionally directs the court to impose sentence or disposition as provided in the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, if applicable.[81]

MCL 712A.18(1)(o) provides, in part:

> "If the court entered a judgment of conviction under [MCL 712A.2d], [the court may] enter any disposition under this section or, if the court determines that the best interests of the public would be served, impose any sentence upon the juvenile that could be imposed upon an adult convicted of the offense for which the juvenile was convicted. . . . The court may delay imposing a sentence of imprisonment under this subdivision for a period not longer than the period during which the court has jurisdiction over the juvenile under this chapter by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate, including any disposition under this section. If the court delays imposing sentence under this section, section 18i of this chapter[82] applies. If the court imposes sentence, it shall enter a judgment of sentence. If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing."[83]

Thus, MCL 712A.18(1)(o) allows the court to:

- enter any disposition allowed under MCL 712A.18;[84]
- if the court determines that the best interests of the public would be served, impose any sentence, including probation, that could be imposed upon an adult convicted of the same offense;[85] or
- delay imposing a sentence of imprisonment while the court has jurisdiction over the juvenile by entering an order of disposition delaying imposition of sentence and placing the

[81] See Section 15.16 for a brief discussion of the applicability of the CVRA in designation proceedings. For a thorough discussion of the CVRA as it applies to juveniles, see the Michigan Judicial Institute's *Crime Victim Rights Benchbook*.

[82] MCL 712A.18i governs review hearings and probation revocation following entry of an order of disposition delaying imposition of sentence.

[83] MCL 712A.18(1)(o) additionally refers to imposition of an "alternative sentence" as permitted under MCL 333.7403(2)(a)(*i*) for a major controlled substance offense. However, effective March 1, 2003, 2002 PA 665 eliminated this alternative sentencing provision. See Section 19.5 for further discussion of alternative sentences for major controlled substance offenses.

[84] See Section 10.10 for discussion of possible juvenile dispositions.

> juvenile on probation upon the terms and conditions it considers appropriate, including any disposition allowed under MCL 712A.18.[86]

MCR 3.903(D)(7) defines "[s]entencing," in the context of designated proceedings, as "the imposition of any sanction on a juvenile that could be imposed on an adult convicted of the offense for which the juvenile was convicted or the decision to delay the imposition of such a sanction." Thus, a juvenile disposition is not considered a *sentence* under the applicable Michigan Court Rules.

A prior conviction entered against an individual who was tried as an adult in a designated proceeding under MCL 712A.2d constitutes a conviction, rather than a juvenile adjudication, for purposes of scoring the prior record variables (PRVs) when sentencing the individual for a subsequent offense, irrespective of whether the individual was sentenced as an adult or received a juvenile disposition in the designated proceeding. *People v Armstrong (Parys)*, 305 Mich App 230, 243-245 (2014) (noting that, under MCL 712A.2d(7), "a juvenile tried as an adult who is found guilty or who pleads guilty or no contest receives a judgment of conviction, which has 'the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction'").

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[85] See Sections 15.19, 15.20, 15.21, 15.22 and Chapter 19.

Certain felonies and repeat offenses are generally punishable by mandatory life imprisonment without the possibility of parole. See MCL 791.234(6) (removing from parole eligibility offenders serving life sentences for certain enumerated offenses, including first-degree murder). However, a mandatory sentence of life imprisonment without the possibility of parole may be inconsistent with the Eighth Amendment if imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 465, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). MCL 769.25 and MCL 769.25a effectively eliminate the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Mandatory life imprisonment without parole sentences are discussed in Section 7.5(B). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)). For additional discussion of the constitutionality of sentencing juveniles and late adolescents to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see Section 16.11(B)(2) and Section 19.1(C). For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

15.18 Factors to Consider in Determining Whether to Enter Juvenile Disposition or Impose Sentence

MCL 712A.18(1)(o) provides, in relevant part:

> "In determining whether to enter an order of disposition or impose a sentence under this subdivision, the court shall consider all of the following factors, giving greater weight to the seriousness of the offense and the juvenile's prior record:
>
> (*i*) The seriousness of the offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
>
> (*ii*) The juvenile's culpability in committing the offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
>
> (*iii*) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
>
> (*iv*) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
>
> (*v*) The adequacy of the punishment or programming available in the juvenile justice system.
>
> (*vi*) The dispositional options available for the juvenile."[87]

MCR 3.955(A) contains substantially similar criteria.

The court need not explicitly address each of the factors set out in MCL 712A.18(1)(o).[88] *People v Petty*, 469 Mich 108, 116-118 (2003). The *Petty*

[86] See Section 15.23.

[87] Note that while nearly identical factors are considered in determining whether to designate a case for trial as an adult under MCL 712A.2d(2), that inquiry requires consideration of "the best interests of *the juvenile* and the public" (emphasis supplied); in contrast, MCL 712A.18(1)(m) and MCR 3.955(B) require consideration of only the best interests of the public in determining whether to order a juvenile disposition or impose an adult sentence following conviction in a designated proceeding.

[88] Effective April 4, 2021, 2020 PA 389 redesignated MCL 712A.18(1)(m) as MCL 712A.18(1)(o).

Court abrogated *People v Thenghkam*, 240 Mich App 29, 41-42, 48 (2000), in which the Court of Appeals had construed the nearly identical inquiry under the automatic waiver statute, MCL 769.1(3), as requiring the trial court to articulate specific findings with regard to each of the enumerated best-interests factors. The *Petty* Court stated as follows:

> "Instead of concentrating primarily on the sufficiency of the trial court's factual determinations vis-à-vis the criteria listed in [former] MCL 712A.18(1)(n)(i)-(vi),[89] a plain reading of the statute requires that a court deliberately consider whether to enter an order of disposition, impose a delayed sentence, or impose an adult sentence in light of the six factors enumerated in [former] subsection 1(n)(i)-(vi). As evidence that it complied with the statute, the trial court, on the record, must acknowledge its discretion to choose among the three alternatives. Hence, a court should consider the enunciated factors . . . to *assist* it in choosing one option over the others. A trial court need not engage in a lengthy 'laundry list' recitation of the factors. Rather, the focus of the hearing should be on the three options, i.e., an adult sentence, a blended sentence, or a juvenile disposition, as outlined in the [relevant] court rules. For this reason, we repudiate the Court's reasoning in *Thenghkam* to the extent it conflicts with this explicit three-part inquiry.
>
> "As a result, trial courts will no longer be forced to undertake a mechanical recitation of the statutory criteria. Rather, a court must logically articulate on the record why it has chosen one alternative over the other two, in light of the criteria articulated in [former] MCL 712A.18(1)(n). By so doing, a court performs the analysis required by the Legislature, while establishing an adequate record to permit appellate review." *Petty*, 469 Mich at 117-118.

[89] Effective October 1, 2003, 2003 PA 71 redesignated MCL 712A.18(1)(n) as MCL 712A.18(1)(m); however, several of the statutory provisions discussed in this Section were not amended accordingly and still refer to former subsection 18(1)(n). Effective April 4, 2021, 2020 PA 389 redesignated MCL 712A.18(1)(m) as MCL 712A.18(1)(o).

15.19 Hearing Procedures[90]

A. Burden of Proof

MCR 3.955(B) states:

> "After the court has considered the results of the risk and needs assessment pursuant to MCR 3.907, the court shall enter an order of disposition unless the court determines that the best interests of the public would be served by sentencing the juvenile as an adult. The prosecuting attorney has the burden of proving by a preponderance of the evidence that, on the basis of the criteria in [MCR 3.955(A)], it would be in the best interests of the public to sentence the juvenile as an adult."

B. Dispositional or Sentencing Hearing

1. Juvenile Disposition

"If the court does not determine that the juvenile should be sentenced as an adult, the court shall hold a dispositional hearing and comply with the procedures set forth in MCR 3.943."[91] MCR 3.955(E).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[92]

2. Adult Sentence

"If the court determines that the juvenile should be sentenced as an adult, either initially or following a delayed imposition of sentence, the sentencing hearing shall be held in accordance with the procedures set forth in MCR 6.425, including the

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[90] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[91] MCR 3.943 governs dispositional hearings in delinquency cases. See Chapter 10.

[92] See Section 10.11 for additional information on MCR 3.937.

procedures of MCR 6.425(G) for appointing appellate counsel."[93] MCR 3.955(C).

C. Time Requirements

1. Juvenile Disposition

If the court decides to enter an order of juvenile disposition, "[t]he interval between the plea of admission or trial and disposition, if any, is within the court's discretion." MCR 3.943(B). However, if the juvenile is detained, the dispositional hearing must be held within 35 days of the plea or trial, except for good cause. *Id*.

2. Adult Sentence

If the court imposes an adult sentence, "[t]he court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law." MCR 6.425(D)(1).

The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US 437, 439-441 (2016) ("[h]olding that the Clause does not apply to delayed sentencing[]"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* at 439.

D. Allocution

A juvenile who is convicted in a designated case has a right to allocute prior to sentencing. MCR 3.955(A) provides, in relevant part:

> "The court . . . shall give the juvenile, the juvenile's lawyer, the prosecutor, and the victim 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."

[93] MCR 6.425 governs sentencing in criminal cases. See Chapter 19.

See also *People v Petty*, 469 Mich 108, 121-123 (2003) (holding that a juvenile defendant must be afforded the opportunity to allocute before a court determines whether to impose a juvenile disposition, a blended sentence, or an adult sentence, and amending MCR 3.955(A) to add the quoted allocution requirement).

E. Judge at Sentencing Hearing

A judge must preside at sentencing in a designated case. MCR 3.912(A)(3).[94] Furthermore, "[t]he juvenile has the right to demand that the same judge who accepted the plea or presided at the trial of a designated case preside at sentencing or delayed imposition of sentence, but not at a juvenile disposition of the designated case." MCR 3.912(C)(2).

F. Entering Judgment of Sentence and Credit for Time Served

"If the court imposes sentence, it shall enter a judgment of sentence. If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing." MCL 712A.18(1)(o).[95]

Offenders under the age of 18 who are convicted of certain offenses carrying a mandatory penalty of life imprisonment without the possibility of parole may be subject to the sentencing requirements set out in MCL 769.25 or MCL 769.25a.[96] A defendant who is sentenced or resentenced under MCL 769.25 or MCL 769.25a must receive credit for time already served, "but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." MCL 769.25(10); MCL 769.25a(6). However, in *People v Wiley*, 324 Mich App 130, 149-150 (2018), the Court of Appeals held that "MCL 769.25a(6) violates the Ex Post Facto Clause of the United States and Michigan Constitutions, US Const art I, § 10; Const 1963, art 1, § 10, because it precludes [juveniles (or former juvenile offenders) who are being resentenced] from having disciplinary credits applied to their term-of-years sentences, and thus, MCL 769.25a(6) is a retroactive[97]

[94] See the Michigan Judicial Institute's table summarizing which proceedings must be conducted by a judge and which proceedings may be conducted by an attorney referee or a nonattorney referee.

[95] See SCAO Forms JC 71, *Judgment of Sentence, Commitment to Jail (Designated Case)*, and JC 72, *Judgment of Sentence, Commitment to Corrections Department (Designated Case)*, which may be accessed at http://courts.michigan.gov/scao/courtforms/juvenile/juvindex.htm. See Section 19.3 for a discussion of credit for time served before sentencing.

[96] See Section 19.4(C)(3) for discussion of MCL 769.25 and MCL 769.25a.

provision that increases their potential sentences or punishments." See also *Hill v Snyder*, 308 F3d 893, 906 (CA 6, 2018).[98]

15.20 Prison Sentences

"If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing." MCL 712A.18(1)(o).

A. Prosecutor-Designated Cases

Juveniles convicted of specified juvenile violations[99] and sentenced under MCL 712A.18(1)(o) may be committed to the Department of Corrections. MCL 712A.18h states:

> "A juvenile sentenced to imprisonment under [MCL 712A.18(1)(p)] shall not be committed to the jurisdiction of the department of corrections. This section does not apply if the juvenile was convicted of a specified juvenile violation as defined in [MCL 712A.2d]."[100]

However, an offender who was under the age of 18 at the time of the commission of an offense is not subject to the imposition of a mandatory sentence of life imprisonment without the possibility of parole. *Miller v Alabama*, 567 US 460, 465, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). A juvenile convicted of an offense carrying a mandatory life-without-parole sentence may be subject to the sentencing requirements set out in MCL 769.25 or MCL 769.25a. Under circumstances in which MCL 769.25 or MCL 769.25a applies to an offender, the prosecuting attorney must file a motion if he or she intends to seek imposition of a life sentence without the possibility of parole. MCL 769.25(3); MCL 769.25a(4)(b).

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[97] Because the United States Supreme Court determined that *Miller* applies retroactively in *Montgomery v Louisiana*, 577 US 190, 208-209 (2016), MCL 769.25a applies retroactively as well. See *People v Wiley*, 324 Mich App 130, 137 (2018).

[98] Though persuasive, Michigan state courts "are not . . . bound by the decisions of the lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

[99] See Section (A) for a list of specified juvenile violations.

"[T]here is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and . . . it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing." *People v Taylor*, 510 Mich 112, 129 (2022). "MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence." *Taylor*, 510 Mich at 135. "The trial court . . . must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP." *Id*. at 136. "This is an exercise in discretion, not a fact-finding mission." *Id*. (noting that "our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence.").

"[T]he Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like other older adults." *People v Parks*, 510 Mich 225, 244 (2022).[101] In *Parks*, the Michigan Supreme Court held that "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under Const 1963, art 1, § 16." *Parks*, 510 Mich at 255. (holding that because defendant "was sentenced without consideration of the attributes of youth, his sentence is unconstitutional, and he must be resentenced"). The Michigan Supreme Court held that *Parks* is retroactive "to cases where the period for direct review had expired when *Parks* was decided." *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App

[100] Certain specified juvenile violations are offenses that generally carry a mandatory penalty of life imprisonment without the possibility of parole. See MCL 791.234(6) (removing from parole eligibility offenders serving life sentences for certain enumerated offenses, including first-degree murder); see also MCL 712A.2d(9); MCL 750.157a(a); MCL 750.316; MCL 750.520b(2)(c). However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 465, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added two sections to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US 460, by effectively eliminating the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who was under the age of 18 at the time of the offense. See MCL 769.25; MCL 769.25a. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see Section 16.11(B)(2) and Section 19.1(C). For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

___ (2024). Previously, *Miller v Alabama*, 567 US 460 (2012), "held that mandatory life without parole for a juvenile convicted of a homicide offense constitutes cruel and unusual punishment as prohibited by the Eighth Amendment." *Poole*, ___ Mich at ___. In *Parks*, the Michigan Supreme Court "held that federal precedent concerning the Eighth Amendment's prohibition against 'cruel and unusual punishments' did not support extending *Miller*'s protections to 18-year-olds," but "that our state Constitution's broader prohibition against 'cruel or unusual punishment' under Const 1963, art 1, § 16 did support such an extension." *Poole*, ___ Mich at ___. Whether *Parks* would have retrospective or prospective application required an initial determination of "whether the *Parks* holding was merely procedural, or whether it concerned substantive rights of a fundamental nature." *Id*. at ___. "[S]ubstantive rules should normally be given retroactive application." *Id*. at ___. Also relevant to determining whether a decision should be applied retroactively or prospectively are the *Linkletter-Hampton* factors: "'(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.'" *Poole*, ___ Mich at ___, quoting *People v Hampton*, 384 Mich 669, 674 (1971) (utilizing the standard set in *Linkletter v Walker*, 381 US 618 (1965)). However, "[t]he importance of the *Linkletter-Hampton* factors is greatly circumscribed when substantive rules or rights are implicated in a holding, and retrospective application is favored." *Poole*, ___ Mich at ___. Only when the *Linkletter-Hampton* factors "strongly indicate otherwise" will a substantive rule be limited to prospective application. *Id*. at ___. Because *Parks* involved a substantive rule, it should be given retroactive application, and its application to the defendant in *Poole* required that the defendant be resentenced according to MCL 769.25. *Poole*, ___ Mich at ___ (confirming retroactivity with *Linkletter-Hampton* factors and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

When sentencing a juvenile to a term-of-years sentence, "consideration of youth and its attendant circumstances is . . . required by this state's sentencing jurisprudence." *People v Boykin*, 510 Mich 171, 188 (2022).[102] "[I]n all sentencing hearings conducted under MCL 769.25 or MCL 769.25a, trial courts are to

[101]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023).

consider the defendant's youth and must treat it as a mitigating factor." *Boykin*, 510 Mich at 189. "Youth matters in sentencing decisions involving juvenile offenders, and the trial court is responsible for tailoring a sentence to an individual defendant and for giving reasons for imposing each sentence in order to facilitate appellate review." *Id*. at 192. There is "no requirement for an on-the record articulation of how youth or the *Miller* factors affected a sentence[.]" *Boykin*, 510 Mich at 192. In fact, "there is no authority that imposes a higher standard of articulation regarding youth beyond our general requirement that a trial court must adequately explain its sentence on the record in order to facilitate appellate review." *Id*. at 194.

A juvenile defendant's "50-to-75-year term-of-years sentence for second-degree murder [does not] pass muster under the Michigan Constitution's prohibition against cruel or unusual punishment . . . ." *People v Eads*, ___ Mich App ___, ___ (2025). Additionally, "[u]nder the principle of proportionality, [a defendant is] entitled to be sentenced in a manner that duly account[s] for the individualized circumstances of the offender and the offense." *Id*. at ___. "[A]s [*Miller v Alabama*, 567 US 460 (2012)] and its progeny have now made clear, such circumstances include mitigating considerations related to [defendant's] youth. *Eads*, ___ Mich App at ___. In this case, defendant "was found guilty of second-degree murder and possession of a firearm during the commission of a felony (felony-firearm) for crimes he committed as a juvenile." *Id*. at ___ (citations omitted). "The trial court sentenced [defendant] as an adult and, departing upward from the guidelines, imposed consecutive terms of 50 to 75 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm." *Id*. at ___. After *Miller* and the enactment of MCL 769.25a, a defendant convicted of first-degree murder as a juvenile was entitled "to resentencing such that he or she, by default, could not receive a term-of-years sentence with a minimum higher than 40 years or a maximum higher than 60 years." *Eads*, ___ Mich App at ___. Defendant's sentence was "a minimum sentence *10 years* higher and a maximum sentence *15 years* higher than [the] statutory upper limits—for committing a *lesser* offense as a juvenile." *Id*. at ___. "[I]ronically, [defendant] fared worse than he would have if the jury had convicted him of [first-degree murder]." *Id*. at ___. Further, "despite [defendant's] juvenile status and all that has now been recognized to come with it, [he] received a sentence for second-degree murder that would require him to outlive his life expectancy before even becoming eligible for parole and would deny him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at ___. The trial court

[102]See also *People v Stovall*, 510 Mich 301, 322 (2022) (holding that "a parolable life sentence for a defendant who commits second-degree murder while a juvenile violates . . . the Michigan Constitution").

"openly acknowledged that [defendant's] background and the circumstances of the murder demonstrated that [he] was immature and impulsive, lacked discipline and self-restraint, and had been negatively influenced by gang members from a young age." *Id*. at ___. "Such observations reflect the very characteristics of youth that a sentencing court must consider as potentially mitigating the sentencing offense." *Id*. at ___ (quotation marks omitted). Here, the trial court "dismissed the very notion that such characteristics might have a mitigating effect and instead considered them as *aggravating* factors in support of a significant departure sentence—an approach plainly contrary to *Miller* and its progeny." *Id*. at ___. Accordingly, defendant's term-of-years sentence "violate[d] the Michigan Constitution's prohibition against cruel or unusual punishment, and it [was] also disproportionate given the sentencing court's failure to consider [defendant's] youth and its attendant characteristics as mitigating factors." *Id*. at ___.

People v Bullock, 440 Mich 15, 30, 33-34 (1992), "set forth criteria to apply in a challenge to a statutory sentence: (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation." *People v Nard*, ___ Mich App ___, ___ (2025). "There is no requirement that a trial court reduce its sentence out of consideration for a defendant's youth." *Id*. at ___. "Instead, recent caselaw requires only that the attributes of youth be taken into consideration." *Id*. at ___. "There is no authority that imposes a higher standard of articulation regarding youth beyond [the] general requirement that a trial court must adequately explain its sentence on the record in order to facilitate appellate review." *Id*. at ___ (cleaned up). In *Nard*, "defendant was convicted of two counts of second-degree murder for the brutal killing of two young boys (and rape of one) who were fishing at a local pond." *Id*. at ___. "For these crimes the trial court, in exercising the statutory discretion granted to it, sentenced defendant to two terms of life with the possibility of parole." *Id*. at ___. "But then, in *People v Stovall*, 510 Mich 301, 322 (2022), the Michigan Supreme Court held that sentencing juvenile offenders convicted of second-degree murder to serve terms of life, even with the possibility of parole, constituted cruel or unusual punishment." *Nard*, ___ Mich App at ___ (citation omitted). "As a result, . . . the trial court resentenced defendant to serve concurrent prison terms of 60 to 150 years for each conviction." *Id*. at ___. Defendant appealed the sentences, "present[ing] an as-applied challenge to his individualized [term-of-years] sentence, which requires [the Court] to consider the particular facts surrounding defendant's conviction and sentence." *Id*. at ___ (quotation marks and

citation omitted). Additionally, defendant argued that "the trial court erred by not adequately considering the mitigating factors of youth." *Id*. at ___. As to the harshness of punishment, the trial court "did not abuse its discretion in finding that defendant's intentional, brutal, and torturous killing of innocent and essentially helpless children outweighed the severity of this term-of-years sentence." *Id*. at ___. As to comparative punishments, "[d]efendant's sentence was not disproportionate to sentences that the Legislature has authorized for other serious crimes." *Id*. at ___. The Court noted that "Michigan's sentence for second-degree murder does not appear out of step with the majority of other jurisdictions in this country." *Id*. at ___. But in this case, the comparative-punishment factor suggests that "defendant's sentence was unduly harsh when compared to second-degree murder sentences for other juvenile offenders." *Id*. at ___. As to rehabilitation, defendant contended that his sentence, effectively life imprisonment, failed to account for his rehabilitative potential, which is a goal of granting parole. *Id*. at ___. The defendant's argument was not persuasive as he had already been paroled. *Id*. at ___. "In sum, the trial court adhered to its obligation to balance defendant's attributes of youth . . . and in doing so it handed down a sentence that was individualized to defendant and the circumstances of his crimes." *Id*. at ___.

"[I]n light of *Miller v Alabama*, 567 US 460 (2012), and the legal developments that have followed, [defendant's] term-of-years sentence of 75 to 150 years for second-degree murder violates the Michigan Constitution's prohibition against cruel or unusual punishment." *People v Echols*, ___ Mich App ___, ___ (2025). "In *Miller*, the United States Supreme Court recognized that juveniles are constitutionally different from adults for purposes of sentencing and held that mandatory life without parole (LWOP) for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Echols*, ___ Mich App at ___ (cleaned up). In this case, defendant, who was one month past his eighteenth birthday, argued that "his term-of-years sentence of 75 to 150 years for second-degree murder for an offense he committed when he was 18 years old violates the Michigan Constitution's prohibition against cruel or unusual punishment." *Echols*, ___ Mich App at ___. Additionally, defendant argued that his sentence was unconstitutional under the state's principle of proportionality. *Id*. at ___.

"Under this sentence, [defendant would] not even become *eligible* for parole for the first time until well past the life expectancy of individuals incarcerated as adults, let alone as youths, and several decades beyond when he would have first become parole-eligible under the life sentence deemed unconstitutional in [*People v Stovall*, 510 Mich 301 (2022)]." *Echols*, ___ Mich App at ___. "Had [defendant]

been convicted of first-degree murder as originally charged, he would now be entitled to a resentencing hearing and would be facing a default term-of-years sentence limited to a minimum of 25 to 40 years and a maximum of 60 years." *Id*. at ___. "Instead, defendant, for committing a *lesser* offense than first-degree murder, is left with a *minimum* sentence that is *15 years higher*—and a maximum sentence that is *90 years higher*—than the default 60-year statutory upper limit for first-degree murder, and without any of the significant procedural safeguards that must be satisfied to exceed the statutory limits for first-degree murder." *Id*. at ___ (cleaned up). "Such a sentence is out of line with other jurisdictions' punishments . . . and leaves [defendant] without any more meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation than a juvenile sentenced to parolable life." *Id*. at ___ (quotation marks and citation omitted). In sum, defendant's "75-to-150-year term-of-years sentence for second-degree murder violates the Michigan Constitution's prohibition against cruel or unusual punishment, and [defendant] is entitled to resentencing as a result." *Id*. at ___. [T]he Court did not resolve the proportionality challenge, noting that defendant's "sentence could not meet [Michigan's] proportionality requirement given that it [was] . . . unconstitutionally cruel or unusual." *Id*. at ___; see also *id*. at ___ (also noting that the trial court must ensure that its resentencing is both constitutional and proportional; among other things, the court must consider "defendant's youth and its attendant characteristics at the time of the offense as potentially mitigating—and not aggravating—factors").

See also *People v Campbell*, ___ Mich App ___, ___ (2025). In *Campbell*, "[d]efendant, who was 18 years old at the time of the offenses, argue[d] that his sentences of 65 to 100 years' imprisonment for his second-degree murder and AWIM [assault with intent to murder] convictions violate the principle of proportionality." *Id*. at ___. "A sentence is reasonable if it adheres to the 'principle of proportionality,' which requires the sentence to be 'proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *Id*. at ___, quoting *People v Steanhouse*, 500 Mich 453, 474 (2017). "[A] sentencing court must consider the offender's youth and treat it as a mitigating factor when imposing a term-of-years sentence on a juvenile defendant." *Campbell*, ___ Mich App at ___. Here, "[d]efendant's *minimum* sentence of 65 years for second-degree murder exceeds the suggested *maximum* sentence for an offender who was 18 years old when he committed first-degree murder." *Id*. at ___. Additionally, "[i]t is clear from the record that the trial court did not consider the mitigating factors of defendant's youth during sentencing" pursuant to the holding in *Miller v Alabama*, 567 US 460 (2012). Thus, "[d]efendant was entitled to be sentenced in a manner that duly accounted for the individualized circumstances of defendant and the offenses, which included his youth and its

attendant characteristics as potentially *mitigating* factors." *Id*. at ___ (quotation marks and citation omitted).

"[T]he decision whether to impose a sentence of life without parole [is properly decided] by a judge, rather than by a jury beyond a reasonable doubt."[103] *People v Skinner (Skinner II)*, 502 Mich 89, 107-108 (2018) (holding that MCL 769.25 does not violate the Sixth or Eighth Amendments "because neither [MCL 769.25] nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead life without parole is authorized by the jury's verdict alone"), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). See Section 19.1(C) for discussion of juvenile life-without-parole sentences.

B. Court-Designated Cases

A juvenile who is not convicted of a specified juvenile violation "shall not be committed to the jurisdiction of the department of corrections." MCL 712A.18h.

15.21 Imposition of "Adult" Probation

The court may place a juvenile on probation in the same manner as probation could be imposed upon an adult convicted of the same offense for which the juvenile was convicted in a designated proceeding. MCL 712A.18(1)(o).[104]

If the court, following conviction in a designated proceeding, imposes a sentence of probation in the same manner as if upon an adult convicted of the same offense, "the probation supervision and related services shall not be performed by employees of the [D]epartment of [C]orrections." MCL 712A.9a.

15.22 Imposition of Jail Sentence

A sentence of imprisonment for a maximum of one year or less is served in a county jail rather than in a state penal institution. MCL 769.28.

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[103] A trial court's decision whether to sentence a juvenile to life without parole is reviewed under the abuse of discretion standard. *Skinner*, 502 Mich at 137.

[104] Note that MCL 771.1(1) precludes the imposition of adult probation for certain offenses, including murder, first- or third-degree criminal sexual conduct, armed robbery, and major controlled substances offenses.

MCL 712A.18(20) imposes additional requirements for sentencing juveniles to imprisonment in the county jail:

> "The court shall not impose a sentence of imprisonment in the county jail under [MCL 712A.18(1)(o)] unless the present county jail facility for the juvenile's imprisonment would meet all requirements under federal law and regulations for housing juveniles. The court shall not impose the sentence until it consults with the sheriff to determine when the sentence will begin to ensure that space will be available for the juvenile."[105]

"If the court imposes a sentence of imprisonment, the juvenile shall receive credit against the sentence for time served before sentencing." MCL 712A.18(1)(o).

15.23 Delayed Imposition of Sentence

MCL 712A.18(1)(o) provides, in relevant part:

> "The court may delay imposing a sentence of imprisonment under this subdivision for a period not longer than the period during which the court has jurisdiction over the juvenile under [the Juvenile Code] by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate, including any disposition under this section.[106] If the court delays imposing sentence under this section, [MCL 712A.18i][107] applies."

See also MCR 3.955(D), which states:

> "If the court determines that the juvenile should be sentenced as an adult, the court may, in its discretion, enter an order of disposition delaying imposition of sentence and placing the juvenile on probation on such terms and conditions as it considers appropriate, including ordering any disposition under MCL 712A.18. A delayed sentence may be imposed in accordance with MCR 3.956.[108]"

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[105] For additional limitations on jailing juveniles under state law, see Chapter 3; see also the Michigan Judicial Institute's table. For federal requirements regarding facilities, see 42 USC 5601 *et seq.* and 28 CFR 31.303.

[106] See SCAO Form JC 73, *Order Delaying Sentence (Designated Case)* and SCAO Form JC 74, *Order of Probation Designated Case)*.

[107] MCL 712A.18i governs review hearings and probation revocation following entry of an order of disposition delaying imposition of sentence.

If the court, following conviction in a designated case, enters an order of disposition delaying imposition of sentence and placing the juvenile on probation, "the probation supervision and related services shall not be performed by employees of the [D]epartment of [C]orrections." MCL 712A.9a.

The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US 437, 439-441 (2016) ("[h]olding that the Clause does not apply to delayed sentencing[]"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id*. at 439.

Part E—Review Requirements[109]

15.24 Retention of Jurisdiction to Impose Adult Sentence

If a delayed sentence is ordered, the sentencing court retains jurisdiction to impose an adult sentence. MCL 712A.18i(1) provides that "[a] delay in sentencing does not deprive the [Family Division] of jurisdiction to sentence the juvenile under [MCL 712A.18(1)(o)] any time during the delay."

15.25 Required Review Hearings[110]

As provided in MCL 712A.18i and MCR 3.956, the following types of review hearings are conducted when sentencing is delayed in a designated proceeding and the juvenile is placed on probation:

- Annual review hearings;

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[108] MCR 3.956 governs review hearings and probation revocation following entry of an order of disposition delaying imposition of sentence.

[109] Review requirements are similar in designated and automatic waiver proceedings. See Chapter 16, Part D, for discussion of progress reviews and review hearings in automatic waiver proceedings.

[110] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

- A mandatory review hearing before the juvenile reaches age 19;
- A review hearing on request of an institution or agency to which the juvenile has been committed; and
- A final review hearing.

The criteria to be considered by the court in determining whether to continue jurisdiction or to impose a sentence of imprisonment following review are discussed in Section 15.26.

A. Annual, Requested, and Mandatory Reviews

1. Annual Review

MCL 712A.18i(2) provides, in part:

> "If the court has entered an order of disposition under [MCL 712A.18(1)(o)] delaying imposition of sentence, the court shall conduct an annual review of the probation, including but not limited to the services being provided to the juvenile, the juvenile's placement, and the juvenile's progress in that placement. . . . The court may order changes in the juvenile's probation based on the review including but not limited to imposition of sentence."

MCR 3.956(A)(1)(a)(*i*) contains substantially similar language.

2. Review on Request of Institution or Agency

MCL 712A.18i(4) provides, in part:

> "If an institution or agency to which the juvenile was committed believes that the juvenile has been rehabilitated and that the juvenile does not present a serious risk to public safety, the institution or agency may petition the court to conduct a review hearing any time before the juvenile becomes 19 years of age or, if the court has continued jurisdiction, any time before the juvenile becomes 21 years of age."

MCR 3.956(A)(1)(a)(*ii*) contains substantially similar language.

3. Mandatory Review Before Age 19

MCR 3.956(A)(1)(a)(*iii*) provides that "[t]he court shall schedule a review hearing to be held within 42 days before the juvenile attains the age of 19, unless adjourned for good cause." See also MCL 712A.18i(4), requiring a review hearing to "be scheduled and held unless adjourned for good cause as near as possible to, but before, the juvenile's nineteenth birthday."

4. Notice Requirements

MCR 3.956(A)(1)(b) provides:

> "(b) Notice of Hearing. Notice of the hearing must be given at least 14 days before the hearing to
>
> (*i*) the prosecuting attorney;
>
> (*ii*) the agency or the superintendent of the institution or facility to which the juvenile has been committed;
>
> (*iii*) the juvenile; and
>
> (*iv*) if the address or whereabouts are known, the parent, guardian, or legal custodian of the juvenile.
>
> The notice must clearly indicate that the court may extend jurisdiction over the juvenile or impose sentence and must advise the juvenile and the parent, guardian, or legal custodian of the juvenile that the juvenile has a right to an attorney."

MCL 712A.18i(5) contains similar language.

5. Appointment of Counsel

"If legal counsel has not been retained or appointed to represent the juvenile, the court shall appoint legal counsel and may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply."[111] MCL 712A.18i(5). MCR 3.956(A)(2) contains substantially similar language.

[111] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/4a548b/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

6. Reports

At a review hearing, the court may consider a commitment report prepared by the Department of Human Services pursuant to MCL 803.225, and any report prepared upon the court's order by the officer or agency supervising probation. MCL 712A.18i(6); MCR 3.956(A)(3).

A commitment report must contain all of the following:

- The services and programs currently being utilized by, or offered to, the juvenile, and the juvenile's participation in those services and programs;
- Where the juvenile currently resides and the juvenile's behavior in his or her current placement;
- The juvenile's efforts toward rehabilitation; and
- Recommendations for the juvenile's release or continued custody. MCL 803.225(1)(a)-(d).

7. Burden and Standard of Proof; Rules of Evidence

MCR 3.956(A)(4)(a) states that "[b]efore the court may continue jurisdiction over the juvenile or impose sentence, the prosecuting attorney must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply."

B. Final Review Hearing

The court must conduct a final review of the juvenile's probation and/or commitment. If the court determines at this hearing that the best interests of the public would be served by imposing any other sentence provided by law for an adult offender, the court may impose that sentence.[112] MCL 712A.18i(7); MCR 3.956(A)(4)(b).

1. Timing and Notice Requirements

Not less than 14 days before a final review hearing is to be conducted, the prosecuting attorney, juvenile, and, if addresses are known, the juvenile's parent or guardian must be notified. The notice must state that the court may impose a sentence upon

[112] The criteria to be considered by the court in determining whether to impose a sentence of imprisonment following review are discussed in Section 15.26.

the juvenile and must advise the juvenile and the juvenile's parent or guardian of the right to legal counsel. MCL 712A.18i(8); MCR 3.956(A)(1)(b).

The required notice must also be provided to "the agency or the superintendent of the institution or facility to which the juvenile has been committed[]" and to the juvenile's legal custodian, if applicable. MCR 3.956(A)(1)(b)(*ii*); MCR 3.956(A)(1)(b)(*iv*).

2. Appointment of Counsel

If an attorney has not been retained or appointed to represent the juvenile, the court must appoint legal counsel and may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply.[113] MCL 712A.18i(8); MCR 3.956(A)(2).

3. Reports

The rules governing the use of reports at final review hearings are the same as those applicable to other review hearings. For discussion of those rules, see Section 15.25(A) and Section 16.1(B).

4. Burden and Standard of Proof; Rules of Evidence

MCR 3.956(A)(4)(a) provides, in part:

> "Before the court may . . . impose sentence, the prosecuting attorney must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. The Michigan Rules of Evidence, other than those with respect to privileges, do not apply."

MCR 3.956(A)(4)(b) additionally requires the court to "determine that the best interests of the public would be served by the imposition of a sentence provided by law for an adult offender[]" before imposing a sentence at the final review hearing.

[113] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/4a548b/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

15.26 Criteria to Consider in Determining Whether to Continue Jurisdiction, Impose Sentence, Release Juvenile, or Change Juvenile's Placement Following Review

Following review, the court must determine whether the prosecutor has shown by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety, considering the following factors:

- the extent and nature of the juvenile's participation in education, counseling, or work programs;
- the juvenile's willingness to accept responsibility for prior behavior;
- the juvenile's behavior in his or her current placement;
- the prior record and character of the juvenile and his or her physical and mental maturity;
- the juvenile's potential for violent conduct as demonstrated by prior behavior;
- the recommendations of any institution, facility, or agency charged with the juvenile's care for the juvenile's release or continued custody; and
- any other information the prosecuting attorney or juvenile may submit. MCL 712A.18i(3)(a)-(g); MCR 3.956(A)(4)(a)(*i*)-(*vii*).

At the final review hearing, the court must also determine whether imposing an adult sentence would serve the best interests of the public by considering the following factors in addition to the factors listed above:

- the effect of treatment on the juvenile's rehabilitation;
- whether the juvenile is likely to be dangerous to the public if released; and
- the best interests of the public welfare and the protection of public security. MCL 712A.18i(7)(a)-(c); MCR 3.956(A)(4)(b)(*i*)-(*iii*).

"When a juvenile with a delayed sentence violates probation . . . the trial court must (with serious probation offenses[114]) or may (with less serious ones) move directly to the imposition of a sentence, without any

consideration of [the] rehabilitation-and-risk factors" set out in MCL 712A.18i(3).[115] *In re Brown*, ___ Mich App ___, ___ (2025). "After a conviction on a designated charge, the trial court has 'the option of imposing either a juvenile disposition, an adult sentence, or a blended sentence, i.e., a delayed sentence pending defendant's performance under the terms provided by a juvenile disposition.'" *Brown*, ___ Mich App at ___, quoting *People v Petty*, 469 Mich 108, 113 (2003). "Under MCL 712A.18(1)(o), the trial court may delay the imposition of sentence and place the juvenile on probation." *Brown*, ___ Mich App at ___. "If a trial court imposes a delayed sentence, then MCL 712A.18i applies." *Brown*, ___ Mich App at ___. See MCL 712A.18(1)(o). "This delay in sentencing does not deprive the trial court of jurisdiction to sentence the juvenile at any time during the delay." *Brown*, ___ Mich App at ___. See MCL 712A.18(1).

In *Brown*, "the trial court originally imposed a delayed sentence for respondent, a juvenile who pleaded no contest to assault with intent to murder, and assault with intent to rob while armed." *Id*. at ___ (citations omitted). "The trial court held a joint probation-violation and review hearing, and . . . addressed the probation violations first." *Id*. at ___. "Respondent admitted to [two] violations." *Id*. at ___. The trial court noted that "the delayed sentence had given respondent 'an incredible opportunity,' but respondent 'failed.' *Id*. at ___. Accordingly, "[t]he trial court sentenced respondent to 17 to 45 years in prison." *Id*. at ___. "On appeal, respondent argue[d] that the trial court erred by sentencing him to prison without first considering the rehabilitation-and-risk factors set forth in MCL 712A.18i(3). *Brown*, ___ Mich App at ___. Here, "[t]here [was] no question that respondent did not commit one of the more serious violations set forth in [MCL 712A.18i(9)], so the question [was] whether the trial court properly applied [MCL 712A.18i(10)]." *Brown*, ___ Mich App at ___. "Under MCL 712A.18i, when a trial court imposes a delayed sentence, the trial court shall conduct a review hearing to determine whether the juvenile has been rehabilitated and whether the juvenile presents a serious risk to public safety." *Brown*, ___ Mich App at ___ (quotation marks and citation omitted). Additionally, under MCL 712A.18i(3), "the trial court may continue jurisdiction over the juvenile or

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[114] A lesser violation under MCL 712A.18i(10) is a violation that is *not* a conviction of a felony or a misdemeanor punishable by more than one year of imprisonment. See MCL 712A.18i(9).

[115] "The factors in MCL 712A.18i(3) are:
"(a) The extent and nature of the juvenile's participation in education, counseling, or work programs.
(b) The juvenile's willingness to accept responsibility for prior behavior.
(c) The juvenile's behavior in his or her current placement.
(d) The prior record and character of the juvenile and his or her physical and mental maturity.
(e) The juvenile's potential for violent conduct as demonstrated by prior behavior;.
(f) The recommendations of any institution or agency charged with the juvenile's care for the juvenile's release or continued custody. and
(g) Other information the prosecuting attorney or juvenile may submit." See *In re Brown*, ___ Mich App ___, ___ (2025).

impose sentence if it determines that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety." *Brown*, ___ Mich App at ___ (quotation marks omitted). To decide whether a juvenile has been rehabilitated or whether a juvenile presents a serious risk to public safety requires a court to consider the factors outlined in MCL 712A.18i(3). *Brown*, ___ Mich App at ___. In contrast, a court is not required to consider the factors in MCL 712A.18i(3) after a probation violation under MCL 712A.18i(10) when deciding whether to revoke probation and impose a sentence of imprisonment. *Id*. at ___. The *Brown* Court concluded that "[a]lthough there is nothing *precluding* a trial court from considering those factors when deciding whether to revoke probation and impose a sentence of imprisonment under [MCL 712A.18i(10)], there is likewise nothing *requiring* that the trial court do so." *Brown*, ___ Mich App at ___. "Thus, the plain language of MCL 712A.18i(10) permitted the trial court to revoke probation and impose sentence once it found that respondent committed a probation violation." *Brown*, ___ Mich App at ___. "Once a probation violation is established under [MCL 712A.18i(9) or MCL 712A.18i(10)], the trial court need not consider the rehabilitation factors outlined in [MCL 712A.18i(3)] (or the additional factors under [MCL 712A.18i(7)])." *Brown*, ___ Mich App at ___.

15.27 Release from Custody and Discharge From Public Wardship

A provision of the Youth Rehabilitation Services Act, MCL 803.301 *et seq*., sets out the requirements for releasing from custody a juvenile who is subject to court jurisdiction and for discharging a juvenile from public wardship. MCL 803.307 states, in relevant part:

> "(1) A youth accepted by a youth agency remains a public ward until discharged from public wardship . . . and, if placed in an institution, shall remain until released . . . .
>
> * * *
>
> (2) Except as otherwise provided in [MCL 803.307], a youth accepted as a public ward shall be automatically discharged from public wardship upon reaching the age of 19. Except as provided in [MCL 803.307(3)], a youth committed to a youth agency under [MCL 712A.18(1)(e) (governing juvenile dispositions)] for an offense that, if committed by an adult, would be a violation or attempted violation of . . . MCL 750.72, [MCL] 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.88, [MCL] 750.89, [MCL] 750.91, [MCL] 750.110a[(2)], [MCL] 750.186a, [MCL] 750.316, [MCL] 750.317, [MCL] 750.349, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d,

> [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, [MCL] 750.530, [or] [MCL] 750.531, or [MCL 333.7401(2)(a)(*i*) or MCL 333.7403(2)(a)(*i*)], shall be automatically discharged from public wardship upon reaching the age of 21. . . .
>
> (3) If the family division of circuit court imposes a delayed sentence on the youth under [MCL 712A.18(1)(p)],[116] the youth shall be discharged from public wardship and committed under the court's order."

Part F—Probation Violations in Delayed Imposition of Sentence Cases[117]

15.28 Probation Violation Hearing Procedure[118]

In designated proceedings where a delayed imposition of sentence has been ordered, probation violation hearings must be conducted pursuant to MCR 3.944(C),[119] which governs probation violation hearings in juvenile delinquency proceedings. MCR 3.956(B)(3).[120] MCR 3.944(C) provides:

> "(1) At the probation violation hearing, the juvenile has the following rights:
>
> (a) the right to be present at the hearing,

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[116] Effective October 1, 2003, 2003 PA 71 redesignated MCL 712A.18(1)(n) as MCL 712A.18(1)(m); following that, effective April 4, 2021, 2020 PA 389 redesignated MCL 712A.18(1)(m) as MCL 712A.18(1)(o); however, several of the statutory provisions discussed in this section were not amended accordingly and still refer to a former subsection.

[117] For probation violation procedures in a designated case in which a juvenile disposition has been imposed, see Chapter 11. For probation violation procedures in an adult criminal proceeding, including a designated proceeding in which an adult sentence has been imposed, see the Michigan Judicial Institute's **Cr***iminal Proceedings Benchbook, Vol. 3*, Chapter 2.

[118] "Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[119] Probation violation hearing and revocation requirements are similar in designated and automatic waiver proceedings. See Chapter 16, Part E, for discussion of probation violations in automatic waiver proceedings.

[120] See Chapter 11 for a discussion of probation violation procedures in cases involving juvenile dispositions.

(b) the right to an attorney pursuant to MCR 3.915(A)(1),

(c) the right to have the petitioner prove the probation violation by a preponderance of the evidence,

(d) the right to have the court order any witnesses to appear at the hearing,

(e) the right to question witnesses against the juvenile,

(f) the right to remain silent and not have that silence used against the juvenile, and

(g) the right to testify at the hearing, if the juvenile wants to testify.

(2) At the probation violation hearing, the Michigan Rules of Evidence do not apply, other than those with respect to privileges. There is no right to a jury.

(3) If it is alleged that the juvenile violated probation by having been found, pursuant to MCR 3.941 [governing pleas of admission or no contest in delinquency proceedings] or MCR 3.942 [governing trial in delinquency proceedings], to have committed an offense, the juvenile may then be found to have violated probation pursuant to this rule."

15.29 Mandatory Probation Revocation

A. Conviction of Felonies and Certain Misdemeanors

In a designated proceeding, the court must revoke probation and impose a sentence of imprisonment if the juvenile is convicted of a felony or a misdemeanor punishable by imprisonment for more than one year. MCL 712A.18i(9); MCR 3.956(B)(1).

B. Adjudication of Responsibility of Certain Offenses

In a designated proceeding, the court must revoke probation and impose a sentence of imprisonment if the juvenile is adjudicated as responsible for an offense that if committed by an adult would be a felony or misdemeanor punishable by imprisonment for more than one year. MCL 712A.18i(9); MCR 3.956(B)(1).

15.30 Other Probation Violations

If the juvenile violates probation in some way other than by being convicted of a felony or a misdemeanor punishable by more than one year's imprisonment or by being adjudicated as responsible for an offense that if committed by an adult would be a felony or a misdemeanor punishable by imprisonment for more than one year, the court may impose sentence or may order any of the following for the juvenile:

- a change in placement;
- community service;
- substance abuse counseling;
- mental health counseling;
- participation in a vocational-technical education program;
- incarceration in a county jail for not more than 30 days if:
  - the present county jail facility would meet all requirements under federal law and regulations for housing juveniles, and
  - the court has consulted with the sheriff to determine when the sentence will begin to ensure that space will be available for the juvenile. A juvenile must be placed in a room or ward out of sight and sound from adult prisoners; and
- other participation or performance as the court considers necessary. MCL 712A.18i(10); MCR 3.956(B)(2).

"Under [MCL 712A.18i(10)], when a trial court finds that a juvenile on probation under a delay of sentence has committed a lesser violation,[121] the trial court 'may' impose sentence." *In re Brown*, ___ Mich App ___, ___ (2025). "When a juvenile with a delayed sentence violates probation, . . . the trial court must (with serious probation offenses) or may (with less serious ones) move directly to the imposition of a sentence, without any consideration of [the] rehabilitation-and-risk factors" set out in MCL 712A.18i(3).[122] *Brown*, ___ Mich App at ___. In *Brown*, "the trial court originally imposed a delayed sentence for respondent, a juvenile who pleaded no contest to assault with intent to murder, and assault with intent to rob while armed." *Id*. at ___ (citations

[121] A lesser violation under MCL 712A.18i(10) is a violation that is *not* a conviction of a felony or a misdemeanor punishable by more than one year of imprisonment. See MCL 712A.18i(9).

omitted). "The trial court held a joint probation-violation and review hearing, and . . . addressed the probation violations first." *Id*. at ___. "Respondent admitted to [two] violations." *Id*. at ___. The trial court noted that "the delayed sentence had given respondent 'an incredible opportunity' but respondent 'failed.' *Id*. at ___. Accordingly, "[t]he trial court sentenced respondent to 17 to 45 years in prison." *Id*. at ___. "On appeal, respondent argue[d] that the trial court erred by sentencing him to prison without first considering the rehabilitation-and-risk factors set forth in MCL 712A.18i(3). *Brown*, ___ Mich App at ___. Here, "[t]here [was] no question that respondent did not commit one of the more serious violations set forth in [MCL 712A.18i(9)], so the question [was] whether the trial court properly applied [MCL 712A.18i(10)]." *Brown*, ___ Mich App at ___. "Under MCL 712A.18i, when a trial court imposes a delayed sentence, the trial court shall conduct a review hearing to determine whether the juvenile has been rehabilitated and whether the juvenile presents a serious risk to public safety." *Brown*, ___ Mich App at ___ (quotation marks and citation omitted). Additionally, under MCL 712A.18i(3), "the trial court may continue jurisdiction over the juvenile or impose sentence if it determines that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety." *Brown*, ___ Mich App at ___ (quotation marks omitted). To decide whether a juvenile has been rehabilitated or whether a juvenile presents s serious risk to public safety requires a court to consider the factors outlined in MCL 712A.18i(3). *Brown*, ___ Mich App at ___. The *Brown* Court concluded that "[a]lthough there is nothing *precluding* a trial court from considering those factors when deciding whether to revoke probation and impose a sentence of imprisonment under [MCL 712A.18i(10)], there is likewise nothing *requiring* that the trial court do so." *Brown*, ___ Mich App at ___. "Thus, the plain language of MCL 712A.18i(10) permitted the trial court to revoke probation and impose sentence once it found that respondent committed a probation violation." *Brown*, ___ Mich App at ___. "Once a probation violation is established under [MCL 712A.18i(9)] or [MCL 712A.18i(10)], the trial court need not consider the rehabilitation factors outlined in [MCL 712A.18i(3)] (or the additional factors under [MCL 712A.18i(7)])." *Id*. at ___.

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[122] The factors in MCL 712A.18i(3) are:
"(a) The extent and nature of the juvenile's participation in education, counseling, or work programs.
(b) The juvenile's willingness to accept responsibility for prior behavior.
(c) The juvenile's behavior in his or her current placement.
(d) The prior record and character of the juvenile and his or her physical and mental maturity.
(e) The juvenile's potential for violent conduct as demonstrated by prior behavior;.
(f) The recommendations of any institution or agency charged with the juvenile's care for the juvenile's release or continued custody. and
(g) Other information the prosecuting attorney or juvenile may submit." See *In re Brown*, ___ Mich App ___, ___ (2025).

15.31 Sentence Following Probation Revocation[123]

In a designated proceeding, a sentence imposed following probation revocation must be "for a term that does not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation." MCL 712A.18i(9); MCR 3.956(B)(1). Furthermore, the juvenile must receive credit for the time served on probation. MCL 712A.18i(11); MCR 3.956(B)(4).

"A juvenile does not satisfy the condition of 'time served on probation' for purposes of jail credit during the period of time when that juvenile willfully absconded from probation." *In re Halliburton*, ___ Mich App ___, ___ (2022). "'[T]ime served on probation' means actually serving the sentence of probation, including complying with the requirements of where that probation must be served." *Id*. at ___. "To serve a particular period of probation, a juvenile must not just be on probation, but must also go through, work through, i.e., complete, that particular period of probation." *Id*. at ___ (holding that respondent was entitled to credit for "time served on probation" while he was placed in a residential treatment center and when he was on a tether because he "was successfully going through and completing those specific periods of probation"). Thus, "when a juvenile willfully absconds from probation, the probation period is effectively tolled, and during that time of willful absconsion, the juvenile is not serving the probation and has earned no credit for 'time served' under the applicable statutes and court rules." *Id*. at ___.

"Under [MCL 712A.18i(10)], when a trial court finds that a juvenile on probation under a delay of sentence has committed a lesser violation,[124] the trial court 'may' impose sentence." *In re Brown*, ___ Mich App ___, ___ (2025). "When a juvenile with a delayed sentence violates probation, . . . the trial court must (with serious probation offenses) or may (with less serious ones) move directly to the imposition of a sentence, without any consideration of [the] rehabilitation-and-risk factors" set out in MCL 712A.18i(3). *Brown*, ___ Mich App at ___. "[T]he plain language of MCL 712A.18i(10) permitted the trial court to revoke probation and impose sentence once it found that respondent committed a probation violation." *Brown*, ___ Mich App at ___. "Once a probation violation is established under [MCL 712A.18i(9)] or [MCL 712A.18i(10)], the trial court need not consider the rehabilitation factors outlined in

[123]"Instruments of restraint . . . may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the" factors set forth in MCR 3.906(A)(1)-(3). MCR 3.906(A). A determination that restraints are necessary must be made in compliance with MCR 3.906(B), and any use of restraints must comply with MCR 3.906(C). See Section 1.5 for more information on the use of restraints in juvenile proceedings.

[124]A lesser violation under MCL 712A.18i(10) is a violation that is *not* a conviction of a felony or a misdemeanor punishable by more than one year of imprisonment. See MCL 712A.18i(9).

[MCL 712A.18i(3)] (or the additional factors under [MCL 712A.18i(7)]). *Id*. at ___. See Sections 15.26 and 15.30.

"A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 3.956(C).[125]

[125] See MCR 6.425(D)(3) (governing incarceration for nonpayment in adult criminal and contempt cases) for guidance in determining whether a juvenile or parent has the ability to pay court-ordered financial obligations. See Section 19.2 for discussion of MCR 6.425(D)(3).

Chapter 16: Automatic Waiver Proceedings

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In this chapter. . .

When a juvenile who is 14, 15, or 16 years old commits a specified juvenile violation, the prosecutor may elect to initiate automatic waiver proceedings by filing a complaint in district court rather than a petition in the Family Division of Circuit Court. If the juvenile is bound over for trial following a preliminary examination, he or she faces trial in a court of general criminal jurisdiction.

Part A of this chapter provides an overview of the automatic waiver process and discusses the procedural requirements for initiating an automatic waiver proceeding.

Part B discusses the procedural requirements for arraignments and preliminary examinations in automatic waiver proceedings. A complete discussion of the rules of criminal procedure applicable to circuit court proceedings is beyond the scope of this benchbook. For information regarding pleas and trials in courts of general criminal jurisdiction, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapters 6 and 12.

Part C discusses the requirements for juvenile sentencing hearings in automatic waiver proceedings. If a juvenile is convicted of a specified juvenile violation in an automatic waiver proceeding, the juvenile must be sentenced in the same manner as an adult if the conviction is for any of the 12 very serious specified juvenile violations enumerated in MCL 769.1(1)(a)-(*l*). If a juvenile is convicted of an offense that is *not* included in the list of crimes requiring imposition of adult sentence, the court must hold a juvenile sentencing hearing to determine whether to impose an adult sentence or to place the juvenile on probation and commit him or her to state wardship.

Part D discusses the review requirements that are applicable when the court places the juvenile on probation and commits him or her to state wardship.

Part E discusses probation violation hearing and revocation requirements that apply when probation and commitment are ordered. For information regarding probation violation when adult sentence is imposed, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2.

Related issues are discussed in the following portions of this benchbook:

- Comparison of waiver and designated case proceedings, Section 1.11;
- Jurisdiction, Section 2.6;
- Detention, Section 3.8;
- Pretrial motions, including motions to suppress evidence, Chapter 7;
- Probation violation procedures in delinquency cases, Chapter 11;
- Sentencing, review, and probation violation procedures in designated proceedings, Chapter 15, Parts D, E, and F;
- Prosecutorial charging discretion with respect to specified juvenile violations, Section 16.4(A);
- Appointment of counsel under the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq.*, Chapter 17;
- Imposition of adult sentences upon juveniles, Chapter 19;
- Review of referee's recommendations and appeals, Chapter 20; and
- Collection of biometric data, including fingerprints, and recordkeeping requirements, Chapter 21.

Part A—Overview of Automatic Waiver Proceedings

16.1 Introduction

The automatic waiver process allows "prosecutors [to] choose to 'waive' certain juvenile offenders into the circuit court to be tried as adults[,]" without the requirement of a hearing in the Family Division. *People v Conat*, 238 Mich App 134, 140, 142 (1999).

A. Governing Statutes

The initiation of automatic waiver proceedings is governed by MCL 764.1f, MCL 600.606, and MCL 712A.2(a)(1).

MCL 764.1f(1) allows the prosecutor to charge a juvenile who is between the ages of 14 and 18[1] as an adult in a court of general criminal jurisdiction if the juvenile has committed any of the specified juvenile violations that are enumerated in MCL 764.1f(2).

Under MCL 600.606, "[t]he circuit court is given jurisdiction over juveniles at least fourteen years of age who commit . . . 'specified juvenile violations,' so that it may hear the automatic waiver cases where the prosecutor charges the juvenile as an adult." *People v Conat*, 238 Mich App 134, 141 (1999).

"Correspondingly, [under MCL 712A.2(a)(1),] the normally exclusive jurisdiction of the family court over juveniles is limited in cases where a juvenile at least fourteen years of age is charged with any of the 'specified juvenile violations,' so that the family court only has jurisdiction if the prosecutor chooses to file a petition in the family court instead of authorizing a complaint and warrant to proceed against the juvenile as an adult." *Conat*, 238 Mich App at 141.[2]

B. Governing Court Rules

MCR 6.901(B) provides that the rules in subchapter 6.900 "apply to criminal proceedings in the district court and the circuit court concerning a juvenile against whom the prosecuting attorney has authorized the filing of a criminal complaint charging a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court."

Following the filing of a complaint and warrant in district court, the rules in subchapter 6.900 "take precedence over, but are not

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[1] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 479 Mich 23 (2014). Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

[2] "A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013) (quoting *People v Lown*, 488 Mich 242, 268 (2011), and holding that because "'[a] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction[,]'" the juvenile defendant, "by entering a guilty plea in the circuit court[] and failing to contest the circuit court's jurisdiction, . . . implicitly consented to that court's exercise of personal jurisdiction").

exclusive of, the rules of procedure applicable to criminal actions against adult offenders." MCR 6.901(A). The rules contained in subchapter 6.900 "do not apply to a person charged solely with an offense in which the family division has waived jurisdiction [in a traditional waiver proceeding] pursuant to MCL 712A.4." MCR 6.901(B).[3]

C. Video and Audio Proceedings

"The courts may use telephonic, voice, or videoconferencing technology under [subchapter 6.900 of the Michigan Court Rules] as prescribed by MCR 6.006." MCR 6.901(C). See Section 1.4(B) for discussion of video and audio technology.

16.2 Jurisdiction[4]

"The circuit court has jurisdiction to hear and determine a specified juvenile violation if committed by a juvenile 14 years of age or older and less than 18 years of age." MCL 600.606(1).[5]

The Family Division "has jurisdiction over a juvenile 14 years of age or older who is charged with a specified juvenile violation *only* if the prosecuting attorney files a petition in the [Family Division] instead of authorizing a complaint and warrant [in the district court]." MCL 712A.2(a)(1) (emphasis supplied).

"A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction." *People v Kiyoshk*, 493 Mich 923, 923 (2013). "[A d]efendant's age when [an] offense was committed does not pertain to the 'kind or character' of the case, but rather constitutes a

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[3] See Chapter 14 for discussion of traditional waiver proceedings.

[4] Although MCL 600.606(1) assigns jurisdiction to the "circuit court" and the Family Division is "a division of circuit court[,]" MCL 600.1001, automatic waiver cases are heard in courts of general criminal jurisdiction. See MCL 600.601(4) (the Family Division "has jurisdiction as provided in [MCL 600.1001 *et seq.*]"); MCL 600.1021(1)(e) (granting the Family Division jurisdiction over "[c]ases involving juveniles as provided in [the Juvenile Code]"); MCL 712A.2(a)(1) (limiting the Family Division's jurisdiction over juveniles 14 years of age or older who are charged with specified juvenile violations to cases in which the prosecutor has filed a petition in the Family Division rather than authorizing a complaint and warrant); and MCR 6.903(C) (for purposes of MCR 6.901 *et seq.*, "'[c]ourt' means the circuit court as provided in MCL 600.606, but does not include the family division of the circuit court").

[5] "[T]he birthday rule of age calculation applies in Michigan." *People v Woolfolk*, 304 Mich App 450, 504 (2014), aff'd 479 Mich 23. Under the birthday rule, "'a person attains a given age on the anniversary date of his or her birth.'" *Woolfolk*, 304 Mich App at 461, 464, 506 (holding that the common-law rule of age calculation, under which "'one becomes of full age the first moment of the day *before*' the anniversary of his or her birth," is inapplicable in Michigan, and that the defendant, who shot and killed the victim on the day before the defendant's eighteenth birthday, "was not yet eighteen years of age when the shooting occurred") (emphasis supplied; citations omitted).

defendant-specific, 'particular fact['; thus, w]hether [a] defendant [is] of an age that ma[kes] circuit court jurisdiction appropriate is . . . a question of personal jurisdiction." *Id*. at 923-924 (quoting *People v Lown*, 488 Mich 242, 268 (2011),[6] and holding that because "'[a] party may stipulate to, waive, or implicitly consent to *personal* jurisdiction,'" the juvenile defendant, "by entering a guilty plea in the circuit court[] and failing to contest the circuit court's jurisdiction, . . . implicitly consented to that court's exercise of personal jurisdiction").

16.3 Specified Juvenile Violations

The specified juvenile violations, as enumerated in MCL 712A.2(a)(1)(A)-(I), MCL 600.606(2)(a)-(i), MCL 764.1f(2)(a)-(i), and MCR 6.903(H)(1)-(19), are as follows:

- first-degree arson, MCL 750.72;
- assault with intent to commit murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- assault with intent to rob while armed, MCL 750.89;
- attempted murder, MCL 750.91;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- robbery of a bank, safe, or vault, MCL 750.531;
- assault with intent to do great bodily harm or assault by strangulation or suffocation, MCL 750.84, if armed with a dangerous weapon[7];
- first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;

[6] "'Subject matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of the case.'" *Kiyoshk*, 493 Mich at 923, quoting *Lown*, 488 Mich at 268.

- escape or attempted escape from a medium- or high-security facility operated by the Department of Health and Human Services (DHHS) or a county juvenile agency,[8] or from a high-security facility operated by a private agency under contract with the DHHS or a county juvenile agency, MCL 750.186a;

- possession of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7403(2)(a)(*i*);

- manufacture, creation, or delivery of, or possession with intent to manufacture, create, or deliver, 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine, MCL 333.7401(2)(a)(*i*);

- an attempt, MCL 750.92, to commit any of the above crimes;

- conspiracy, MCL 750.157a, to commit any of the above crimes;

- solicitation, MCL 750.157b, to commit any of the above crimes;

- any lesser-included offense of a specified juvenile violation, if the juvenile is charged with a specified juvenile violation; and

- any other offense arising out of the same transaction as a specified juvenile violation, if the juvenile is charged with a specified juvenile violation.

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[7] MCL 712A.2(a)(1)(B) defines "dangerous weapon," as used in the context of a specified juvenile violation, as one 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*)."

Substantially identical definitions of "dangerous weapon" are contained in MCL 600.606(2)(b), MCL 764.1f(2)(b), and MCR 6.903(I). "[A]ccording to the unambiguous statutory language in MCL 764.1f(2)(b), to properly obtain jurisdiction over a juvenile defendant charged with AWIGBH through the automatic waiver process, *the juvenile defendant themselves* must be armed with a dangerous weapon." *People v Oslund*, ___ Mich ___, ___ (2024). MCL 764.1f(2)(b)'s "use of the term '*the* juvenile' unambiguously refers to the charged juvenile in question." *Oslund*, ___ Mich at ___. "For purposes of automatic waiver, the actions of other individuals cannot be transferred or imputed onto the charged juvenile defendant." *Id*. at ___.

[8] See Section 16.17(B) and Section (C) for discussion of county juvenile agencies.

16.4 Initiation of Automatic Waiver Proceedings

A. Prosecutorial Charging Discretion

Whether to proceed in the Family Division or a court of general criminal jurisdiction with respect to a specified juvenile violation is a matter of prosecutorial discretion. MCL 764.1f(1) provides:

> "If the prosecuting attorney has reason to believe that a juvenile 14 years of age or older but less than 18 years of age has committed a specified juvenile violation, the prosecuting attorney may authorize the filing of a complaint and warrant on the charge with a magistrate concerning the juvenile."

A uniform prosecutorial policy to authorize complaints and warrants in all cases involving juveniles over the age of 15 who were charged with certain specified juvenile violations was consistent with MCL 764.1f and did not violate the defendants' right to due process or represent an abuse of prosecutorial discretion. *People v Rode,* 196 Mich App 58, 65-66 (1992) (noting that "[a] prosecutor has broad discretion in determining which charges to bring and when to bring them" and that "review of a prosecutor's exercise of charging discretion is generally precluded by the constitutional separation of powers absent unconstitutional, illegal, or ultra vires acts or an abuse of power"), rev'd on other grounds by *People v Hana,* 447 Mich 325 (1994).[9, 10]

A prosecutor was not prohibited from dismissing a juvenile proceeding and immediately thereafter filing a complaint in the circuit court under the automatic waiver provisions. *People v Dilling,* 222 Mich App 44, 47-50 (1997). Because the juvenile was neither detained nor prejudiced by any delay, there was no denial of due process, and there was no evidence that the prosecutor acted in bad faith; moreover, "[the d]efendant had no absolute right to be treated as a juvenile, MCL 764.1f." *Dilling*, 222 Mich App at 48-49. "The dismissal of the [juvenile] petition did not taint the subsequent circuit court proceeding, which was a proceeding that could have been initiated [under MCL 600.606] in the first instance." *Dilling*, 222 Mich App at 50.

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

[10] When *Rode*, 196 Mich App 58, was decided, MCL 764.1f authorized automatic waiver for juveniles "15 years of age or older but less than 17 years of age." Effective January 1, 1997, 1996 PA 255 amended MCL 764.1f to lower to 14 the minimum age for automatic waiver. Effective October 1, 2021, 2019 PA 106 amended MCL 764.1f to authorize automatic waiver for juveniles "14 years or older but less than 18 years of age[.]"

B. Special Adjournment[11]

If a petition has been filed in the Family Division alleging that a juvenile between 14 and 18 years of age has committed an offense that would constitute a specified juvenile violation, the prosecutor may request a "special adjournment" of the preliminary hearing in order to decide whether to continue in the Family Division or to instead authorize the filing of a criminal complaint and warrant under MCL 764.1f. MCR 3.935(A)(3)(a) provides, in part:

> "On a request of a prosecuting attorney who has approved the submission of a petition with the [Family Division], conditioned on the opportunity to withdraw it within 5 days if the prosecuting attorney authorizes the filing of a complaint and warrant with a magistrate, the [Family Division] shall . . .[:]
>
> > "(*i*) . . . adjourn the preliminary hearing for up to 5 days to give the prosecuting attorney the opportunity to determine whether to authorize the filing of a criminal complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f, instead of unconditionally approving the filing of a petition with the [Family Division]."

During the special adjournment, the juvenile must be released or detained in accordance with MCR 3.935(D) and MCR 3.935(E).[12] MCR 3.935(A)(3)(a)(*iii*).

If the prosecuting attorney files a complaint and warrant in district court, an arraignment must be held within 24 hours. MCR 6.907(A)(2).[13] Following the arraignment, the district court must set a date for a probable cause conference and a date for the preliminary examination. MCL 766.4(1).[14]

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[11] See Section 6.3(B) for discussion of special adjournments in the Family Division.

[12] See Section 6.3(H) and Section 6.3(I) for discussion of detention and conditional release under MCR 3.935(D) and MCR 3.935(E).

[13] See Section 16.6 for discussion of the arraignment in automatic waiver proceedings.

[14] At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1.

MCR 6.907(C)(2) requires the judge in an automatic waiver proceeding to "set a date for the juvenile's preliminary examination within . . . 14 days[after arraignment], less time given and used by the prosecuting attorney under special adjournment pursuant to MCR 3.935(A)(3), up to three days' credit"; however, MCR 6.907, and the other court rules governing automatic waiver proceedings, have not been amended to reflect the requirements of MCL 766.4. See Section 16.8 for additional discussion of MCL 766.4.

16.5 Right to Counsel

"[A] criminal defendant's initial appearance before a judicial officer, where he [or she] learns the charge against him [or her] and his [or her] liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel[,]" irrespective of the prosecution's involvement in, or awareness of, the proceeding. *Rothgery v Gillespie Co*, 554 US 191, 194-195, 213 (2008).

A. Advice of Right to Counsel

MCR 6.905(A) requires that an unrepresented juvenile be advised of the right to counsel at each stage of the proceedings:

> "If the juvenile is not represented by an attorney, the magistrate or court shall advise the juvenile at each stage of the criminal proceedings of the right to the assistance of an attorney. If the juvenile has waived the right to an attorney, the court at later proceedings must reaffirm that the juvenile continues to not want an attorney."

Additionally, the Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the court to advise the juvenile of the right to counsel. MCL 780.991(1)(c).[15]

B. Right to Appointed Counsel Under the Court Rules

MCR 6.905(B) provides:

> "Unless the juvenile has a retained attorney, or has waived the right to an attorney, the magistrate or the court must refer the matter to the local indigent criminal defense system's appointing authority for appointment of an attorney to represent the juvenile."

C. Right to Appointed Counsel Under the Michigan Indigent Defense Commission Act

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., creating the Michigan Indigent Defense Commission (MIDC)[16] and establishing a system for the appointment of defense counsel for indigent defendants, applies to juveniles who are

[15] See Chapter 17 for discussion of the MIDCA.

[16] The MIDC is within the Department of Licensing and Regulatory Affairs (LARA). MCL 780.985(1); MCL 780.983(c).

charged with felony offenses in automatic waiver[17] proceedings. MCL 780.983(a)(*ii*)(D).

The MIDCA authorizes the MIDC to set out minimum standards for attorneys who represent indigent criminal defendants. MCL 780.989(1)(a). Although the MIDC is within the executive branch (and not the judicial branch), the MIDCA does not violate the separation of powers doctrine of the Michigan Constitution because "any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary." *Oakland Co v State of Michigan*, 325 Mich App 247, 262 (2018). The MIDCA "does not directly regulate trial courts or attorneys." *Id*. Instead, it "regulates 'indigent criminal defense system[s],' statutorily defined as funding units, rather than trial courts themselves." *Id.* at 262-263. In addition, it "repeatedly recognizes the Michigan Supreme Court's constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts." *Id*. at 263. Further, "the [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with the minimum standards, nor does the [MIDCA] purport to control what happens in court." *Id*. at 264. Accordingly, the MIDCA is not facially unconstitutional. *Id*. at 265.

Among other requirements, the MIDCA requires the court to advise the accused of the right to counsel and requires that the accused be screened for eligibility for appointed counsel. MCL 780.991(1)(c) provides:

> "Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults,[18] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services."

"A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . must be made as determined by the indigent criminal defense system[19] not later

[17] The MIDCA applies to "[a]n individual less than 18 years of age at the time of the commission of a felony" if "[t]he prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under . . . MCL 764.1f." MCL 780.983(a)(*ii*)(D).

[18] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*).

than at the defendant's first appearance in court." MCL 780.991(3)(a).[20] The "trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the [Michigan Supreme Court.]" *Id*.[21] Furthermore, nothing in the MIDCA "prevents a court from making a determination of indigency for any purpose consistent with" Const 1963, art 6. MCL 780.991(3)(a).

Counsel must be assigned as soon as the defendant has been determined as eligible for indigent criminal defense services, and counsel must be appointed "as soon as the defendant's liberty is subject to restriction by a magistrate or judge." MIDC Standard 4. "Representation includes but is not limited to the arraignment on the complaint and warrant."[22] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

For further discussion of the MIDCA, see Chapter 17.

D. Waiver of Right to Counsel

MCR 6.905(C) provides:

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[19] An *indigent criminal defense system* is "[t]he local unit of government that funds a trial court." MCL 780.983(h)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an *indigent criminal defense system* is "those local units of government, collectively."MCL 780.983(h)(*ii*).

[20]The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

[21] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265. See Chapter 17 for more information on the constitutionality of the MIDCA.

[22] The requirement that counsel be appointed at arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269 (although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

> "The magistrate or court may permit a juvenile to waive representation by an attorney if:
>
> > (1) an attorney is appointed to give the juvenile advice on the question of waiver;
> >
> > (2) the magistrate or the court finds that the juvenile is literate and is competent to conduct a defense;
> >
> > (3) the magistrate or the court advises the juvenile of the dangers and of the disadvantages of self-representation;
> >
> > (4) the magistrate or the court finds on the record that the waiver is voluntarily and understandingly made; and
> >
> > (5) the court appoints standby counsel to assist the juvenile at trial and at the juvenile sentencing hearing."

If the juvenile waives representation, "the court at later proceedings must reaffirm that the juvenile continues to not want an attorney." MCR 6.905(A).

E. Cost of Legal Representation

MCR 6.905(D) provides:

> "The court may assess cost of legal representation, or part thereof, against the juvenile or against a person responsible for the support of the juvenile, or both. The order assessing cost shall not be binding on a person responsible for the support of the juvenile unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first class mail, to the person's last known address."

Part B—Arraignments and Preliminary Examinations

16.6 Arraignment in District Court[23]

"When the prosecuting attorney authorizes the filing of a complaint and warrant charging a juvenile with a specified juvenile violation instead of approving the filing of a petition in the family division of the circuit court, the juvenile in custody must be taken to the magistrate for arraignment on the charge." MCR 6.907(A).

A. Notification of Parent

"The prosecuting attorney must make a good-faith effort to notify the parent of the juvenile of the arraignment." MCR 6.907(A).

B. Temporary Detention Pending Arraignment

A juvenile may be detained pending arraignment in a county juvenile facility, a state-operated regional juvenile detention facility, or a facility operated by the Family Division if the Family Division consents or the circuit court orders such placement. MCR 6.907(B)(1)-(3). "If no juvenile facility is reasonably available and if it is apparent that the juvenile may not otherwise be safely detained," the juvenile may be temporarily lodged in an adult facility, provided that he or she is kept separate from adult prisoners. MCR 6.907(B).[24]

C. Time Requirements

"The juvenile must be released if arraignment has not commenced:

> "(1) within 24 hours of the arrest of the juvenile; or
>
> (2) within 24 hours after the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 3.935(A)(3),[25] provided the juvenile is being detained in a juvenile facility." MCR 6.907(A)(1)-(2).

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[23] A complete discussion of the statutory and procedural requirements for conducting arraignments is beyond the scope of this benchbook. For a thorough discussion of these requirements, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 5.

[24] See Section 3.8 for a detailed discussion of places of detention for juveniles charged in automatic waiver proceedings.

[25] See Section 6.3(B) and Section 16.4(B) for discussion of the special adjournment process.

D. Right to Counsel[26]

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., requires the court to advise the accused of the right to counsel and requires that the accused be screened for eligibility for appointed counsel.[27] MCL 780.991(1)(c) provides:

> "Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults,[28] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services."

"A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, . . . must be made as determined by the indigent criminal defense system[29] not later than at the defendant's first appearance in court." MCL 780.991(3)(a).[30] The "trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the [Michigan Supreme Court.]" *Id*.[31] Furthermore, nothing in the MIDCA "prevents a court from making a determination of indigency for any purpose consistent with" Const 1963, art 6. MCL 780.991(3)(a). See also MCL 775.16, which provides that if the juvenile "appears before a magistrate without counsel," the magistrate must advise him or her of the right to appointed counsel

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[26] See Chapter 17 for additional discussion of requirements under the MIDCA.

[27] The MIDCA applies to "[a]n individual less than 18 years of age at the time of the commission of a felony" if "[t]he prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under . . . MCL 764.1f." MCL 780.983(a)(*ii*)(D) (defining *adult*, for purposes of the MIDCA, to include these juveniles).

[28] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*).

[29] An *indigent criminal defense system* is "[t]he local unit of government that funds a trial court." MCL 780.983(h(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an *indigent criminal defense system* is "those local units of government, collectively." MCL 780.983(h)(*ii*).

[30] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e).

[31] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265. See Chapter 17 for more information on the constitutionality of the MIDCA.

and must appoint counsel if the juvenile is eligible under the MIDCA.

Counsel must be assigned as soon as the defendant has been determined as eligible for indigent criminal defense services, and counsel must be appointed "as soon as the defendant's liberty is subject to restriction by a magistrate or judge." MIDC Standard 4. "Representation includes but is not limited to the arraignment on the complaint and warrant."[32] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

E. Required Procedures

MCR 6.907(C) provides:

> "At the arraignment on the complaint and warrant:
>
> > "(1) The magistrate shall determine whether a parent, guardian, or an adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the magistrate appoints an attorney to appear at arraignment with the juvenile or provided an attorney has been retained and appears with the juvenile.
> >
> > (2) The magistrate shall set a date for the juvenile's preliminary examination within the next 14 days,[33] less time given and used by the prosecuting attorney under special adjournment pursuant to MCR 3.935(A)(3),[34] up to three days credit. The magistrate shall inform the juvenile and

[32] The requirement that counsel be appointed for arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269. "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

[33] At arraignment for a felony charge, the court must schedule "a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment[]" and a preliminary examination to be held "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also 2014 PA 123, enacting section 1. The court rules governing automatic waiver proceedings, including MCR 6.907, have not been amended to reflect the requirements of MCL 766.4. See Section 16.8 for additional discussion of MCL 766.4.

[34] See Section 6.3(B) and Section 16.4(B) for discussion of the special adjournment process.

> the parent, guardian, or adult relative of the juvenile, if present, of the preliminary examination date. If a parent, guardian, or an adult relative is not present at the arraignment, the court shall direct the attorney for the juvenile to advise a parent or guardian of the juvenile of the scheduled preliminary examination."

F. Scheduling the Probable Cause Conference and Preliminary Examination[35]

Unless waived by agreement of the parties, at a felony arraignment, the court must schedule a probable cause conference. MCL 766.4(1); MCL 766.4(2); see also MCR 6.104(E)(4); MCR 6.108(A). Additionally, defendants charged with a felony offense or a misdemeanor offense punishable by more than one year of imprisonment are statutorily entitled to a prompt, fair, and impartial preliminary examination, MCL 766.1, which, unless waived by the defendant with the consent of the prosecuting attorney, must also be scheduled at arraignment, MCL 766.4(1); MCL 766.7.

MCL 766.4(1) provides, in relevant part:

> "Except as provided in . . . MCL 712A.4,[36] the [judge] before whom any person is arraigned on a charge of having committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment."[37]

However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4). Additionally, MCR 6.110(B)(2) provides:

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[35] This subsection discusses MCL 766.4 and MCL 766.7 as amended by 2014 PA 123, effective May 20, 2014. Effective January 1, 2015, ADM File No. 2014-42 amended MCR 6.104 (governing arraignments) and MCR 6.110 (governing preliminary examinations) and added MCR 6.108 (governing probable cause conferences) to correspond to these statutory changes. These amendments, and the discussion in this subsection, are applicable only to cases in which the juvenile's arraignment is held on or after January 1, 2015. See 2014 PA 123, enacting section 1.

[36] MCL 712A.4 governs traditional waiver of Family Division jurisdiction over a juvenile between the ages of 14 and 17 who is accused of an act that if committed by an adult would be a felony. For discussion of traditional waiver proceedings, see Chapter 14.

[37] See also MCR 6.104(E)(4).

> "Upon the request of the prosecuting attorney, the preliminary examination shall commence immediately at the date and time set for the probable cause conference for the sole purpose of taking and preserving the testimony of the victim, if the victim is present, as long as the defendant is either present in the courtroom or has waived the right to be present. If victim testimony is taken as provided under this rule, the preliminary examination will be continued at the date originally set for that event."

See also MCL 766.4(4).

MCR 1.108(1) governs the method of computing the relevant time periods under MCL 766.4:

> "The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order."

The parties may agree to waive the probable cause conference. MCL 766.4(2) provides:

> "The probable cause conference may be waived by agreement between the prosecuting attorney and the attorney for the defendant. The parties shall notify the court of the waiver agreement and whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea."[38]

MCL 766.7, governing waiver and adjournment of the preliminary examination, provides, in part:

> "The defendant may waive the preliminary examination with the consent of the prosecuting attorney. An adjournment, continuance, or delay of a preliminary examination may be granted by a [judge] without the consent of the defendant or the prosecuting attorney for good cause shown. A [judge] may adjourn, continue, or delay the examination of any cause with the consent of the defendant and prosecuting attorney. An action on the part of the [judge] in adjourning or continuing any

[38] See also MCR 6.108(A).

> case does not cause the [judge] to lose jurisdiction of the case."[39]

16.7 Releasing or Detaining a Juvenile Before Trial or Sentencing

A. Bail

"The magistrate or the court may order a juvenile released to a parent or guardian on the basis of any lawful condition, including that bail be posted." MCR 6.909(A)(1).[40]

MCR 6.909(A)(2) sets out the conditions for detaining a juvenile without bail:

> "If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail:
>
> (a) to a juvenile charged with first-degree murder, second-degree murder, or
>
> (b) to a juvenile charged with first-degree criminal sexual conduct, or armed robbery,
>
> (*i*) who is likely to flee, or
>
> (*ii*) who clearly presents a danger to others."

Unless detention without bail is permissible under MCR 6.909(A)(2), "the magistrate or court must advise the juvenile of a right to bail as provided for an adult accused." MCR 6.909(A)(1).

B. Confinement Pending Trial and Sentencing

If a juvenile is not released following arraignment, he or she must be detained according to the rules set out in MCR 6.909(B). Except as provided in MCR 6.909(B)(2) and MCR 6.907(B), the juvenile must be placed in a juvenile facility rather than a jail or similar facility used to incarcerate adult prisoners.[41] MCR 6.909(B)(1).

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[39] See also MCR 6.110(A); MCR 6.110(B)(1).

[40] For discussion of the requirements for setting bail and other conditions of release in felony cases, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 8.

[41] See Section 3.8 for a detailed discussion of detention of juveniles in automatic waiver proceedings.

16.8 Probable Cause Conference and Preliminary Examination

A. Introduction

The preliminary examination is conducted in accordance with the procedural and statutory requirements governing preliminary examinations in adult criminal proceedings, which are contained in MCR 6.110 and MCL 766.1 *et seq.*[42] MCR 6.907(C)(2) and MCR 6.911 contain additional guidelines applicable to juveniles in automatic waiver proceedings.[43]

Effective May 20, 2014, and applicable to cases in which the defendant is arraigned in district court on or after January 1, 2015, 2014 PA 123 and 2014 PA 124 amended MCL 766.4 and other provisions applicable to the arraignment and other preliminary proceedings in district court, making numerous changes concerning requirements for preliminary examinations and adding provisions concerning probable cause conferences. Effective January 1, 2015, ADM File No. 2014-42 amended MCR 6.104 (governing arraignment on the warrant or complaint), MCR 6.110 (governing preliminary examinations), and MCR 6.111 (governing circuit court arraignment in district court), and added MCR 6.108 (governing probable cause conferences), to correspond to these statutory changes; however, the rules in subchapter 6.900 (which are applicable to juveniles in automatic waiver proceedings) have not yet been amended.[44]

MCL 766.4 provides, in part:

> "(1) [T]he [judge] before whom any person is arraigned on a charge of having committed a felony shall set a date for a probable cause conference to be held not less than 7 days or more than 14 days after the date of the arraignment, and a date for a preliminary examination of not less than 5 days or more than 7 days after the date of the probable cause conference. The dates for the probable cause conference and preliminary examination shall be set at the time of arraignment. . . .[45]

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[42] A complete discussion of the statutory and procedural requirements for conducting arraignments is beyond the scope of this benchbook. For a thorough discussion of these requirements, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 5.

[43] See MCR 6.901(A) (the rules in subchapter 6.900 "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders[]").

[44] See MCR 6.901(A) (the rules in subchapter 6.900 "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders[]").

[45] See also MCR 6.104(E)(4).

* * *

> (3) A district judge has the authority to accept a felony plea. A district judge shall take a plea to a misdemeanor or felony as provided by court rule if a plea agreement is reached between the parties. Sentencing for a felony shall be conducted by a circuit judge, who shall be assigned and whose name shall be available to the litigants, pursuant to court rule, before the plea is taken.
>
> (4) If a plea agreement is not reached and if the preliminary examination is not waived by the defendant with the consent of the prosecuting attorney, a preliminary examination shall be held as scheduled unless adjourned or waived under [MCL 766.7[46]]. The parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference. . . ."

For a thorough discussion of these requirements, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7.

B. Time Requirements

Probable cause conference. The probable cause conference, unless waived, must be scheduled for "not less than 7 days or more than 14 days after the date of the arraignment[.]" MCL 766.4(1); see also MCR 6.104(E)(4).

Preliminary examination. The preliminary examination, unless waived or adjourned, must be scheduled for "not less than 5 days or more than 7 days after the date of the probable cause conference." MCL 766.4(1); see also MCR 6.104(E)(4). However, "[t]he parties, with the approval of the court, may agree to schedule the preliminary examination earlier than 5 days after the conference." MCL 766.4(4).[47]

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[46] Amended MCL 766.7 provides:

"A [judge] may adjourn a preliminary examination for a felony to a place in the county as the [judge] determines is necessary. The defendant may in the meantime be committed either to the county jail or to the custody of the officer by whom he or she was arrested or to any other officer; or, unless the defendant is charged with treason or murder, the defendant may be admitted to bail. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. An adjournment, continuance, or delay of a preliminary examination may be granted by a [judge] without the consent of the defendant or the prosecuting attorney for good cause shown. A [judge] may adjourn, continue, or delay the examination of any cause with the consent of the defendant and prosecuting attorney. An action on the part of the [judge] in adjourning or continuing any case does not cause the [judge] to lose jurisdiction of the case."

Immediate commencement of preliminary examination for purpose of taking victim testimony. MCL 766.4(4) provides, in relevant part:

> "Upon the request of the prosecuting attorney, . . . the preliminary examination shall commence immediately for the sole purpose of taking and preserving the testimony of a victim if the victim is present. For purposes of this subdivision, 'victim' means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime. If that testimony is insufficient to establish probable cause to believe that the defendant committed the charged crime or crimes, the [judge] shall adjourn the preliminary examination to the date set at arraignment. A victim who testifies under this subdivision shall not be called again to testify at the adjourned preliminary examination absent a showing of good cause."[48]

Consolidation for codefendants. MCL 766.4(5) provides:

> "If 1 or more defendants have been charged on complaints listing codefendants with a felony or felonies, the probable cause conference and preliminary examination for those defendants who have been arrested and arraigned at least 72 hours before that conference on those charges shall be consolidated, and only 1 joint conference or 1 joint preliminary examination shall be held unless the prosecuting attorney consents to a severance, a defendant seeks severance by motion and the [judge] finds severance to be required by law, or 1 of the defendants is unavailable and does not appear at the hearing."[49]

C. Probable Cause Conference

MCL 766.4(1) provides, in relevant part:

> "The probable cause conference shall include the following:

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[47] MCR 6.907(C)(2) requires the judge in an automatic waiver proceeding to "set a date for the juvenile's preliminary examination within . . . 14 days[after arraignment], less time given and used by the prosecuting attorney under special adjournment pursuant to MCR 3.935(A)(3), up to three days' credit[;]" however, MCR 6.907 has not been amended to reflect the requirements of MCL 766.4

[48] See also MCR 6.110(B)(2).

[49] See also MCR 6.108(E); MCR 6.110(A).

> (a) Discussions as to a possible plea agreement among the prosecuting attorney, the defendant, and the attorney for the defendant.
>
> (b) Discussions regarding bail and the opportunity for the defendant to petition the [judge] for a bond modification.
>
> (c) Discussions regarding stipulations and procedural aspects of the case.
>
> (d) Discussions regarding any other matters relevant to the case as agreed upon by both parties."[50]

MCL 766.4(2) provides:

> "The probable cause conference may be waived by agreement between the prosecuting attorney and the attorney for the defendant. The parties shall notify the court of the waiver agreement and whether the parties will be conducting a preliminary examination, waiving the examination, or entering a plea."[51]

District court magistrates have jurisdiction "[t]o conduct probable cause conferences and all matters allowed at the probable cause conference, except for the taking of pleas and sentencings, under . . . MCL 766.4, when authorized to do so by the chief district court judge." MCL 600.8511(h); see also MCR 6.108(B).[52] However, "[t]he district court judge must be available during the probable cause conference to take pleas, consider requests for modification of bond, and if requested by the prosecutor, take the testimony of a victim." MCR 6.108(D).

Videoconferencing technology is the preferred mode for conducting probable cause conferences for in-custody defendants. MCR 6.006(C)(1). Accordingly, probable cause conferences are "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 [MCL 780.752(m)], or a determination by the court that a case is not suited for videoconferencing under MCR 2.407(B)(5)." MCR 6.006(C)(1).

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[50] See also MCR 6.108(C).

[51] See also MCR 6.108(A).

[52] MCR 6.108(B) provides that "[a] district court magistrate may conduct probable cause conferences when authorized to do so by the chief district judge and may conduct all matters allowed at the probable cause conference, except taking pleas and imposing sentences unless permitted by statute to take pleas or impose sentences."

D. Preliminary Examination

1. Waiver

"The juvenile may waive a preliminary examination if the juvenile is represented by an attorney and the waiver is made and signed by the juvenile in open court. The magistrate shall find and place on the record that the waiver was freely, understandingly, and voluntarily given." MCR 6.911(A). The prosecuting attorney must consent to the waiver. MCL 766.7; MCR 6.110(A).

If the juvenile "waives [the] statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver," the trial court may remand the case for a preliminary examination upon timely motion before trial or a guilty plea. MCL 767.42(1).

2. Adjournment

The judge may adjourn, continue, or delay the preliminary examination with the consent of the defendant and prosecuting attorney without a showing of good cause. MCR 6.110(B)(1); see also MCL 766.7. "If a party objects, the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment." MCR 6.110(B)(1); see also MCL 766.7. However, "[a] violation of [MCR 6.110(B)(1)] is deemed to be harmless error unless the defendant demonstrates actual prejudice." MCR 6.110(B)(1).

3. Rules of Evidence

"A verbatim record must be made of the preliminary examination. The court shall allow the prosecutor and the defendant to subpoena and call witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. The court must conduct the examination in accordance with the Michigan Rules of Evidence." MCR 6.110(C).

a. Scope of Examination

"At the preliminary examination, [the judge] shall examine the complainant and the witnesses in support of the prosecution[] . . . in regard to the offense charged and concerning any other matters connected with the charge that the [judge] considers pertinent." MCL 766.4(6). See

also *People v Hunt*, 442 Mich 359, 363 (1993), citing *People v Dochstader*, 274 Mich 238, 243 (1936) (examining judge "may examine not only the truth of the charge in the complaint, but also other pertinent matters related to the charge[]"); *People v Crippen*, 242 Mich App 278, 282 (2000) (court's inquiry at preliminary examination "is not limited to whether the prosecution has presented sufficient evidence on each element of the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence[]").

b. Testimony by Telephonic, Voice, or Video Conferencing

Absent any rule to the contrary, "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). "The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by [SCAO], and all proceedings at which such technology is used must be recorded verbatim by the court." MCR 6.006(D).

MCL 766.11a provides:

> "On motion of either party, the [judge] shall permit the testimony of any witness, except the complaining witness, an alleged eyewitness, or a law enforcement officer to whom the defendant is alleged to have made an incriminating statement, to be conducted by means of telephonic, voice, or video conferencing. The testimony taken by video conferencing shall be admissible in any subsequent trial or hearing as otherwise permitted by law."

c. Rules of Evidence and Admissible Hearsay

MCL 766.11b provides:

> "(1) The rules of evidence apply at the preliminary examination except that the following are not excluded by the rule against hearsay and shall be admissible at the preliminary examination without requiring

the testimony of the author of the report, keeper of the records, or any additional foundation or authentication:

> (a) A report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance.
>
> (b) A certified copy of any written or electronic order, judgment, decree, docket entry, register of actions, or other record of any court or governmental agency of this state.
>
> (c) A report other than a law enforcement report that is made or kept in the ordinary course of business.
>
> (d) Except for the police investigative report, a report prepared by a law enforcement officer or other public agency. Reports permitted under this subdivision include, but are not limited to, a report of the findings of a technician of the division of the department of state police concerned with forensic science, a laboratory report, a medical report, a report of an arson investigator, and an autopsy report.

(2) The [judge] shall allow the prosecuting attorney or the defense to subpoena and call a witness from whom hearsay testimony was introduced under [MCL 766.11b] on a satisfactory showing to the [judge] that live testimony will be relevant to the [judge's] decision whether there is probable cause to believe that a felony has been committed and probable cause to believe that the defendant committed the felony.[53]

(3) As used in this section, 'controlled substance' means that term as defined under . . . MCL 333.7104."[54]

[53] See also MCR 6.110(D)(1), which provides that "[t]he court shall allow the prosecutor and defendant to subpoena and call witnesses from whom hearsay testimony was introduced on a satisfactory showing that live testimony will be relevant."

See also MRE 1101(b)(8), providing that "[a]t a preliminary examination in a criminal case, during which hearsay is admissible to prove the ownership, value, or possession of – or right to use or enter – property."

MCR 6.110(D)(2) provides:

> "If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of
>
> (a) a prior evidentiary hearing, or
>
> (b) a prior evidentiary hearing supplemented with a hearing before the trial court, or
>
> (c) if there was no prior evidentiary hearing, a new evidentiary hearing."

E. Bindover Decision Following Preliminary Examination

At the preliminary examination, the prosecution must demonstrate that probable cause exists to believe that a crime has been committed and that the juvenile committed the alleged crime. MCL 766.13; MCR 6.110(E). "Probable cause requires a quantum of evidence 'sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief' of the accused's guilt." *People v Yost*, 468 Mich 122, 126 (2003), quoting *People v Justice (After Remand)*, 454 Mich 334, 344 (1997). While guilt

[54] MCL 766.11b irreconcilably conflicts with MCR 6.110(C) (providing that the Michigan Rules of Evidence apply at preliminary examinations) because it permits the admission of evidence that would be excluded under the Michigan Rules of Evidence; however, because "MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one[,] . . . the specific hearsay exception in MCL 766.11b takes precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110(C)." *People v Parker (Timothy)*, 319 Mich App 664, 674 (2017) (holding that "[t]he district court properly admitted the laboratory report [of the defendant's blood draw at his preliminary examination on a charge of operating while intoxicated] pursuant to the statutory hearsay exception in MCL 766.11b[,]" and "[t]he circuit court abused its discretion by remanding [the] defendant's case to the district court for continuation of the preliminary examination[]").

need not be established beyond a reasonable doubt, the prosecution must make out a prima facie case by presenting "evidence of each element of the crime charged, or evidence from which the elements may be inferred." *People v Abraham*, 234 Mich App 640, 656 (1999).

1. Finding of Probable Cause That a Specified Juvenile Violation Was Committed by the Juvenile

If a district court judge determines that probable cause exists to believe that a specified juvenile violation was committed and that the juvenile committed it, the juvenile must be bound over to the circuit court, which then has jurisdiction over the juvenile. MCL 766.13; MCR 6.110(E). The juvenile must be ordered to appear within 14 days for circuit court arraignment, "or the [district court judge] may conduct the circuit court arraignment as provided by court rule." MCL 766.13.[55]

Note that the definition of *specified juvenile violation* includes:

- any attempt, solicitation, or conspiracy to commit any of the specified juvenile violations;
- a lesser-included offense of a specified juvenile violation, if the juvenile is also charged with a specified juvenile violation; and
- any other offense arising out of the same transaction as a specified juvenile violation, if the juvenile is also charged with a specified juvenile violation. MCL 712A.2(a)(1)(E)-(I); MCL 600.606(2)(e)-(i); MCL 764.1f(2)(e)-(i); MCR 6.903(H)(17)-(19).

2. Finding of No Probable Cause

"If the [judge] determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the [judge] shall either discharge the defendant or reduce the charge to an offense that is not a felony." MCL 766.13. See also MCR 6.110(F) (requiring the judge to either "discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense or reduce the charge to an offense that is not a felony[]").

[55] See MCR 6.111(A) (governing circuit court arraignment in district court). For discussion of circuit court arraignments following bindover, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 7.

3. Finding of Probable Cause that an Offense Other Than a Specified Juvenile Violation Was Committed by the Juvenile

MCL 766.14(2) provides:

> "If at the conclusion of the preliminary examination of a juvenile the magistrate finds that a specified juvenile violation did not occur or that there is not probable cause to believe that the juvenile committed the violation, but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense, the magistrate shall transfer the case to the family division of circuit court of the county where the offense is alleged to have been committed."

See also MCR 6.911(B), which provides that if the magistrate finds that "some other offense occurred that if committed by an adult would constitute a crime, and that there is probable cause to believe that the juvenile committed that offense, the magistrate shall transfer the matter to the family division of the circuit court in the county where the offense is alleged to have been committed for further proceedings."

"If the [district] court transfers the matter to the family division, a transcript of the preliminary examination shall be sent to the family division without charge upon request." MCR 6.911(B).

MCR 3.939 provides:

> "**(A) General Procedure.** Except as provided in subrule (B), the court shall hear and dispose of a case transferred pursuant to MCL 766.14 in the same manner as if the case had been commenced in the family division of circuit court. A petition that has been approved by the prosecuting attorney must be submitted to the court.
>
> "**(B) Probable Cause Finding of Magistrate.** The court may use the probable cause finding of the magistrate made at the preliminary examination to satisfy the probable cause requirement of MCR 3.935(D)(1)."[56]

[56] See Section 6.3(H) for a discussion of MCR 3.935(D)(1), which sets out conditions for the pretrial detention of a juvenile.

MCL 766.14(3) provides that transfer of the case to the Family Division does not prevent the Family Division from waiving jurisdiction using the "traditional" waiver procedure set out in MCL 712A.4.[57]

16.9 Juvenile's Right to a Speedy Trial

MCR 6.909(C) provides:

> "Within 7 days of the filing of a motion, the court shall release a juvenile who has remained in detention while awaiting trial for more than 91 days to answer for the specified juvenile violation unless the trial has commenced. In computing the 91-day period, the court is to exclude delays as provided in MCR 6.004(C)(1) through [MCR 6.004(C)](6)[58] and the time required to conduct the hearing on the motion."

Part C—Juvenile Sentencing Hearings

16.10 Introduction

Postconviction proceedings for juveniles tried and convicted according to the automatic waiver provisions are governed by MCL 769.1, MCL 769.1b, and MCR 6.931–MCR 6.938. Following trial and conviction, the circuit court must either sentence the juvenile in the same manner as an adult or place the juvenile on probation and commit him or her to state wardship.[59] MCL 769.1(1); MCL 769.1(3); MCR 6.931(A). Adult

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[57] See Chapter 14 for discussion of traditional waiver proceedings.

[58] MCR 6.004(C)(1)-(6) apply when calculating permissible pretrial delay in criminal felony and misdemeanor cases in which the defendant is incarcerated. For further discussion of MCR 6.004(C), see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 9.

[59] Effective January 12, 1999, pursuant to 1998 PA 518, the Legislature enacted the County Juvenile Agency Act, MCL 45.621 *et seq*. Under this act and other applicable statutes, a juvenile who is convicted in an automatic waiver proceeding may be committed to a "county juvenile agency" rather than to state wardship. See MCL 769.1(3); MCL 803.301 *et seq*. Accordingly, effective January 12, 1999, 1998 PA 517 amended applicable provisions of the Youth Rehabilitation Services Act, MCL 803.301 *et seq*., to refer to "public" wardship rather than to "state" wardship. See, e.g., MCL 803.302(c). However, the County Juvenile Agency Act applies only to Wayne County; therefore, only Wayne County may operate as a county juvenile agency. See MCL 45.626; see also House Legislative Analysis, SB 1185, December 9, 1998. Because Wayne County is not currently operating as a county juvenile agency, as a practical matter, juveniles who are committed in automatic waiver proceedings are committed to state wardship. See MCR 6.901 *et seq*. (referring generally to commitments under MCL 769.1 as commitments "to state wardship"); see also Section 16.17(B) and Section (C).

sentencing is mandatory if the juvenile is convicted of any of the 12 very serious specified juvenile violations set out in MCL 769.1(1)(a)-(*l*). MCL 769.1(1); MCR 6.931(A). If adult sentencing is not required under MCL 769.1(1), a juvenile sentencing hearing, if not waived under MCL 769.1(4), must be conducted in order to determine whether the best interests of the public would be served by imposing an adult sentence or by placing the juvenile on probation and committing him or her to state wardship. MCL 769.1(3); MCR 6.931(A); MCR 6.931(E)(2).

MCR 6.931(C) provides:

> "If a juvenile sentencing hearing is required, the prosecuting attorney, the juvenile, and the attorney for the juvenile must be advised on the record immediately following conviction of the juvenile by a guilty plea or verdict of guilty that a hearing will be conducted at sentencing, unless waived, to determine whether to sentence the juvenile as an adult or to place the juvenile on juvenile probation and commit the juvenile to state wardship as though a delinquent. The court may announce the scheduled date of the hearing. On request, the court shall notify the victim of the juvenile sentencing hearing."

The Sixth Amendment's Speedy Trial Clause "does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges[,]" and therefore does not "apply to the sentencing phase of a criminal prosecution[.]" *Betterman v Montana*, 578 US 437, 439-441 (2016) ("[h]olding that the Clause does not apply to delayed sentencing[]"). However, "although the Speedy Trial Clause does not govern[inordinate delay in sentencing], a defendant may have other recourse, including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id*. at 439.

16.11 Mandatory Imposition of Adult Sentence

"If the juvenile has been convicted of an offense listed in MCL 769.1(1)(a)-(*l*), the court must sentence the juvenile in the same manner as an adult." MCR 6.931(A).[60] However, "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under Const 1963, art 1, § 16." *People v Parks*, 510 Mich 225, 255 (2022) (holding that "the Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of

being subjected to a mandatory life-without-parole sentence like other older adults").[61]

Extending the holding in *People v Parks*, 510 Mich 225, 268 (2022), the Michigan Supreme Court held that "as applied to defendants who were 19 or 20 years old at the time of their crime, a *mandatory* LWOP sentence that does not allow for consideration of the mitigating factors of youth or the potential for rehabilitation is a grossly disproportionate punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023). In *Taylor*, one defendant was 19 years old at the time of his offense, and the other defendant (in a separate and unrelated case) was 20 years old when he committed his offense. *Taylor*, ___ Mich at ___. "Each defendant was sentenced to a legislatively mandated punishment of life in prison without the possibility of parole (LWOP)." *Id*. at ___. "Defendants argue[d] that the mandatory nature of their sentences violate[d] Michigan's prohibition against 'cruel or unusual punishment' . . . ." *Taylor*, ___ Mich at ___. See Const 1963, art 1, § 16. "Determining what constitutes cruel or unusual punishment is guided by evolving standards of decency that mark the progress of a maturing society." *Taylor*, ___ Mich at ___ (quotation marks and citation omitted). "Inherent in this standard is the understanding that as society progresses, punishments that were once acceptable can later be considered cruel or unusual." *Id*. at ___. Additionally, "to evaluate the proportionality of a punishment under Michigan's Cruel or Unusual Punishment Clause, courts must consider: (1) the severity of the punishment relative to the gravity of the offense, (2) punishments imposed in the same jurisdiction for other offenses, (3) punishments imposed in other jurisdictions for the same offense, and (4) Michigan's traditional goal of and preference for rehabilitation." *Id*. at ___. Applying the

[60] Some of the specified juvenile violations listed in MCL 769.1(1)(a)-(*l*) are offenses that generally carry a mandatory penalty of life imprisonment without the possibility of parole. See MCL 791.234(6) (removing from parole eligibility offenders serving life sentences for certain enumerated offenses, including first-degree murder); see also MCL 750.157a(a); MCL 750.316; MCL 750.520b(2)(c) (subsequent offense). However, a mandatory sentence of life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. *Miller v Alabama*, 567 US 460, 465, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense); For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see Section 16.11(B)(2) and Section 19.4(C). For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

standards from *People v Lorentzen*, 387 Mich 167, 176-181 (1972), and *People v Bullock*, 440 Mich 15, 33-34 (1992), the *Taylor* Court found that "[l]ate adolescents who are 19 or 20 years old, as a class, share with 18-year-olds the same mitigating characteristics of late-adolescent brain development." *Taylor*, ___ Mich at ___. As such, "[t]he same considerations that were discussed at length in *Parks* apply equally to this class of late adolescents." *Taylor*, ___ Mich at ___. "Mandatorily condemning such offenders to die in prison, without first considering the attributes of youth that late adolescents and juveniles share, no longer comports with the 'evolving standards of decency that mark the progress of a maturing society.'" *Id*. at ___, quoting *Lorentzen*, 387 Mich at 179. "Accordingly, as applied to defendants who were 19 or 20 years old at the time of their crime, a *mandatory* LWOP sentence that does not allow for consideration of the mitigating factors of youth or the potential for rehabilitation is a grossly disproportionate punishment in violation of Const 1963, art 1, § 16." *Taylor*, ___ Mich at ___ (further holding that "[t]his decision also applies retroactively to all relevant criminal cases on collateral review").

A. Subset of Specified Juvenile Violations Requiring Adult Sentence

MCL 769.1(1) provides that if a juvenile is convicted of any of the following specified juvenile violations, he or she must be sentenced in the same manner as an adult:

- first-degree arson, MCL 750.72;
- assault with intent to commit murder, MCL 750.83;
- assault with intent to maim, MCL 750.86;
- attempted murder, MCL 750.91;

[61]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

- conspiracy, MCL 750.157a, to commit murder;
- solicitation, MCL 750.157b, to commit murder;
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- kidnapping, MCL 750.349;
- first-degree criminal sexual conduct, MCL 750.520b;
- armed robbery, MCL 750.529; or
- carjacking, MCL 750.529a.

However, an offender who was under the age of 18 at the time of the commission of an offense is not subject to the imposition of a mandatory sentence of life imprisonment without the possibility of parole. *Miller v Alabama*, 567 US 460, 465, 489 (2012) (homicide offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 82 (2010) (sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). A juvenile convicted of an offense carrying a mandatory life-without-parole sentence may be subject to the sentencing requirements set out in MCL 769.25 or MCL 769.25a. Under circumstances in which MCL 769.25 or MCL 769.25a applies to an offender, the prosecuting attorney must file a motion if he or she intends to seek imposition of a life sentence without the possibility of parole. MCL 769.25(3); MCL 769.25a(4)(b).

"[T]here is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and . . . it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing." *People v Taylor*, 510 Mich 112, 129 (2022). "MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence." *Taylor*, 510 Mich at 135. "The trial court . . . must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP." *Id*. at ___. "This is an exercise in discretion, not a fact-finding mission." *Id*. at ___ (noting that "our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence.").

"[T]he Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like other older adults." *People v Parks*, 510 Mich 225, 244 (2022).[62] In *Parks*, the Michigan Supreme Court held that "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under Const 1963, art 1, § 16." *Parks*, 510 Mich at 255 (holding that because defendant "was sentenced without consideration of the attributes of youth, his sentence is unconstitutional, and he must be resentenced").

"[T]he decision whether to impose a sentence of life without parole [is properly decided] by a judge, rather than by a jury beyond a reasonable doubt."[63] *People v Skinner (Skinner II)*, 502 Mich 89, 107-108 (2018) (holding that MCL 769.25 does not violate the Sixth or Eighth Amendments "because neither [MCL 769.25] nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead life without parole is authorized by the jury's verdict alone"), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). See Section 19.4(C) for discussion of juvenile life-without-parole sentences.

A juvenile defendant's "50-to-75-year term-of-years sentence for second-degree murder [does not] pass muster under the Michigan Constitution's prohibition against cruel or unusual punishment . . . ." *People v Eads*, ___ Mich App ___, ___ (2025). Additionally, "[u]nder the principle of proportionality, [a defendant is] entitled to be sentenced in a manner that duly account[s] for the individualized circumstances of the offender and the offense." *Id*. at ___. "[A]s [*Miller v Alabama*, 567 US 460 (2012)] and its progeny have now made clear, such circumstances include mitigating considerations related to [defendant's] youth. *Eads*, ___ Mich App at

[62]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

[63]A trial court's decision whether to sentence a juvenile to life without parole is reviewed under the abuse of discretion standard. *Skinner*, 502 Mich at 137.

___. In this case, defendant "was found guilty of second-degree murder and possession of a firearm during the commission of a felony (felony-firearm) for crimes he committed as a juvenile." *Id*. at ___ (citations omitted). "The trial court sentenced [defendant] as an adult and, departing upward from the guidelines, imposed consecutive terms of 50 to 75 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm." *Id*. at ___.

After *Miller* and the enactment of MCL 769.25a, a defendant convicted of first-degree murder as a juvenile was entitled "to resentencing such that he or she, by default, could not receive a term-of-years sentence with a minimum higher than 40 years or a maximum higher than 60 years." *Eads*, ___ Mich App at ___. Defendant's sentence was "a minimum sentence *10 years* higher and a maximum sentence *15 years* higher than [the] statutory upper limits—for committing a *lesser* offense as a juvenile." *Id*. at ___. "[I]ronically, [defendant] fared worse than he would have if the jury had convicted him of [first-degree murder]." *Id*. at ___. Further, "despite [defendant's] juvenile status and all that has now been recognized to come with it, [he] received a sentence for second-degree murder that would require him to outlive his life expectancy before even becoming eligible for parole and would deny him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at ___. The trial court "openly acknowledged that [defendant's] background and the circumstances of the murder demonstrated that [he] was immature and impulsive, lacked discipline and self-restraint, and had been negatively influenced by gang members from a young age." *Id*. at ___. "Such observations reflect the very characteristics of youth that a sentencing court must consider as potentially mitigating the sentencing offense." *Id*. at ___ (quotation marks omitted). Here, the trial court "dismissed the very notion that such characteristics might have a mitigating effect and instead considered them as *aggravating* factors in support of a significant departure sentence—an approach plainly contrary to *Miller* and its progeny." *Id*. at ___. Accordingly, defendant's term-of-years sentence "violate[d] the Michigan Constitution's prohibition against cruel or unusual punishment, and it [was] also disproportionate given the sentencing court's failure to consider [defendant's] youth and its attendant characteristics as mitigating factors." *Id*. at ___.

"[I]n light of *Miller v Alabama*, 567 US 460 (2012), and the legal developments that have followed, [defendant's] term-of-years sentence of 75 to 150 years for second-degree murder violates the Michigan Constitution's prohibition against cruel or unusual punishment." *People v Echols*, ___ Mich App ___, ___ (2025). "In *Miller*, the United States Supreme Court recognized that juveniles

are constitutionally different from adults for purposes of sentencing and held that mandatory life without parole (LWOP) for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Echols*, ___ Mich App at ___ (cleaned up). In this case, defendant, who was one month past his eighteenth birthday, argued that "his term-of-years sentence of 75 to 150 years for second-degree murder for an offense he committed when he was 18 years old violates the Michigan Constitution's prohibition against cruel or unusual punishment." *Echols*, ___ Mich App at ___. Additionally, defendant argued that his sentence was unconstitutional under the state's principle of proportionality. *Id*. at ___.

"Under this sentence, [defendant would] not even become *eligible* for parole for the first time until well past the life expectancy of individuals incarcerated as adults, let alone as youths, and several decades beyond when he would have first become parole-eligible under the life sentence deemed unconstitutional in [*People v Stovall*, 510 Mich 301 (2022)]." *Echols*, ___ Mich App at ___. "Had [defendant] been convicted of first-degree murder as originally charged, he would now be entitled to a resentencing hearing and would be facing a default term-of-years sentence limited to a minimum of 25 to 40 years and a maximum of 60 years." *Id*. at ___. "Instead, defendant, for committing a *lesser* offense than first-degree murder, is left with a *minimum* sentence that is *15 years higher*—and a maximum sentence that is *90 years higher*—than the default 60-year statutory upper limit for first-degree murder, and without any of the significant procedural safeguards that must be satisfied to exceed the statutory limits for first-degree murder." *Id*. at ___ (cleaned up). "Such a sentence is out of line with other jurisdictions' punishments . . . and leaves [defendant] without any more meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation than a juvenile sentenced to parolable life." *Id*. at ___ (quotation marks and citation omitted). In sum, defendant's "75-to-150-year term-of-years sentence for second-degree murder violates the Michigan Constitution's prohibition against cruel or unusual punishment, and [defendant] is entitled to resentencing as a result." *Id*. at ___. [T]he Court did not resolve the proportionality challenge, noting that defendant's "sentence could not meet [Michigan's] proportionality requirement given that it [was] . . . unconstitutionally cruel or unusual." *Id*. at ___; see also *id*. at ___ (also noting that the trial court must ensure that its resentencing is both constitutional and proportional; among other things, the court must consider "defendant's youth and its attendant characteristics at the time of the offense as potentially mitigating—and not aggravating—factors").

See also *People v Campbell*, ___ Mich App ___, ___ (2025). In *Campbell*, "[d]efendant, who was 18 years old at the time of the offenses, argue[d] that his sentences of 65 to 100 years' imprisonment for his second-degree murder and AWIM [assault with intent to murder] convictions violate the principle of proportionality." *Id*. at ___. "A sentence is reasonable if it adheres to the 'principle of proportionality,' which requires the sentence to be 'proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *Id*. at ___ (2025), quoting *People v Steanhouse*, 500 Mich 453, 474 (2017). "[A] sentencing court must consider the offender's youth and treat it as a mitigating factor when imposing a term-of-years sentence on a juvenile defendant." *Campbell*, ___ Mich App at ___. Here, "[d]efendant's *minimum* sentence of 65 years for second-degree murder exceeds the suggested *maximum* sentence for an offender who was 18 years old when he committed first-degree murder." *Id*. at ___. Additionally, "[i]t is clear from the record that the trial court did not consider the mitigating factors of defendant's youth during sentencing" pursuant to the holding in *Miller v Alabama*, 567 US 460 (2012). Thus, "[d]efendant was entitled to be sentenced in a manner that duly accounted for the individualized circumstances of defendant and the offenses, which included his youth and its attendant characteristics as potentially *mitigating* factors." *Id*. at ___ (quotation marks and citation omitted).

B. Constitutionality of Mandatory Adult Sentencing

1. Separation of Powers, Equal Protection, and Due Process Concerns

The automatic waiver statutes, MCL 600.606 and MCL 764.1f, and court rules, MCR 6.901 *et seq*., do not violate the separation of powers doctrine because they "do not give prosecutors authority to exercise judicial power . . . [but] simply vest the circuit courts with jurisdiction to hear certain cases that previously came within the exclusive jurisdiction of the probate courts." *People v Black*, 203 Mich App 428, 429-430 (1994).

At the time that *Black*, 203 Mich App 428, was decided, MCL 769.1 required the circuit court, without exception, to conduct a hearing to determine whether to sentence a juvenile convicted in an automatic waiver proceeding as an adult or as a juvenile. See *People v Conat*, 238 Mich App 134, 142 (1999). Effective January 1, 1997, 1996 PA 247 amended MCL 769.1 to require the circuit court to impose adult sentences upon juveniles convicted of certain specified juvenile violations. MCL 769.1(1); see *Conat*, 238 Mich App at 142-143.

In the four consolidated cases considered in *Conat*, 238 Mich App at 138, 144, 146-147, the circuit courts held that MCL 769.1, as amended by 1996 PA 247, unconstitutionally divested the sentencing court of discretion to sentence a juvenile offender convicted of an enumerated serious specified juvenile violation as a juvenile rather than as an adult. The Court of Appeals upheld the constitutionality of the amendment, holding that it does not violate the doctrine of separation of powers or federal and state equal protection and due process guarantees. *Conat*, 238 Mich App at 146-164. "That the prosecutor's charging decision has an effect on the sentence that the court may impose . . . is an inevitable effect of the exercise of prosecutorial discretion and does not offend the separation of powers doctrine." *Id*. at 152. Furthermore, "[w]ithout a showing of intentional discrimination based on impermissible factors, the mere fact that some persons are charged differently from others for the same conduct does not violate equal protection." *Id*. at 156-157. Finally, "[b]ecause juveniles have no constitutional right to be treated differently from adults when they engage in criminal conduct, and because without the legislatively created juvenile justice system all juveniles at least fourteen years of age would be subject to adult criminal penalties, . . . the amended automatic waiver system does not deny juveniles the constitutional right to due process." *Id*. at 159.

2. Eighth Amendment Concerns

a. Defendants May Not Be Sentenced to Mandatory Life Imprisonment Without Parole for Homicide Offenses

Previously, a juvenile who was convicted, in an automatic waiver proceeding, of first-degree murder—including felony murder and aiding and abetting first-degree murder—was subject under Michigan law to a mandatory sentence of life imprisonment. See former MCL 750.316; MCL 750.316(1)(b); MCL 767.39; MCL 769.1(1)(e); MCL 769.1(1)(g). Moreover, under MCL 791.234(6)(a), any offender serving a life sentence for first-degree murder is ineligible for parole.[64]

In *Miller v Alabama*, 567 US 460, 465, 489 (2012), the United States Supreme Court held that a *mandatory* sentence of

[64] Certain other offenses are also generally subject to a mandatory sentence of life imprisonment without the possibility of parole. See MCL 791.234(6)(b)-(f); MCL 750.436(2)(e); MCL 750.543f.

life imprisonment without the possibility of parole may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18[65] at the time of the sentencing offense. Rather, a homicide offender under the age of 18 may be sentenced to life imprisonment without the possibility of parole only if a judge or jury first has the opportunity to consider mitigating circumstances. *Id.* at 489.

Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 added MCL 769.25 and MCL 769.25a to Chapter IX of the Code of Criminal Procedure and amended several provisions of the Michigan Penal Code in order to achieve compliance with *Miller*, 567 US 460, by (1) eliminating mandatory life-without-parole sentences for certain offenders under the age of 18 in cases that are not final for purposes of appellate review; (2) establishing, in MCL 769.25, a procedure under which the prosecuting attorney, in a case that is not final for purposes of appellate review, may seek imposition of a life-without-parole sentence for an offender under the age of 18, and providing for the imposition of a term-of-years sentence if a life-without-parole sentence is not imposed; and (3) establishing, in MCL 769.25a, a procedure for the resentencing of defendants in cases that *are* final for purposes of appellate review, in the event that either the Michigan Supreme Court or the United States Supreme Court determined that *Miller* was to be given retroactive application (and, indeed, the United States Supreme Court held in *Montgomery v Louisiana*, 577 US 190 (2016), that *Miller* is to be applied retroactively, thereby triggering application of MCL 769.25a to cases on collateral review).

Under circumstances in which MCL 769.25 or MCL 769.25a applies to an offender, the prosecuting attorney must file a motion if he or she intends to seek imposition of a life sentence without the possibility of parole. MCL

[65] Note that, with the exception of 17-year-old "wayward minors" (see MCL 712A.2(d)), only those individuals who are below the age of 18 at the time of their offenses are subject to application of Michigan's juvenile justice statutes governing delinquency, traditional waiver, automatic waiver, and designated proceedings. See MCL 600.606(1); MCL 712A.2(a)(1); MCL 712A.2d; MCL 712A.3; MCL 712A.4. Proceedings against defendants who commit crimes after reaching age 18 are conducted in courts of general criminal jurisdiction. "[T]he common law of this state . . . provide[s] that a defendant is a juvenile for the purposes of *Miller*[, 567 US 460,] when he or she is under the age of 18, *as determined by his or her anniversary of birth*," rather than "by the day preceding the anniversary of birth as at English common law." *People v Woolfolk*, 479 Mich 23, 26, 27 (2014) (aff'g 304 Mich App 450 (2014) and holding that "defendant remained 'under the age of 18' at the time he committed [a] homicide offense [on the night before his 18th birthday] and [was] therefore entitled to be treated in accordance with the United States Supreme Court's rule in *Miller*").

769.25(3); MCL 769.25a(4)(b). "[T]here is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and . . . it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing." *People v Taylor*, 510 Mich 112, 129 (2022). "MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence." *Taylor*, ___ Mich at ___. "The trial court . . . must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP." *Id*. at ___. "This is an exercise in discretion, not a fact-finding mission." *Id*. at ___ (noting that "our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence.").

"[T]he Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like other older adults." *People v Parks*, 510 Mich 225, 255 (2022).[66] In *Parks*, the Michigan Supreme Court held that "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under Const 1963, art 1, § 16." *Parks*, 510 Mich at 255 (holding that an 18-year-old defendant "must be resentenced" because he "was sentenced without consideration of the attributes of youth").

[66]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

Retroactive application of *People v Parks*, ___ Mich ___ (2025). The Michigan Supreme Court held that *Parks* is retroactive "to cases where the period for direct review had expired when *Parks* was decided." *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024). Previously, *Miller v Alabama*, 567 US 460 (2012), "held that mandatory life without parole for a juvenile convicted of a homicide offense constitutes cruel and unusual punishment as prohibited by the Eighth Amendment." *Poole*, ___ Mich at ___. In *Parks*, the Michigan Supreme Court "held that federal precedent concerning the Eighth Amendment's prohibition against 'cruel and unusual punishments' did not support extending *Miller*'s protections to 18-year-olds," but "that our state Constitution's broader prohibition against 'cruel or unusual punishment' under Const 1963, art 1, § 16 did support such an extension." *Poole*, ___ Mich at ___. Whether *Parks* would have retrospective or prospective application required an initial determination of "whether the *Parks* holding was merely procedural, or whether it concerned substantive rights of a fundamental nature." *Id*. at ___. "[S]ubstantive rules should normally be given retroactive application." *Id*. at ___. Also relevant to determining whether a decision should be applied retroactively or prospectively are the *Linkletter-Hampton* factors: "'(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.'" *Poole*, ___ Mich at ___, quoting *People v Hampton*, 384 Mich 669, 674 (1971) (utilizing the standard set in *Linkletter v Walker*, 381 US 618 (1965)). However, "[t]he importance of the *Linkletter-Hampton* factors is greatly circumscribed when substantive rules or rights are implicated in a holding, and retrospective application is favored." *Poole*, ___ Mich at ___. Only when the *Linkletter-Hampton* factors "strongly indicate otherwise" will a substantive rule be limited to prospective application. *Id*. at ___. Because *Parks* involved a substantive rule, it should be given retroactive application, and its application to the defendant in *Poole* required that the defendant be resentenced according to MCL 769.25. *Poole*, ___ Mich at ___ (confirming retroactivity with *Linkletter-Hampton* factors and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

"[T]he decision whether to impose a sentence of life without parole [is properly decided] by a judge, rather than by a jury beyond a reasonable doubt."[67] *People v*

Skinner (Skinner II), 502 Mich 89, 107-108 (2018) (holding that MCL 769.25 does not violate the Sixth or Eighth Amendments "because neither [MCL 769.25] nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead life without parole is authorized by the jury's verdict alone"), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). The court must then conduct a hearing and "consider the factors listed in [*Miller*, 567 US 460]," before sentencing the juvenile. MCL 769.25(6). See Section 19.4(C) for discussion of the procedures that must be followed, in cases in which MCL 769.25 or MCL 769.25a apply, before a juvenile may be sentenced or resentenced to nonparolable life imprisonment. For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

b. Defendants Under Age 18 May Not Be Sentenced to Life Imprisonment Without Parole for Nonhomicide Offenses

A sentence of life imprisonment without the possibility of parole may not be imposed upon a defendant under the age of 18 for any nonhomicide offense. *Graham v Florida*, 560 US 48, 82 (2010).

For additional discussion of *Miller*, 567 US 460, and *Graham*, 560 US 48, see Section 19.4(C).

16.12 Offenses That Do Not Require Imposition of Adult Sentence

MCL 769.1(3) provides, in part:

> "Unless a juvenile is required to be sentenced in the same manner as an adult under [MCL 769.1(1)], a judge of a court having jurisdiction over a juvenile shall conduct a hearing at the juvenile's sentencing to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, . . .

[67] A trial court's decision whether to sentence a juvenile to life without parole is reviewed under the abuse of discretion standard. *Skinner*, 502 Mich at 137.

> MCL 803.301 to [MCL] 803.309, or by imposing any other sentence provided by law for an adult offender."

MCR 6.931(A) contains substantially similar language.

Thus, where the juvenile is convicted of any of the following specified juvenile violations, a hearing, unless waived under MCL 769.1(4),[68] must be held to determine whether the juvenile should be sentenced as an adult:

- assault with intent to rob while armed, MCL 750.89;
- robbery of a bank, safe, or vault, MCL 750.531;
- assault with intent to do great bodily harm or assault by strangulation or suffocation, MCL 750.84, if armed with a dangerous weapon[69];
- first-degree home invasion, MCL 750.110a(2), if armed with a dangerous weapon;
- escape or attempted escape from a medium- or high-security facility operated by the Department of Health and Human Services (DHHS) or a county juvenile agency, or from a high-security facility operated by a private agency under contract with the DHHS or a county juvenile agency, MCL 750.186a;
- possession, manufacture, sale, or delivery of, or possession with intent to manufacture or deliver, 1000 grams or more of a schedule 1 or 2 controlled substance,[70] MCL 333.7401(2)(a)(*i*) or MCL 333.7403(2)(a)(*i*)[71];
- an attempt, MCL 750.92, to commit any of the above crimes, other than murder;

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[68] See Section 16.13.

[69] MCL 712A.2(a)(1)(B) defines "dangerous weapon," as used in the context of a specified juvenile violation, as one 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*)."

Substantially identical definitions of "dangerous weapon" are contained in MCL 600.606(2)(b), MCL 764.1f(2)(b), and MCR 6.903(I).

[70] See MCL 333.7212 (schedule 1 substances) and MCL 333.7214 (schedule 2 substances).

- conspiracy, MCL 750.157a, to commit any of the above crimes, other than murder;

- solicitation, MCL 750.157b, to commit any of the above crimes, other than murder;

- any lesser-included offense of a specified juvenile violation, if the petition alleges that the juvenile committed a specified juvenile violation and if the lesser-included offense is not an enumerated offense requiring adult sentencing under MCL 769.1(1)(a)-(*l*); or

- any other offense arising out of the same transaction as a specified juvenile violation, if the petition alleges that the juvenile committed a specified juvenile violation and if the other offense is not an enumerated offense requiring adult sentencing under MCL 769.1(1)(a)-(*l*).

16.13 Waiver of Juvenile Sentencing Hearing

MCL 769.1(4) provides:

> "With the consent of the prosecutor and the defendant, the court may waive the [juvenile sentencing hearing]. If the court waives the hearing . . . , the court may place the juvenile on probation and commit the juvenile to [state wardship], but shall not impose any other sentence provided by law for an adult offender."

See also MCR 6.931(B), which similarly provides:

> "The court need not conduct a juvenile sentencing hearing if the prosecuting attorney, the juvenile, and the attorney for the juvenile, consent that it is not in the best interest of the public to sentence the juvenile as though an adult offender. If the juvenile sentence hearing is waived, the court shall not impose a sentence as provided by law for an adult offender.

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[71] MCL 769.1(5) and MCR 6.931(E)(3) require the circuit court, when sentencing a juvenile for a violation or conspiracy to commit a violation of MCL 333.7403(2)(a)(*i*) (possession of 1000 grams or more of a mixture containing a Schedule 1 or 2 narcotic or cocaine), to consider, in addition to an adult sentence or probation and commitment, an alternative sentence of at least 25 years' imprisonment. Until 2003, MCL 333.7403(2)(a)(*i*) required a mandatory sentence of life imprisonment for adults or a minimum sentence of 25 years' imprisonment for juveniles convicted in automatic waiver or designated proceedings. Effective March 1, 2003, 2002 PA 665 amended MCL 333.7403(2)(a)(*i*) to eliminate these mandatory and minimum sentences and to allow the imposition of a sentence of "imprisonment for life or any term of years" in all cases. Therefore, MCL 769.1(5) and MCR 6.931(E)(3) are now of questionable relevance. See Section 19.5 for additional discussion of "alternative sentences" for controlled substances offenses.

The court must place the juvenile on juvenile probation and commit the juvenile to state wardship."

16.14 Required Procedures at Juvenile Sentencing Hearing

Unless the juvenile is convicted of one of the very serious offenses enumerated in MCL 769.1(1)(a)-(*l*),[72] or unless a hearing is waived,[73] the circuit court must conduct a juvenile sentencing hearing to determine whether the best interests of the public would be served by:

- imposing any sentence provided by law for an adult offender, or
- placing the juvenile on probation and committing the juvenile to an institution or agency as described in the Youth Rehabilitation Services Act, MCL 803.301 *et seq*. MCL 769.1(3); MCR 6.931(A).

A. Reports

Before sentencing a juvenile, a presentence investigation report (PSIR) must be prepared by a Department of Corrections probation officer. MCL 771.14.[74] Additionally, before a juvenile sentencing hearing, or before disposition if the hearing has been waived,[75] a "social report"[76] must be prepared by the DHHS ("or county juvenile agency,[77] as applicable"). MCL 771.14a; MCL 803.224; see also MCR 6.903(L).[78] The court must receive and consider these reports at the juvenile sentencing hearing. MCR 6.931(E)(1).

The court must give the prosecuting attorney, the juvenile, and the juvenile's attorney an opportunity to review the PSIR and the social report prior to the juvenile sentencing hearing. MCL 771.14(5); MCL 771.14a(3); MCR 6.931(D).

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[72] See Section 16.11(A).

[73] See MCL 769.1(4); MCR 6.931(B); see also Section 16.13.

[74] For a discussion of PSIR requirements, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 6.

[75] See MCL 769.1(4); MCR 6.931(B); see also Section 16.13 for discussion of waiver.

[76] Although MCR 6.931(E)(1) refers to the required DHHS report as a "social report" (see also MCR 6.903(L)), the relevant DHHS policy manual refers to this report as a "pre-sentence investigation (PSI) report." See the DHHS's Juvenile Justice Specialist (JJS) Roles and Responsibilities Manual, JJ2 210, *Pre-Sentence Investigations*.

[77] See Section 16.17(B) and Section (C) for discussion of county juvenile agencies.

[78] MCR 6.903(L) defines "[s]ocial report" as "the written report on a juvenile for use at the juvenile sentencing hearing prepared by the [DHHS] as required by MCL 803.224 (§ 4 of the Juvenile Facilities Act)."

1. Contents of Social Report[79]

MCL 771.14a(1) provides that, before the juvenile's sentencing, the DHHS or county juvenile agency "shall inquire into the juvenile's antecedents, character, and circumstances and shall report in writing to the court as provided in . . . MCL 803.224."

MCL 803.224, in turn, provides as follows:

> "(1) If a juvenile within the jurisdiction of the circuit court under . . . MCL 600.606[] is committed to a juvenile facility pending trial, the [DHHS] or county juvenile agency, as applicable, shall inquire into the juvenile's antecedents, character, and circumstances and shall report in writing to the court before the juvenile's sentencing.
>
> (2) A report prepared under [MCL 803.224(1)] shall include all of the following:
>
> > (a) An evaluation of and a prognosis for the juvenile's adjustment in the community based on factual information contained in the report.
> >
> > (b) A recommendation as to whether the juvenile is more likely to be rehabilitated by the services and facilities available in adult programs and procedures than in juvenile programs and procedures.
> >
> > (c) A recommendation as to what disposition is in the best interests of the public welfare and the protection of the public security."

2. Information That May be Exempted From Disclosure in Social Report

MCL 771.14a(2) provides:

> "The court may exempt from disclosure in a report under this section information or a diagnostic opinion that might seriously disrupt a program of rehabilitation or sources of information obtained on a promise of confidentiality. If a part of the

[79] Although MCR 6.931(E)(1) refers to the required DHHS report as a "social report" (see also MCR 6.903(L)), the relevant DHHS policy manual refers to this report as a "pre-sentence investigation (PSI) report." See the DHHS's Juvenile Justice Specialist (JJS) Roles and Responsibilities Manual, JJ2 210, *Pre-Sentence Investigations*.

> report is not disclosed, the court shall state on the record the reasons for its action and inform the juvenile and his or her attorney that information has not been disclosed. The action of the court in exempting information from disclosure is subject to appellate review. Information or a diagnostic opinion exempted from disclosure under this subsection shall be specifically noted in the report."

3. Use of Prior Juvenile Adjudications[80]

"The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior" must be considered by the judge at the juvenile sentencing hearing, and this factor, together with the seriousness of the sentencing offense, is accorded more weight than the other relevant factors. MCL 769.1(3)(c).

In apparent contrast with MCL 769.1(3)(c), MCL 712A.23 provides:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]."

However, MCL 712A.23 presumably does not preclude consideration of a juvenile offense record in determining whether to sentence a juvenile as an adult in an automatic waiver proceeding. As noted, MCL 769.1(3)(c) specifically directs the circuit court to consider the juvenile's prior record of delinquency when determining the appropriate sentence. Furthermore, MCL 712A.23 does not prevent consideration of a juvenile offense record when imposing sentence upon an adult defendant, *People v McFarlin (Gary)*, 389 Mich 557, 561, 575 (1973) ("the presentence report should include information concerning juvenile history, including a disposition by a juvenile court, and . . . it is proper to consider this information

[80] See Section 21.8 for a more complete discussion of the use of prior juvenile adjudications and conduct that did not result in an adjudication when determining whether to sentence a juvenile as an adult and when determining the length of a juvenile's adult sentence.

as a factor in sentencing an adult offender"), or when imposing sentence upon a juvenile defendant following traditional waiver proceedings, *People v Coleman*, 19 Mich App 250, 256 (1969), abrogated on other grounds by *People v McFarlin (Gary)*, 41 Mich App 116 (1972), rev'd on other grounds 389 Mich 557 (1973)[81] (the term "evidence" in MCL 712A.23 "connotes testimony and matters actually presented at trial[, and t]he post-conviction examination of juvenile records in order to impose a fair and just sentence is not a use of such records as 'evidence'").

4. Appointment of Psychiatrist or Psychologist

A psychiatric examination may be performed, by court order or upon request, before sentencing. *People v Wright*, 431 Mich 282, 287 (1988), citing MCL 771.14(1). However, an indigent juvenile is not entitled to the appointment of a psychiatrist or psychologist of his or her own choosing at public expense for purposes of a juvenile sentencing hearing. *People v Stone*, 195 Mich App 600, 604-606 (1992) (noting that although *Ake v Oklahoma*, 470 US 68, 77, 83 (1985), requires that an indigent defendant have access to psychiatric assistance in the preparation of a defense under some circumstances, it does not require the appointment of a psychologist or psychiatrist of the defendant's own choosing, and further noting that the defendant's private interest was less compelling in the posttrial stage than at trial; thus, "[a]ssuming, arguendo, that [a juvenile defendant] was entitled to access to a competent psychologist, he [or she] was afforded that right[]" where a psychologist was appointed by the juvenile court to prepare a report for use at the juvenile's discretionary waiver hearing on another charge).

B. Rules of Evidence

The rules of evidence do not apply at a juvenile sentencing hearing. MCL 769.1(3); MCR 6.931(E)(1). "[A]ll relevant and material evidence may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial." MCR 6.931(E)(1).

C. Burden and Standard of Proof

Except for the 12 very serious specified juvenile violations enumerated in MCL 769.1(1)[82] and for a certain controlled

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

substance offense under MCL 333.7403(2)(a)(*i*), for which the court must consider an alternative sentence,[83] the court must "sentence the juvenile in the same manner as an adult unless the court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to [state wardship]. . . ." MCL 769.1(3). MCR 6.931(E)(2) contains substantially similar language.

16.15 Criteria to be Considered at Juvenile Sentencing Hearing

MCL 769.1(3) provides, in relevant part:

> "In making the determination [whether the interests of the public would be best served by imposition of an adult sentence or by placing the juvenile on probation and committing him or her to state wardship], the judge shall consider all of the following, giving greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency:
>
> > (a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
> >
> > (b) The juvenile's culpability in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
> >
> > (c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.

[82] See Section 16.11(A).

[83] See Section 19.5 for more information regarding alternative sentences for certain controlled substance offenses.

> (d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
>
> (e) The adequacy of the punishment or programming available in the juvenile justice system.
>
> (f) The dispositional options available for the juvenile."[84]

MCR 6.931(E)(4) contains substantially similar language.

16.16 Required Findings of Court at Juvenile Sentencing Hearings

MCR 6.931(E)(5) provides:

> "*Findings*. The court must make findings of fact and conclusions of law forming the basis for the juvenile probation and commitment decision or the decision to sentence the juvenile as though an adult offender. The findings and conclusions may be incorporated in a written opinion or stated on the record."

Similarly, MCL 769.1(6) provides that "[t]he court shall state on the record the court's findings of fact and conclusions of law for the probation and commitment decision or sentencing decision made under [MCL 769.1(3)]."

In *People v Petty*, 469 Mich 108, 113-119 (2003), the Michigan Supreme Court abrogated *People v Thenghkam*, 240 Mich App 29 (2000), to the extent that it required the trial court to make factual findings on each of the criteria set out in MCL 769.1(3). The *Petty* Court, addressing the degree of analysis required under former MCL 712A.18(1)(n) (now MCL 712A.18(1)(o)), which required the Family Division to consider criteria that are nearly identical to those under MCL 769.1(3)(a)-(f) when deciding whether to impose an adult sentence or juvenile disposition in a designated case, repudiated the "command [of *Thenghkam*, 240 Mich App at 41, 48, 67] to create a mechanical list of factual findings for each

[84] Before 1997, MCL 769.1(3) required the sentencing court to consider "the best interests of *the juvenile and* the public" (emphasis supplied) when determining whether to sentence a juvenile as an adult or to impose probation and commit him or her to state wardship; additionally, the court was to consider all of the enumerated criteria, "giving each weight as appropriate to the circumstances[.]" Effective January 1, 1997, 1996 PA 247 amended MCL 769.1(3) to eliminate the requirement that the court consider the best interests of the juvenile and to require the court to "giv[e] greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency[.]"

criterion" and held that "[a] trial court need not engage in a lengthy 'laundry list' recitation of the factors[;]" rather, the court must simply "acknowledge its discretion" to choose between the available sentencing and dispositional options and "consider the enunciated factors . . . to assist it in choosing one option over the other." *Petty*, 469 Mich at 117, 121.[85]

16.17 Requirements for Imposing Probation and Committing a Juvenile to State Wardship

A. Probation is an Alternative "Adult" Sentence

"Juveniles who come within the jurisdiction of the adult system by automatic waiver are not 'sentenced within the juvenile offender system' when they are sentenced to probation under MCL 769.1(3) . . . . They are sentenced within the adult system with a sentence that is an alternative to the normal adult penalty." *People v Valentin (Anthony)*, 457 Mich 1, 9 (1998).

B. Definitions Applicable to Commitment

1. "County Juvenile Agency"

Effective January 12, 1999, pursuant to 1998 PA 518, the Legislature enacted the county juvenile agency act, MCL 45.621 *et seq*., to provide for the creation of a "county juvenile agency." A "[c]ounty juvenile agency," as defined in the act, is a county that has approved a resolution to offer certain services and facilities to juveniles, to assume financial responsibility for such services, and to comply with applicable federal laws. MCL 803.302(a); MCL 45.622; MCL 45.623; MCL 45.627. A county juvenile agency is required to provide or contract for provision of "[a]n effective program of supervision and care for juveniles committed to the county juvenile agency by the family division of circuit court or court of general criminal jurisdiction[,]" "[a]ppropriate county juvenile agency services[,]" and "[a]ppropriate services and facilities necessary for public wards it is responsible for." MCL 45.627(1)(a)-(c).

However, because the county juvenile agency act applies only to a county that "is eligible for a transfer of federal title IV-E

[85] Accordingly, although not specifically overruled by *Petty*, 469 Mich at 113-119, other Court of Appeals cases requiring the trial court to make findings regarding each of the factors set out in MCL 769.1(3) are presumably no longer good law. See *People v Hazzard*, 206 Mich App 658, 660-661 (1994); *People v Miller*, 199 Mich App 609, 612 (1993).

funds"[86] under a 1997 waiver, the act applies only to Wayne County. MCL 45.626; see also House Legislative Analysis, SB 1185, December 9, 1998. As a practical matter, because Wayne County is not now operating as a county juvenile agency, juveniles who are committed under MCL 769.1(3) are currently committed only to state wardship. See MCR 6.901 *et seq*. (referring generally to commitments under MCL 769.1 as commitments "to state wardship"); see also Section (C).

2. "State" or "Public" Wardship[87]

For purposes of automatic waiver proceedings, a "'[p]ublic ward' is "[a] youth accepted for care by a youth agency who is at least 14 years of age when committed to the youth agency by a court of general criminal jurisdiction under . . . MCL 769.1, if the act for which the youth is committed occurred before his or her eighteenth birthday." MCL 803.302(c)(*ii*).

MCR 6.903(M) defines "[s]tate wardship" as the "care and control of a juvenile until the juvenile's 21st birthday by an institution or agency within or under the supervision of the [DHHS] as provided in the Youth Rehabilitation Services Act, MCL 803.301 *et seq*., while the juvenile remains under the jurisdiction of the court on the basis of a court order of juvenile probation and commitment as provided in MCL 769.1."

3. "Youth Agency"

"'Youth agency' means either the [DHHS] or a county juvenile agency,[88] whichever has responsibility over a public ward." MCL 803.302(d).

C. Postjudgment Procedure

"If the court retains jurisdiction over the juvenile, places the juvenile on juvenile probation, and commits the juvenile to state wardship, the court shall comply with [MCR 6.931(F)(1)-(10)]." MCR 6.931(F). These requirements are discussed below.

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[86] "Title IV-E funds" are federal funds used to partially reimburse states for costs associated with delinquent and dependent children in foster care. See Section (C).

[87] Effective January 12, 1999, 1998 PA 517 amended the Youth Rehabilitation Services Act, MCL 803.301 *et seq*., to redesignate references to "state" wardship as "public" wardship in conformity with the simultaneous enactment of the county juvenile agency act, MCL 45.621 *et seq*. See Section 16.17(B) and Section (C).

[88] See Section 16.17(B) and Section (C).

1. Reimbursement of Costs

MCL 769.1(7) provides, in part:

> "Money collected for juveniles placed with or committed to the department of health and human services or a county juvenile agency must be accounted for and reported on an individual basis."[89]

"An order directed to a person responsible for the juvenile's support under [MCL 769.1] is not binding on the person unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first-class mail to the person's last known address." MCL 769.1(8). See Chapter 18 for further discussion of reimbursement orders.

2. Advice Regarding Probation Revocation

MCR 6.931(F)(1) provides:

> "The court shall advise the juvenile at sentencing that if the juvenile, while on juvenile probation, is convicted of a felony or a misdemeanor punishable by more than one year's imprisonment, the court must revoke juvenile probation and sentence the juvenile to a term of years in prison not to exceed the penalty that might have been imposed for the offense for which the juvenile was originally convicted."

"A defendant who is not advised of the ramifications of a subsequent conviction is not afforded due process and cannot thereafter have his [or her] juvenile probation revoked for the failure to comply with [the] condition of probation [requiring mandatory revocation and resentencing upon conviction of a felony or misdemeanor punishable by more than one year in prison]." *People v Valentin*, 220 Mich App 401, 405 (1996), aff'd 457 Mich 1 (1998), citing *People v Stanley*, 207 Mich App 300, 307 (1994).

[89] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/4a548b/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

3. Records and Reports That Must be Sent to Juvenile and DHHS

"The court shall assure that the juvenile receives a copy of the social report."[90] MCR 6.931(F)(2).

Additionally, the court must send a copy of the order and the written opinion or transcript of the findings and conclusions of law to the DHHS or county juvenile agency, as applicable. MCL 769.1(6); MCR 6.931(F)(3).

4. Limitations on Juvenile Probation

The court, in imposing probation and committing the juvenile to state wardship, shall not do any of the following:

- place the juvenile on deferred sentencing as provided in MCL 771.1(2). MCR 6.931(F)(4); see also MCL 771.1(4);
- require, as a condition of juvenile probation, that the juvenile report to a Department of Corrections probation officer. MCR 6.931(F)(7);
- impose, as a condition of juvenile probation, jail time against the juvenile except as provided in MCR 6.933(G)(2).[91] MCR 6.931(F)(8);
- commit the juvenile to the Department of Corrections for failing to comply with a restitution order. MCR 6.931(F)(9); or
- place the juvenile in a Department of Corrections probation camp for one year as provided in MCL 771.3a(1). MCR 6.931(F)(10); see also MCL 771.3a(2).[92]

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[90] Although MCR 6.931(F)(2) refers to the required DHHS report as a "social report" (see also MCR 6.903(L)), the relevant DHHS policy manual refers to this report as a "pre-sentence investigation (PSI) report." See the DHHS's Juvenile Justice Specialist (JJS) Roles and Responsibilities Manual, JJ2 210, *Pre-Sentence Investigations*.

[91] MCR 6.933(G)(2)(g) allows the court, if a juvenile has violated juvenile probation, to "order the juvenile continued on juvenile probation and under state wardship[]" and to incarcerate the juvenile in a county jail for up to 30 days. See Part E of this Chapter.

[92] MCR 6.931(F)(5) additionally provides that "[t]he court shall not place the juvenile on life probation for conviction of a controlled substance violation, as set forth in MCL 771.1(4)." However, effective March 1, 2003, 2002 PA 666 deleted the text of former MCL 771.1(4), which had allowed a sentencing judge to place a defendant on life probation for a violation of MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*). Also effective March 1, 2003, 2002 PA 665 abolished the penalty of lifetime probation for violations of MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*).

In addition, "[t]he five-year limit on the term of probation for an adult felony offender shall not apply." MCR 6.931(F)(6).

Part D—Review Requirements

16.18 Retention of Jurisdiction to Impose Adult Sentence

If probation and commitment are ordered, the sentencing court retains jurisdiction to impose an adult sentence. MCL 769.1(9) provides that, in an automatic waiver proceeding, "[i]f a juvenile is placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4)] to [state wardship], the court shall retain jurisdiction over the juvenile while the juvenile is on probation and committed to [state wardship]."

16.19 Required Progress Reviews and Review Hearings

As provided in MCL 769.1, MCL 769.1b, and MCR 6.935–MCR 6.938, the following types of reviews are conducted after a juvenile is placed on probation and committed to state wardship following an automatic waiver proceeding:

- Semiannual and annual progress reviews; these reviews may be conducted without a hearing unless a more physically restrictive placement is ordered;
- A commitment review hearing before the juvenile reaches age 19;
- A commitment review hearing upon motion of the institution, agency, or facility to which the juvenile has been committed; and
- A final review hearing.

The criteria to be considered by the court in determining whether to continue jurisdiction or to impose a sentence of imprisonment following review are discussed in Section 16.20.

A. Semiannual Progress and Annual Reviews

MCR 6.935(A) provides:

> "**(A) General.** When a juvenile is placed on probation and committed to a state institution or agency, the court

retains jurisdiction over the juvenile while the juvenile is on probation and committed to that state institution or agency. The court shall review the progress of a juvenile it has placed on juvenile probation and committed to state wardship."

1. Semiannual Progress Review

MCR 6.935(B)(1) provides:

> "(1) *Semiannual Progress Reviews*. The court must conduct a progress review no later than 182 days after the entry of the order placing the juvenile on juvenile probation and committing the juvenile to state wardship. A review shall be made semiannually thereafter as long as the juvenile remains in state wardship."

2. Annual Review

MCL 769.1(10) provides, in relevant part:

> "If the court has retained jurisdiction over a juvenile under [MCL 769.1(9)], the court shall conduct an annual review of the services being provided to the juvenile, the juvenile's placement, and the juvenile's progress in that placement."

MCR 6.935(B)(2) contains substantially similar language.

3. Progress Review Report

MCR 6.935(C) provides, in relevant part:

> "**(C) Progress Review Report.** In conducting [semiannual progress and annual] reviews, the court shall examine the progress review report prepared by the [DHHS], covering placement and services being provided the juvenile and the progress of the juvenile, and the court shall also examine the juvenile's annual report prepared under MCL 803.223 (§ 3 of the Juvenile Facilities Act)."

See also MCL 769.1(10) (requiring the court, in conducting an annual review, to "examine the juvenile's annual report prepared under . . . MCL 803.223").

MCL 803.223, in turn, provides that "[i]f a juvenile is committed to a juvenile facility, the [DHHS] or county juvenile agency, as applicable, shall prepare for the court that committed the juvenile an annual report stating the services being provided to the juvenile, where the juvenile has been placed, and the juvenile's progress in that placement."

"The report created pursuant to MCL 803.223 for the purpose of annual reviews may be combined with a commitment review report" prepared under MCL 803.225. MCR 6.937(A)(3).[93]

4. Changes in Placement

MCL 769.1(10) provides, in relevant part:

> "[Following an annual review, t]he court may order changes in the juvenile's placement or treatment plan including, but not limited to, committing the juvenile to the jurisdiction of the department of corrections, based on the review."

MCR 6.935(C) contains substantially similar language but applies to both semiannual progress and annual reviews.

5. Hearing Not Required Unless More Physically Restrictive Change is Ordered

MCR 6.935(D) provides:

> "**(D) Hearings for Progress and Annual Reviews.** Unless the court orders a more restrictive placement or treatment plan, there shall be no requirement that the court hold a hearing when conducting a progress review for a court-committed juvenile pursuant to MCR 6.935(B). However, the court may not order a more physically restrictive change in the level of placement of the juvenile or order more restrictive treatment absent a hearing as provided in MCR 6.937.[94]"

[93] See Section 16.19(B) for a discussion of commitment reports.

[94] MCR 6.937 governs commitment review hearings. See Section 16.19(B).

B. Commitment Review Hearings

1. Required Hearing Before Age 19 for Court-Committed Juveniles

MCL 769.1b(1) provides, in relevant part:

> "If a juvenile is placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, . . . MCL 803.301 to [MCL] 803.309, the court shall conduct a review hearing to determine whether the juvenile has been rehabilitated and whether the juvenile presents a serious risk to public safety. If the court determines that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety, jurisdiction over the juvenile shall be continued or the court may commit the juvenile to the department of corrections as provided in this section."[95]

a. Time Requirements

MCR 6.937(A) provides:

> "**(A) Required Hearing Before Age 19 for Court-Committed Juveniles.** The court shall schedule and hold, unless adjourned for good cause, a commitment review hearing as nearly as possible to, but before, the juvenile's 19th birthday."

MCL 769.1b(2) contains substantially similar language.

b. Notice Requirements

MCR 6.937(A)(1) provides:

> (1) *Notice*. The [DHHS] or agency, facility, or institution to which the juvenile is committed, shall advise the court at least 91 days before the juvenile attains age 19 of the need to schedule a commitment review hearing. Notice of the hearing must be given to the

[95] The criteria to be considered by the court in determining whether to continue jurisdiction or to impose a sentence of imprisonment following review are discussed in Section 16.20.

> prosecuting attorney, the agency or the superintendent of the facility to which the juvenile has been committed, the juvenile, and the parent of the juvenile if the parent's address or whereabouts are known, at least 14 days before the hearing. Notice must clearly indicate that the court may extend jurisdiction over the juvenile until the age of 21. The notice shall include advice to the juvenile and the parent of the juvenile that the juvenile has the right to an attorney."

See also MCL 769.1b(3).

c. Appointment of Counsel

Unless an attorney has been retained or has been waived by the juvenile under MCR 6.905(C),[96] the court must refer the matter to the local indigent criminal defense system's appointing authority for appointment of an attorney to represent the juvenile. MCL 769.1b(3); MCR 6.905(B); MCR 6.937(A)(2). "[The court] may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply." MCL 769.1b(3).

d. Reports

"The institution or agency charged with the care of the juvenile shall prepare commitment reports as provided in . . . MCL 803.225, for use by the court at a review hearing . . . ." MCL 769.1b(4); see also MCR 6.937(A)(3).

A commitment report must contain all of the following:

- The services and programs currently being utilized by, or offered to, the juvenile, and the juvenile's participation in those services and programs;
- Where the juvenile currently resides and the juvenile's behavior in his or her current placement;
- The juvenile's efforts toward rehabilitation; and

[96] See Section 16.5(D) for the requirements for a valid waiver of the right to counsel.

- Recommendations for the juvenile's release or continued custody. MCL 803.225(1)(a)-(d); MCR 6.937(A)(3)(a)-(d).

"The report created pursuant to MCL 803.223 for the purpose of annual reviews[97] may be combined with a commitment review report." MCR 6.937(A)(3).

e. Burden and Standard of Proof; Rules of Evidence

MCR 6.937(A)(4) provides, in relevant part:

> "(4) *Findings; Criteria*. Before the court continues the jurisdiction over the juvenile until the age of 21, the prosecutor must demonstrate by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety. The rules of evidence do not apply."[98]

f. Failure to Hold Commitment Review Hearing Does Not Deprive Court of Jurisdiction to Revoke Probation

Failure to hold the required review hearing before a juvenile's 19th birthday as required by MCL 769.1b(2) and MCR 6.937(A) does not deprive the court of jurisdiction to revoke the juvenile's probation and impose an adult sentence, where probation revocation proceedings are commenced within the probation period. *People v Valentin (Anthony)*, 220 Mich App 401, 406–408 (1996), aff'd 457 Mich 1 (1998) (noting that "'Michigan courts have traditionally held that the sentencing court retains jurisdiction to revoke a defendant's probation if probation revocation proceedings are commenced within the probation period and are pending when it expires[]'" and "declin[ing] to add any . . . sanction [for a violation of the applicable statute or court rule] that the Legislature and the Supreme Court declined to provide[]" [internal citation omitted]).

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[97] See Section 16.19(A) for discussion of the annual report required under MCL 803.223.

[98] The criteria to be considered by the court in determining whether to continue jurisdiction over a juvenile following a commitment review hearing are discussed in Section 16.20.

2. Other Commitment Review Hearings

MCL 769.1b(2) provides, in relevant part:

> "If the institution or agency to which the juvenile was committed believes that the juvenile has been rehabilitated and that the juvenile does not present a serious risk to public safety, that institution or agency may petition the court to conduct a review hearing at any time before the juvenile becomes 19 years of age or, if the court has continued jurisdiction under [MCL 769.1b(1)], at any time before the juvenile becomes 21 years of age."

MCR 6.937(B) provides, in relevant part:

> "**(B) Other Commitment Review Hearings.** The court, on motion of the institution, agency, or facility to which the juvenile is committed, may release a juvenile at any time upon a showing by a preponderance of evidence that the juvenile has been rehabilitated and is not a risk to public safety."

Alternatively, "[t]he court, upon notice and opportunity to be heard as provided in [MCR 6.937], may also move the juvenile to a more restrictive placement or treatment program." MCR 6.937(B).[99]

a. Notice Requirements

MCR 6.937(B) provides, in relevant part:

> "The notice provision in [MCR 6.937(A)], other than the requirement that the court clearly indicate that it may extend jurisdiction over the juvenile until the age of 21, . . . shall apply."

Accordingly, notice must be given at least 14 days before the hearing to the prosecuting attorney, the agency or the superintendent of the facility to which the juvenile has been committed, the juvenile, and the parent of the juvenile if the parent's address or whereabouts are known. MCR 6.937(A)(1); MCL 769.1b(3). In addition,

[99] The criteria to be considered by the court in determining whether to release a juvenile or place the juvenile in a more restrictive placement or treatment program following a commitment review hearing are discussed in Section 16.20.

"[t]he notice shall include advice to the juvenile and the parent of the juvenile that the juvenile has the right to an attorney." MCR 6.937(A)(1). See also MCL 769.1b(3).

b. Appointment of Counsel

"The local funding unit's appointing authority must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or the right to counsel waived." MCR 6.937(B). See also MCL 769.1b(3).

c. Rules of Evidence

"The rules of evidence shall not apply." MCR 6.937(B).

C. Final Review Hearing

The court must conduct a final review of the juvenile's probation and/or commitment. If the court determines at this hearing that the best interests of the public would be served by imposing any other sentence provided by law for an adult offender, the court may impose that sentence.[100] MCL 769.1b(5); MCR 6.938(A).

1. Timing and Notice Requirements

Not less than 14 days before a final review hearing is to be conducted, the prosecuting attorney, juvenile, and, if addresses are known, the juvenile's parent or guardian must be notified. The notice must state that the court may impose a sentence upon the juvenile and must advise the juvenile and the juvenile's parent or guardian of the right to legal counsel. MCL 769.1b(6); MCR 6.938(B).

2. Appointment of Counsel

If an attorney has not been retained or appointed to represent the juvenile, the local funding unit's appointing authority must appoint legal counsel and the court may assess the cost of providing counsel as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply. MCL 769.1b(6); MCR 6.938(C).

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[100] The criteria to be considered by the court in determining whether to impose a sentence of imprisonment following review are discussed in Section 16.20.

3. Reports

The rules governing the use of reports at final review hearings are the same as those applicable to other review hearings. For discussion of those rules, see Section 15.25(A) and Section 16.19(B).

4. Burden and Standard of Proof; Rules of Evidence

MCR 6.938 does not specifically assign a burden of proof to either party or state whether the rules of evidence apply at a final review hearing. MCR 6.938(A) states only that "[i]f the court determines at this review that the best interests of the public would be served by imposing any other sentence provided by law for an adult offender, the court may impose that sentence."

16.20 Criteria to Consider in Determining Whether to Continue Jurisdiction, Impose Sentence, Release Juvenile, or Change Juvenile's Placement Following Review

Following review, the court must determine whether the prosecutor has shown by a preponderance of the evidence that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety, considering the following factors:

- the extent and nature of the juvenile's participation in education, counseling, or work programs;
- the juvenile's willingness to accept responsibility for prior behavior;
- the juvenile's behavior in his or her current placement;
- the prior record and character of the juvenile and his or her physical and mental maturity;
- the juvenile's potential for violent conduct as demonstrated by prior behavior;
- the recommendations of any institution, facility, or agency charged with the juvenile's care for the juvenile's release or continued custody; and
- any other information the prosecuting attorney or juvenile may submit. MCL 769.1b(1)(a)-(g); MCR 6.937(A)(4)(a)-(g). See also

> MCR 6.937(B) (stating that the criteria listed in MCR 6.937[A] apply to a commitment review hearing held at the request of the institution, agency, or facility to which the juvenile is committed).

At the final review hearing, the court must also determine whether imposing an adult sentence would serve the best interests of the public by considering the following factors in addition to the factors listed above:

- the effect of treatment on the juvenile's rehabilitation;
- whether the juvenile is likely to be dangerous to the public if released; and
- the best interests of the public welfare and the protection of public security. MCL 769.1b(5)(a)-(c); MCR 6.938(D)(8)-(10).

16.21 Release from Custody and Discharge From Public Wardship

A provision of the Youth Rehabilitation Services Act, MCL 803.301 *et seq.*, sets out the requirements for releasing from custody a juvenile who is subject to court jurisdiction and for discharging a juvenile from public wardship. MCL 803.307 states, in relevant part:

> "(1) A youth accepted by a youth agency remains a public ward until discharged from public wardship with the approval of any of the following and, if placed in an institution, shall remain until released with the approval of any of the following:
>
> * * *
>
> (b) If the youth was committed to a youth agency under . . . MCL 769.1 [(governing automatic waiver proceedings)], with the approval of the court of general criminal jurisdiction under . . . MCL 769.1b.
>
> (2) Except as otherwise provided in [MCL 803.307], a youth accepted as a public ward shall be automatically discharged from public wardship upon reaching the age of 19. Except as provided in [MCL 803.307(3)], a youth committed to a youth agency under [MCL 712A.18(1)(e) (governing juvenile dispositions)] for an offense that, if committed by an adult, would be a violation or attempted violation of . . . MCL 750.72, [MCL] 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.88, [MCL] 750.89, [MCL] 750.91, [MCL] 750.110a[(2)],

> [MCL] 750.186a, [MCL] 750.316, [MCL] 750.317, [MCL] 750.349, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, [MCL] 750.530, [or] [MCL] 750.531, or [MCL 333.7401(2)(a)(*i*) or MCL 333.7403(2)(a)(*i*)], shall be automatically discharged from public wardship upon reaching the age of 21. Except as provided in [MCL 803.307(4)], a youth committed to a youth agency under . . . MCL 769.1 [(governing automatic waiver proceedings)][] shall be automatically discharged from public wardship upon reaching the age of 21.
>
> * * *
>
> (4) If a court of general criminal jurisdiction sentences the youth to a sentence provided by law for an adult offender under . . . MCL 769.1b [(governing automatic waiver proceedings)], the youth shall be discharged from public wardship and committed under the court's order."

Part E—Juvenile Probation Violations[101]

16.22 Juvenile Probation Violation Hearing Procedure

A. Issuance of Summons; Warrant

"When a juvenile, who was placed on juvenile probation and committed to an institution as a state ward, is alleged to have violated juvenile probation, on finding probable cause to believe that a probationer has violated a condition of probation, the court may

> (1) issue a summons in accordance with MCR 6.102 for the probationer to appear for arraignment on the alleged violation, or
>
> (2) issue a warrant for the arrest of the probationer.

An arrested probationer must promptly be brought before the court for arraignment on the alleged violation." MCR 6.933(A).

[101] For probation revocation procedures in adult criminal proceedings, including automatic waiver proceedings in which an adult sentence was imposed, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2.

B. Arraignment on the Charge

"At the arraignment on the alleged probation violation, the court must

> (1) ensure that the probationer receives written notice of the alleged violation,
>
> (2) advise the probationer that
>
> > (a) the probationer has a right to contest the charge at a hearing, and
> >
> > (b) the probationer is entitled to a lawyer's assistance at the hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one,
>
> (3) if requested and appropriate, appoint a lawyer,
>
> (4) determine what form of release, if any, is appropriate, and
>
> (5) subject to [MCR 6.933(C)], set a reasonably prompt hearing date or postpone the hearing." MCR 6.933(B).

C. Timing of Hearing

"The hearing of a probationer being held in custody for an alleged probation violation must be held within 14 days after the arraignment or the court must order the probationer released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution." MCR 6.933(C).

D. Continuing Duty to Advise of Right to Assistance of Lawyer

"Even though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E)." MCR 6.933(D). See also *People v McKinnie*, 197 Mich App 458, 460 (1992).

"If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding . . . need show only that the court advised the defendant of the continuing right to a lawyer's

assistance (at public expense if the defendant is indigent) and that the defendant waived that right." MCR 6.005(E). "Before the court begins such proceedings,

> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must refer the defendant to the local indigent criminal defense system's appointing authority for the appointment of one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one." *Id*.

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

"A defendant has limited due process rights with regard to a revocation hearing." *McKinnie*, 197 Mich App at 460-461. "The right to counsel, however, is fundamental and compliance with MCR 6.005(E) must be strict." *McKinnie*, 197 Mich App at 461 (defendant's judgment of sentence for probation violation vacated where the trial court did not comply with MCR 6.445 and MCR 6.005(E)).

"[D]ue process is satisfied in a probation revocation proceeding if a trial court advises a defendant of his right to counsel and the appointment of counsel, if he is indigent, and determines that there is a knowing and intelligent waiver of that right." *People v Belanger*, 227 Mich App 637, 647 (1998). "Factors to be considered when deciding whether [a] defendant ha[s] made a knowing waiver of his right to counsel are defendant's age, education, prior criminal experience, mental state, financial condition, and the various factors, pressures or inducements which led him to admit the allegations against him without the assistance of counsel." *People v Kitley*, 59 Mich App 71, 76 (1975).

E. The Violation Hearing

Conduct of the Hearing. "The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has

the burden of proving a violation by a preponderance of the evidence." MCR 6.933(E)(1).

Judicial Findings. "At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403." MCR 6.933(E)(2).

F. Pleas of Guilty

"The probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

> (1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule [MCR 6.933(B)(2)(b)],
>
> (2) advise the probationer of the maximum possible jail or prison sentence for the offense,
>
> (3) ascertain that the plea is understandingly, voluntarily, and accurately made, and
>
> (4) establish factual support for a finding that the probationer is guilty of the alleged violation." MCR 6.933(F).

G. Disposition in General

Certain Criminal Offense Violations. "If the court finds that the juvenile has violated juvenile probation by being convicted of a felony or a misdemeanor punishable by more than one year's imprisonment, the court must revoke the probation of the juvenile and order the juvenile committed to the Department of Corrections for a term of years not to exceed the penalty that could have been imposed for the offense that led to the probation. The court in imposing sentence shall grant credit against the sentence as required by law." MCR 6.933(G)(1)(a). "The court may not revoke probation and impose sentence under [MCR 6.933(G)(1)] unless at the original sentencing the court gave the advice, as required by MCR 6.931(F)(1), that subsequent conviction of a felony or a misdemeanor punishable by more than one year's imprisonment would result in the revocation of juvenile probation and in the imposition of a sentence of imprisonment." MCR 6.933(G)(1)(b).

Other Violations. "If the court finds that the juvenile has violated juvenile probation, other than as provided in [MCR 6.933(G)(1)], the

court may order the juvenile committed to the Department of Corrections as provided in [MCR 6.933(G)(1)], or may order the juvenile continued on juvenile probation and under state wardship, and may order any of the following:

> (a) a change of placement,
>
> (b) restitution,
>
> (c) community service,
>
> (d) substance abuse counseling,
>
> (e) mental health counseling,
>
> (f) participation in a vocational-technical education program,
>
> (g) incarceration in a county jail for not more than 30 days, and
>
> (h) any other participation or performance as the court considers necessary.

If the court determines to place the juvenile in jail for up to 30 days, and the juvenile is under 18 years of age, the juvenile must be placed separately from adult prisoners as required by law." MCR 6.933(G)(2). "If the court revokes juvenile probation pursuant to [MCR 6.933(G)(1)], the court must receive an updated presentence report and comply with MCR 6.445(G) before it imposes a prison sentence on the juvenile." MCR 6.933(G)(3).

H. Disposition Regarding Specific Underlying Offenses.

Controlled Substance Violation Punishable by Mandatory Nonparolable Life Sentence For Adults. "A juvenile who was placed on probation and committed to state wardship for manufacture, delivery, or possession with the intent to deliver 650 grams(1,000 grams beginning March 1, 2003) or more of a controlled substance, MCL 333.7401(2)(a)(i), may be resentenced only to a term of years following mandatory revocation of probation for commission of a subsequent felony or a misdemeanor punishable by more than one year of imprisonment." MCR 6.933(H)(1).

First-Degree Murder. "A juvenile convicted of first-degree murder who violates juvenile probation by being convicted of a felony or a misdemeanor punishable by more than one year's imprisonment may only be sentenced to a term of years, not to nonparolable life." MCR 6.933(H)(2).

I. Review

"The juvenile may appeal as of right from the imposition of a sentence of incarceration after a finding of juvenile probation violation." MCR 6.933(I).

J. Determination of Ability to Pay.

"A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 6.933(J).

16.23 Technical Probation Violation

For purposes of subchapters 6.000-6.800 of the Michigan Court Rules, *technical probation violation* "means any violation of the terms of a probation order, including missing or failing a drug test, excluding the following:

> (a) A violation of an order of the court requiring that the probationer have no contact with a named individual.
>
> (b) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.
>
> (c) The consumption of alcohol by a probationer who is on probation for a felony violation of MCL 257.625.
>
> (d) Absconding, defined as the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCR 6.003(7).

"A probationer may acknowledge a technical probation violation in writing without a hearing before the court being required." MCL 771.4b(2)."Subject to the exception in [771.4b(6)[102]], the court shall not revoke probation on the basis of a technical probation violation unless a probationer has already been sanctioned for 3 or more technical probation violations and commits a new technical probation violation." 771.4b(4).

[102]MCL 771.4b(6) provides that MCL 771.4b(1) is not applicable to a probationer who is on probation for a domestic violence violation of MCL 750.81 or MCL 750.81a, an offense involving domestic violence, or a violation of MCL 750.411h or MCL 750.411i. MCL 771.4b(6).

"[T]here is a rebuttable presumption that the court shall not issue a warrant for arrest for a technical probation violation and shall issue a summons or order to show cause to the probationer instead." MCL 771.4b(7). A warrant may be issued if the court overcomes the presumption by stating on the record "a specific reason to suspect" that the probationer (1) "presents an immediate danger to himself or herself, another person, or the public"; (2) has left court-ordered inpatient treatment without permission; or (3) has already failed to appear after being issued a summons or order to show cause. *Id.*

When a probationer is arrested and detained for a technical probation violation hearing, the hearing must be held "as soon as is possible," and "[i]f the hearing is not held within the applicable and permissible jail sanction, as determined under [MCL 771.4b(1)(a)-(b)], the probationer must be returned to community supervision." MCL 771.4b(8).

Technical probation violations do not include "[a] violation of an order of the court requiring that the probationer have no contact with a named individual." *People v Smith*, ___ Mich App ___, ___ (2024). In *Smith*, "[a]fter defendant pleaded guilty to violating his probation order requiring him to not have physical contact with anyone under the age of 17, the trial court found that defendant committed a 'nontechnical' probation violation . . . ." *Smith*, ___ Mich App at ___ (considering "whether the trial court erred by finding that defendant committed a nontechnical violation of his probation order"). However, "defendant's probation order [did] not name an 'individual,' and describing a class of persons [did] not fall within the clear words of the statute." *Id.* at ___, quoting MCL 771.4b(9)(b)(*i*).

The *Smith* Court first noted that its "judicial duty is to enforce the language utilized by the Legislature to accomplish its policy goals, and there is no wiggle room in the language employed in MCL 771.4b(9)(b)(*i*)." *Smith*, ___ Mich App at ___. The Court next noted that "the prosecution [did] not specify how MCL 771.4b(9)(b)(*i*) present[ed] an irreconcilable conflict with another statutory provision." *Smith*, ___ Mich App at ___. "MCL 771.4(2) specifically provides that all probation orders are revocable subject to the requirements of section 4b of this chapter, and continues that revocation of probation, and subsequent incarceration, should be imposed only for repeated technical violations, for new criminal behavior, as otherwise allowed in section 4b of this chapter, or upon request of the probationer." *Id.* at ___ (cleaned up) (concluding that "[b]ecause MCL 771.4b(7)(a) presents no conflict with other provisions of MCL 771.4b, it provides no basis for deviating from the legislative intent expressed by the plain language of MCL 771.4b(9)(b)(*i*)"). Lastly, the Court "reject[ed] the prosecution's argument that the use of 'should' rather than 'shall' within MCL 771.4(2) . . . indicates that probation revocation need not necessarily follow from the bases specified." *Smith*, ___ Mich App at ___.

"However, despite the permissive language, the Legislature continued to incorporate the definitions and restrictions regarding technical violations found in MCL 771.4b. *Smith*, ___ Mich App at ___. Thus, there is no statutory ambiguity allowing construction of MCL 771.4b(9)(b)(*i*) in any way other than recognizing that its plain language renders defendant's violation of the no-contact order a technical one." *Smith*, ___ Mich App at ___. "Because MCL 771.4b(9)(b)(*i*) unambiguously provides that a violation of a no-contact provision in a probation order is nontechnical only when the no-contact order pertains to a named individual," the *Smith* Court held "that it was error for the trial court to conclude that the Legislature intended defendant's violation of the probation order prohibiting contact with a broad class of persons to be 'nontechnical.'" *Id.* at ___.

"In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing." MCR 6.450(A).

Required advice. "The acknowledgment must be in writing and advise the probationer of the following information

> (1) the probationer has a right to contest the alleged technical probation violation at a formal probation violation hearing;
>
> (2) the probationer is entitled to a lawyer's assistance at the probation violation hearing and at all subsequent court proceedings, and that the appointing authority will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one;
>
> (3) the court will not revoke probation or sentence the probationer to incarceration as a result of the acknowledgment, but the court may continue probation, modify the conditions of probation, or extend probation;
>
> (4) if the probationer violates probation again, the court may consider the acknowledgment a prior technical probation violation conviction for the purposes of determining the maximum jail or prison sentence and probation revocation eligibility authorized by law;
>
> (5) acknowledging a technical probation violation may delay the probationer's eligibility for an early discharge from probation."[103] MCR 6.450(A).

[103]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for a discussion of early discharge from probation under MCR 6.441.

See also SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

16.24 Mandatory Probation Revocation Upon Conviction of Felonies and Certain Misdemeanors

The court must revoke probation and impose a sentence of imprisonment if the juvenile is convicted of a felony or a misdemeanor punishable by imprisonment for more than one year. MCL 771.7(1); MCR 6.933(B)(1)(a). However, "[t]he court may not revoke probation and impose sentence under [MCR 6.933(G)(1)] unless at the original sentencing the court gave the advice, as required by MCR 6.931(F)(1), that subsequent conviction of a felony or a misdemeanor punishable by more than one year's imprisonment would result in the revocation of juvenile probation and in the imposition of a sentence of imprisonment." MCR 6.933(G)(1)(b).

"If the court revokes juvenile probation pursuant to [MCR 6.933(G)(1)], the court must receive an updated presentence report and comply with MCR 6.445(G)[104] before it imposes a prison sentence on the juvenile." MCR 6.933(G)(3).

16.25 Other Probation Violations

In automatic waiver proceedings, if the juvenile violates probation in some way other than by committing a felony or a misdemeanor punishable by more than one year's imprisonment, the court may impose sentence or may order any of the following for the juvenile:

- a change of placement;
- restitution;
- community service;
- substance abuse counseling;
- mental health counseling;

[104] MCR 6.445(G) provides, in part, that "[t]he court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B) [governing presentence report disclosure before sentencing] and [MCR 6.425(D)] [governing sentencing procedure]." MCR 6.425(D)(3)(a) requires the court to determine the defendant's ability to pay without manifest hardship before sentencing him or her to incarceration, or revoking probation, for failure to comply with court-ordered financial obligations. MCR 6.425(D)(3)(c) requires the court to consider certain criteria in determining manifest hardship. See Section 19.2 for discussion of MCR 6.425(D)(3).

- participation in a vocational-technical education program;
- incarceration in a county jail, in a room or ward out of sight and sound from adult prisoners for juveniles under the age of 18, for not more than 30 days; and
- other participation or performance as the court considers necessary. MCL 771.7(2); MCR 6.933(G)(2).

16.26 Sentence Following Probation Revocation

In automatic waiver proceedings, a sentence imposed following probation revocation must be "for *a term of years* that does not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation." MCL 771.7(1) (emphasis supplied). MCR 6.933(G)(1)(a) contains substantially similar language.[105]

MCR 6.933(H) states:

> "**(C) Disposition Regarding Specific Underlying Offenses.**
>
> (1) C*ontrolled Substance Violation Punishable by Mandatory Nonparolable Life Sentence For Adults*. A juvenile who was placed on probation and committed to state wardship for . . . [a violation of] MCL 333.7401(2)(a)(*i*)[] may be resentenced only to a term of years following mandatory revocation of probation for commission of a subsequent felony or a misdemeanor punishable by more than one year of imprisonment.
>
> (2) *First-Degree Murder*. A juvenile convicted of first-degree murder who violates juvenile probation by being convicted of a felony or a misdemeanor punishable by more than one year's imprisonment may only be sentenced to a term of years, not to nonparolable life."[106]

[105] In contrast, a sentence imposed following probation revocation in a designated proceeding must be "for *a term* that does not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation." MCL 712A.18i(9); MCR 3.956(B)(1) (emphasis supplied). See Section 15.31.

[106] Life imprisonment is no longer mandatory under MCL 333.7401(2)(a)(*i*). In addition, MCL 769.1(1) now requires a juvenile convicted of first-degree murder in an automatic waiver proceeding to be sentenced as an adult. Thus, a juvenile would not be eligible for juvenile probation as contemplated by MCR 6.933(C)(1). See MCL 750.316; MCL 769.25. Based on these observations, MCR 6.933(H) is of questionable relevance.

Credit for Time Served. If a sentence of imprisonment is imposed upon a juvenile whose probation is revoked, the juvenile must receive credit for the time served on probation. MCL 771.7(1); MCR 6.933(G)(1)(a).

Incarceration for Nonpayment of Court-Ordered Financial Obligations. "A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so." MCR 6.933(J).[107]

[107] See MCR 6.425(D)(3) (governing incarceration for nonpayment in adult criminal and contempt cases) for guidance in determining whether a juvenile or parent has the ability to pay court-ordered financial obligations. See Section 19.2 for discussion of MCR 6.425(D)(3).

Chapter 17: Appointment of Counsel Under the Michigan Indigent Defense Commission Act (MIDCA)

17.1. Introduction 17-2
17.2 MIDCA Requirements 17-3

In this chapter. . .

This chapter discusses the requirements of the Michigan Indigent Defense Commission Act, governing the appointment of defense counsel, which applies to juveniles who are charged with felony offenses in traditional waiver, designated, and automatic waiver proceedings.

For discussion of additional requirements concerning the right to counsel in these proceedings, see Chapter 14 (traditional waiver proceedings), Chapter 15 (designated proceedings), and Chapter 16 (automatic waiver proceedings).

17.1 Introduction[1]

The Michigan Indigent Defense Commission Act (MIDCA), MCL 780.981 *et seq*., creating the Michigan Indigent Defense Commission (MIDC) within the Department of Licensing and Regulatory Affairs (LARA)[2] and establishing a system for the appointment of defense counsel for indigent defendants, applies to juveniles who are charged with felony offenses in traditional waiver,[3] designated,[4] and automatic waiver[5] proceedings. MCL 780.983(a)(*ii*)(A)-(D).

Under the MIDCA, the MIDC is required to "develop[] and oversee[] the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered to all indigent adults[6] in this state consistent with the safeguards of the United States constitution, the state constitution of 1963, and [the MIDCA]." MCL 780.989(1)(a). Although the MIDC is within the executive branch (and not the judicial branch), the MIDCA does not violate Const 1963, art 3 § 2, Const 1963 art 6 § 4, or Const 1963 art 6 § 5 because "any sharing or overlapping of functions required by the [MIDCA] is sufficiently specific and limited that it does not encroach on the constitutional authority of the judiciary." *Oakland Co v State of Michigan*, 325 Mich App 247, 262 (2018). The MIDCA "does not directly regulate trial courts or attorneys." *Id*. Instead, it "regulates 'indigent criminal defense system[s],' statutorily defined as funding units, rather than trial courts themselves." *Id.* at 262-263. In addition, it "repeatedly recognizes the Michigan Supreme Court's constitutional authority to regulate practice and procedure and to exercise general superintending control of Michigan courts." *Id*. at 263. Further, "the [MIDCA] contains no provision authorizing the MIDC to force the judiciary to comply with

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[1] For additional discussion of the MIDCA, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4.

[2] See MCL 780.985(1); MCL 780.983(c).

[3] In traditional waiver proceedings, the requirements of the MIDCA are applicable both "[d]uring consideration of a petition filed under . . . MCL 712A.4[] to waive jurisdiction . . . and upon granting a waiver of jurisdiction." MCL 780.983(a)(ii)(A). See Chapter 14 for discussion of traditional waiver.

[4] The MIDCA applies to all stages of a *prosecutor*-designated case. See MCL 780.983(a)(*ii*)(B). However, the MIDCA applies to *court*-designated cases only "[d]uring consideration of a request by a prosecuting attorney . . . that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult." MCL 780.983(a)(*ii*)(C). It is unclear whether this distinction was intentional or an oversight. See Chapter 15 for discussion of designated cases.

[5] The MIDCA applies to "[a]n individual less than 18 years of age at the time of the commission of a felony" if "[t]he prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under . . . MCL 764.1f." MCL 780.983(a)(*ii*)(D). See Chapter 16 for discussion of automatic waiver.

[6] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*). Note that the MIDCA does not appear to apply to *court*-designated cases after designation. See MCL 780.983(a)(*ii*)(C). It is unclear whether this was intentional or an oversight.

the minimum standards, nor does the [MIDCA] purport to control what happens in court." *Id*. at 264. Accordingly, the MIDCA is not facially unconstitutional. *Id*. at 265.

Similarly, a challenge to the MIDC's minimum standard requirements[7] that they "violate the separation of powers doctrine and are otherwise not authorized by law . . . lack[ed] merit." *Oakland Co*, 325 Mich App at 257, 266. Also, rules and procedures established by the MIDC do not violate the Administrative Procedures Act[8] because they "are merely explanatory and do not contain compulsory provisions." *Id*. at 272.

MCL 780.991(2)(a)-(f) set out requirements for MIDC standards, rules, and procedures concerning defense counsel, including that "[d]efense counsel's workload [be] controlled to permit effective representation," MCL 780.991(2)(b), and that "[t]he same defense counsel continuously represent[] and personally appear[] at every court appearance throughout the pendency of the case," MCL 780.991(2)(d). Additionally, the MIDCA sets out requirements concerning advice of the right to counsel, MCL 780.991(1)(c), and eligibility for appointed counsel, MCL 780.991(3).

MCL 780.989(3) provides, in relevant part:

> "In establishing and overseeing . . . minimum standards, rules, and procedures . . . , the MIDC shall emphasize the importance of indigent criminal defense services provided to juveniles under the age of 17 who are tried in the same manner as adults or who may be sentenced in the same manner as adults[.]"

17.2 MIDCA Requirements

The standards, rules, and procedures established by the MIDC must address the MIDCA requirements discussed in the following subsections.

A. Advice of the Right to Counsel

The trial court must "assure that each criminal defendant is advised of his or her right to counsel." MCL 780.991(1)(c).

B. Screening for Eligibility for Appointed Counsel

MCL 780.991(1)(c) provides, in relevant part:

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[7] See MIDC Minimum Standards.

[8] MCL 24.201 *et seq*.

> "All adults,[9] except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under [the MIDCA], and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." See also MIDC Standard 4; Standard for Determining Indigency and Contribution, Indigency Determination.[10]

1. Preliminary Inquiry

MCL 780.991(3)(a) provides, in relevant part:

> "A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, for purposes of [the MIDCA] must be made as determined by the indigent criminal defense system[11] not later than at the defendant's first appearance in court.[12] The determination may be reviewed by the indigent criminal defense system at any other stage of the proceedings. . . . A trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the [Michigan Supreme Court], consistent with [Const 1963, art 6, § 4].[13] Nothing in [the MIDCA] shall prevent a court from making a determination of indigency

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[9] As used in the MIDCA, "'[a]dult'" includes "[a]n individual less than 18 years of age at the time of the commission of a felony" who is the subject of a traditional waiver, designated, or automatic waiver proceeding. MCL 780.983(a)(*ii*). Note that the MIDCA does not appear to apply to *court*-designated cases after designation. See MCL 780.983(a)(*ii*)(C). It is unclear whether this was intentional or an oversight.

[10] Although the federal Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution. *Oakland Co v State of Michigan*, 325 Mich App 247, 269 (2018).

[11] An *indigent criminal defense system* is "[t]he local unit of government that funds a trial court." MCL 780.983(h)(*i*). Alternatively, "[i]f a trial court is funded by more than 1 local unit of government," an *indigent criminal defense system* is "those local units of government, collectively." MCL 780.983(h)(*ii*).

[12] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

> for any purpose consistent with [Const 1963, art 6]."

See also MIDC Standard 4. "The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge." *Id*. "Representation includes but is not limited to the arraignment on the complaint and warrant."[14] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

2. Relevant Factors in Determining Eligibility for Appointment of Counsel

"In determining whether a defendant is entitled to the appointment of counsel, the indigent criminal defense system shall consider whether the defendant is indigent and the extent of his or her ability to pay." MCL 780.991(3)(a). See also MIDC Standard 4; Standard for Determining Indigency and Contribution, Indigency Determination. A defendant may be either fully or partially indigent.[15] See MCL 780.991(3)(a); MCL 780.991(3)(d)-(e). See Section 17.2(B)(3) for more information on finding a defendant partially indigent.

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[13] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co*, 325 Mich App at 265. See Chapter 17 for more information on the constitutionality of the MIDCA.

[14] The requirement that counsel be appointed at arraignment under MIDC Standard 4 does not conflict with the United States Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269 (although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

[15] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent," which must include "prompt judicial review, under the direction and review of the supreme court[.]" See MCL 780.991(3)(e); Standard for Determining Indigency and Contribution, Judicial Review. The MIDC has set out a minimum standard for determining indigency and contribution "for those local funding units that elect to assume the responsibility of making indigency determinations and for setting the amount that a local funding unit could require a partially indigent defendant to contribute to their defense"; however, "[a] plan that leaves screening decisions to the court can be acceptable." Standard for Determining Indigency and Contribution, Indigency Determination (a).

Trial courts may play a role in determining whether a defendant is entitled to the appointment of counsel. *Id.*[16] Nothing in the MIDCA prevents a *court* from making a determination of indigency for any purpose consistent with Const 1963, art VI, § 4. MCL 780.991(3)(a). See also Standard for Determining Indigency and Contribution, Indigency Determination (a) ("[a] plan that leaves screening decisions to the court can be acceptable").

"A defendant is considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own." See also MCL 780.983(e). Substantial financial hardship is rebuttably presumed under certain circumstances. MCL 780.991(3)(b). See Section 17.2(B)(3).

In determining eligibility for appointed counsel under the MIDCA,MCL 780.991(3)(a) sets out factors the court may consider, which "include, but are not limited to":

- "income or funds from employment or any other source, including personal public assistance, to which the defendant is entitled";
- "property owned by the defendant or in which he or she has an economic interest";
- "outstanding obligations";
- "the number and ages of the defendant's dependents";
- "employment and job training history"; and
- "[the defendant's] level of education." MCL 780.991(3)(a).

3. Determination of Partial Indigence[17]

"A determination that a defendant is partially indigent may only be made if the indigent criminal defense system determines that a defendant is not fully indigent." MCL 780.991(3)(d). The more

[16] This statute recognizes "the authority of the judicial branch with respect to indigency determinations," and "it is sufficiently clear from MCL 780.991(3)(a) that the judiciary has not been deprived of its constitutional authority in this area." *Oakland Co v State of Michigan*, 325 Mich App 247, 265 (2018). See Chapter 17 for more information on the constitutionality of the MIDCA.

[17] The MIDC must "promulgate objective standards for indigent criminal defense systems to determine the amount a partially indigent defendant must contribute to his or her defense. The standards must include availability of prompt judicial review, under the direction and supervision of the Supreme Court[.]" MCL 780.991(f). See also Standard for Determining Indigency and Contribution, Judicial Review.

rigorous screening process set forth in MCL 780.991(3)(c) must be utilized if the indigent criminal defense system determines that a defendant may be partially indigent. MCL 780.991(3)(d). The screening process applies to defendants who do not fall below the presumptive thresholds described in MCL 780.991(3)(b).[18]

"If an indigent criminal defense system determines that a defendant is partially indigent, the indigent criminal defense system shall determine the amount of money the defendant must contribute to his or her defense. An indigent criminal defense system's determination regarding the amount of money a partially indigent defendant must contribute to his or her defense is subject to judicial review." MCL 780.991(3)(a). See also Standard for Determining Indigency and Contribution, Contribution. See Section 17.2(G) for more information on collecting contributions and reimbursements from individuals determined to be partially indigent.

4. Rebuttable Presumption of Substantial Financial Hardship

Substantial financial hardship is rebuttably presumed if the defendant:

- "receives personal public assistance, including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance[;]"
- "resides in public housing[;]"
- "earns an income less than 140% of the federal poverty guideline[;]"
- "is currently serving a sentence in a correctional institution[;]" or
- "is receiving residential treatment in a mental health or substance abuse facility." MCL 780.991(3)(b). See also Standard for Determining Indigency and Contribution, Indigency Determination.

If the defendant does not "fall[] below [these] presumptive thresholds," he or she "must be subjected to a more rigorous screening process to determine if his or her particular circumstances . . . would result in a substantial hardship if he or

[18]See Section 17.2(B)(3) for more information regarding rebuttable presumption of substantial financial hardship and the screening process required in certain circumstances.

she were required to retain private counsel." MCL 780.991(3)(c). Relevant "particular circumstances" include:

- "the seriousness of the charges being faced[;]
- [the defendant's] monthly expenses[;] and
- local private counsel rates[.]" *Id*.

5. Burden of Proof

"A defendant is responsible for applying for indigent defense counsel[19] and for establishing his or her indigency and eligibility for appointed counsel under [the MIDCA]. Any oral or written statements made by the defendant in or for use in the criminal proceeding and material to the issue of his or her indigency must be made under oath or an equivalent affirmation." MCL 780.991(3)(g).

C. Appointment of Counsel

"[C]ounsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services." MCL 780.991(1)(c).

"The indigency determination shall be made and counsel appointed to provide assistance to the defendant as soon as the defendant's liberty is subject to restriction by a magistrate or judge." MIDC Standard 4. "Representation includes but is not limited to the arraignment on the complaint and warrant."[20] *Id*. "All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court." *Id*. However, the defendant is not prohibited "from making an informed waiver of counsel." *Id*.

"The selection of lawyers and the payment for their services shall not be made by the judiciary or employees reporting to the judiciary. Similarly, the selection and approval of, and payment for, other

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[19] Note, however, that MCL 780.991(1)(c) requires the screening of "*[a]ll* adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, . . . for eligibility under [the MIDCA]" (emphasis supplied).

[20] The requirement that counsel be appointed at arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App at 269 (although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

expenses necessary for providing effective assistance of defense counsel shall not be made by the judiciary or employees reporting to the judiciary." MIDC Standard 5(A).[21] "The court's role shall be limited to: informing defendants of right to counsel; making a determination of indigency and entitlement to appointment; if deemed eligible for counsel, referring the defendant to the appropriate agency (absent a valid waiver). Judges are permitted and encouraged to contribute information and advice concerning the delivery of indigent criminal defense services, including their opinions regarding the competence and performance of attorneys providing such services." MIDC Standard 5(B). "Only in rare cases may a judge encourage a specific attorney be assigned to represent a specific defendant because of unique skills and abilities that attorney possesses. In these cases, the judge's input may be received and the system may take this input into account when making an appointment, however the system may not make the appointment solely because of a recommendation from the judge." MIDC Standard 5 (staff comment).

The MIDC's minimum standards, rules, and procedures must generally ensure that "[t]he same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case." MCL 780.991(2)(d).

D. Bond and Right to Counsel

"Where there are case-specific interim bonds set, counsel at arraignment shall be prepared to make a de novo argument regarding an appropriate bond regardless of and, indeed, in the face of, an interim bond set prior to arraignment which has no precedential effect on bond-setting at arraignment." MIDC Standard 4.[22]

E. Review of Determination of Eligibility

The preliminary determination of indigency, including partial indigency, "may be reviewed by the indigent criminal defense system at any other stage of the proceedings." MCL 780.991(3)(a). See also Standard for Determining Indigency and Contribution, Judicial

[21]See the MIDC's *Frequently Asked Questions About Standard 5* for more information. The link to this resource was created using Perma.cc and directs the reader to an archived record of the page.

[22]The requirement that counsel be appointed for arraignment under MIDC Standard 4 does not conflict with the US Constitution, the Michigan Constitution, or the Michigan Court Rules. *Oakland Co*, 325 Mich App 247, 269 (2018) (although the US Constitution does not *require* the appointment of counsel at arraignment, appointment at this juncture is not constitutionally prohibited, and through the MIDCA, the Michigan Legislature has enacted a protection greater than that secured by the United States Constitution). "Absent a state constitutional prohibition, states are free to enact legislative 'protections greater than those secured under the United States Constitution[.]'" *Id*., quoting *People v Harris*, 499 Mich 332, 338 (2016).

Review, for more information on a defendant's right of review and related procedures.

F. Effective Assistance of Counsel

"The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the [effective] assistance of counsel as provided under" the state and federal constitutions. MCL 780.991(2). In establishing these standards, rules, and procedures, the MIDC must adhere to the following principles:

> "(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
>
> (b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation must be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.
>
> (c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
>
> (d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
>
> (e) indigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.
>
> (f) indigent criminal defense systems systematically review defense counsel at the local level for efficiency and for effective representation according to MIDC standards." MCL 780.991(2).

1. No Expansion of Federal or State Constitutional Law

> "Nothing in [the MIDCA] shall be construed to overrule, expand, or extend, either directly or by analogy, any decisions reached by the United States

> [S]upreme [C]ourt or the [Michigan Supreme Court] regarding the effective assistance of counsel." MCL 780.1003(1).

2. Prohibition of Civil Remedy

MCL 780.1003(3)-(4) provide:

> "(3) Except as otherwise provided in [the MIDCA], the failure of an indigent criminal defense system to comply with statutory duties imposed under [the MIDCA] does not create a cause of action against the government or a system.
>
> (4) Statutory duties imposed that create a higher standard than that imposed by the United States constitution or the state constitution of 1963 do not create a cause of action against a local unit of government, an indigent criminal defense system, or this state."

3. Prohibition of Remedy in Criminal Cases

> "Violations of MIDC rules that do not constitute ineffective assistance of counsel under the United States constitution or the state constitution of 1963 do not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance of counsel." MCL 780.1003(5).

G. Collection of Contribution or Reimbursement from Partially Indigent Individuals

> "The court shall collect contribution or reimbursement from individuals determined to be partially indigent[.]" MCL 780.993(17). Reimbursement under MCL 780.993(17) is subject to MCL 775.22, which governs the allocation of funds received by an individual in a criminal case. MCL 780.993(17). One hundred percent of the funds collected by the court under MCL 780.993(17) must be remitted to the indigent criminal defense system in which the court is sitting. *Id*. See also Standard for Determining Indigency and Contribution, Contribution; Standard for Determining Indigency and Contribution, Determination of Reimbursement.

For additional discussion of requirements under the MIDCA, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 4.

Chapter 18: Paying the Costs of Juvenile Proceedings

18.1. County, State, and Federal Sources of Funding 18-2
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In this chapter. . .

This chapter discusses the sources of funds used to pay the costs associated with court proceedings involving juveniles. Specific discussions include:

- County, state, and federal funds;
- Juvenile and parental reimbursement of the costs of care;
- Juvenile and parental reimbursement for appointed attorney fees; and
- Allocation of payments.

18.1 County, State, and Federal Sources of Funding

A. Generally

Except as otherwise provided, expenses incurred in cases under the Juvenile Code are to be paid out of a county's general fund. MCL 712A.25(1).[1] Although MCL 712A.25(1) requires a county to use general fund money to pay for expenses incurred in proceedings under the Juvenile Code, other statutory provisions allow the county, in certain circumstances, to use its Child Care Fund to pay, to be reimbursed by the Department of Health and Human Services (DHHS) for a portion of such expenses, or to share costs, depending upon the placement ordered by the court and other factors. Situations in which the county may use funds other than general funds include:

- Intake, detention, detention alternatives, probation, foster care, diagnostic evaluation and treatment, shelter care, or any other service approved by the office or county juvenile agency, including preventive, diversionary, or protective care services are paid out of a county's Child Care Fund, with reimbursement by the Department of Health and Human Services (DHHS) of 50 percent of eligible expenditures. MCL 400.117a(1)(h); MCL 400.117a(4)(c).[2]

- If a juvenile is referred to the DHHS for placement and supervision under MCL 400.55(h), the costs of care and services are paid out of the county's Child Care Fund, with reimbursement by the DHHS of 50 percent of eligible expenditures. MCL 400.55(h); MCL 400.117a(1)(h).

- If a juvenile is committed to the DHHS under MCL 712A.18(1)(e) (delinquency or designated case proceedings) or MCL 769.1(3) or MCL 769.1(4) (automatic waiver proceedings), the county must reimburse the DHHS for 50 percent of the costs of care and services. MCL 803.305(1).

- If a juvenile and the placement ordered by the court are eligible for federal Aid to Dependent Children—Foster

[1] If a county is a county juvenile agency, it must pay expenses for county juvenile agency services incurred under the Juvenile Code pursuant to MCL 400.117a. MCL 712A.25(2). See Section (C) for more information.

[2] "Beginning October 1, 2021 and ending September 30, 2024, the state shall pay 100% of the cost to provide juvenile justice services when a court exercises jurisdiction over a juvenile who is 17 years of age, but under 18 years of age at the time of the offense. The costs must include all expenditures under [MCL 400.117a(4)(b)] until jurisdiction is terminated, for youth under [MCL 712A.2(a) and MCL 712A.2(d)]. There shall be no change in funding provided for juveniles who are under 17 years of age at the time of the offense." MCL 400.117a(4)(j).

> Care under Title IV-E of the Social Security Act, 42 USC 670 *et seq.*, the county, state, and federal governments may share the costs of care and services, depending upon the placement ordered.

The DHHS must distribute money appropriated by the Legislature to counties for the cost of juvenile justice services as provided in MCL 400.117a(4)(a)-(j). MCL 400.117a(4). Payment for expenditures for children placed with the DHHS for care, supervision, or placement (including children who are within the court's jurisdiction under MCL 712A.2(a) and MCL 712A.2(b)) must be paid by the DHHS for all undisputed charges. MCL 400.117a(4)(a).[3] Payment for expenditures[4] for children not placed with the DHHS for care, supervision, or placement (including children who are within the court's jurisdiction under MCL 712A.2(a) and MCL 712A.2(b)) must be paid by a county and be reimbursed by the DHHS for all undisputed charges. MCL 400.117a(4)(b).

The purposes for which funding under MCL 400.117a must be distributed as provided under MCL 400.117a(4) may be allowed unless otherwise accessible and available by other public assistance programs necessary to achieve the goals and outcomes for in-home care or out-of-home care, and reimbursement must not be made for costs associated with an otherwise eligible child or family, or both, if the reason for the unavailability of public assistance is due to intentional program violations and disqualification of any public assistance. MCL 400.117a(5).

B. County Child Care Fund

The Child Care Fund consists of funds appropriated by a county for "juvenile justice services." MCL 400.117c(1). A "juvenile justice service" is defined as:

> "[A] service, exclusive of judicial functions, provided by a county for juveniles who are within or likely to come within the court's jurisdiction under . . . MCL 712A.2, or within the jurisdiction of the court of general criminal jurisdiction under . . . MCL 600.606, if that court commits the juvenile to a county or court juvenile facility under . . . MCL 764.27a.[5] A service includes

[3] Implementation of MCL 400.117a(4)(a) takes effect on October 1 of the fiscal year following the appropriation to support new payment processes and the implementation of technological changes to the statewide automated child welfare information system. MCL 400.117a(4)(a).

[4] See MCL 400.117a(4)(b)(*i*)-(*iv*) for an inclusive list of *expenditures*.

[5] See Section 3.8 for a discussion of detention of juveniles in court or county juvenile facilities pending arraignment and trial in automatic waiver proceedings.

> intake, detention, detention alternatives, probation, foster care, diagnostic evaluation and treatment, shelter care, or any other service approved by the office or county juvenile agency, as applicable, including preventive, diversionary, or protective care services. A juvenile justice service approved by the office or county juvenile agency must meet all applicable state and local government licensing standards." MCL 400.117a(1)(h).

The Child Care Fund *must* be used to pay the costs of providing foster care for juveniles under the jurisdiction of the Family Division or a court of general criminal jurisdiction. MCL 400.117c(2). The Child Care Fund *may* be used to pay for placement in the Michigan Children's Institute or for maintaining the juvenile as a public ward under the youth rehabilitation services act. MCL 400.117c(3). The Child Care Fund *may* also "be used for programs and practices starting when a complaint, referral, or petition is generated by the local prosecutor, law enforcement, or authorized school personnel for a youth at risk of juvenile court involvement through residential placement and reentry, excluding general prevention services for all youth at risk of juvenile justice system involvement. [DHHS] must align child care fund policies, budget requirements, and oversight practices to support these goals as well as to ensure appropriate use of funding." MCL 400.117a(3).

Except as provided in MCL 400.117a(4)(j),[6] the county amount distributed shall equal 75 percent of the annual expenditures from the county's Child Care Fund "for in-home expenses including community-based supervision, services, and related practices, and per diem rates for the use of respite care and shelter for less than 30 days." MCL 400.117a(4)(c). Except as provided in MCL 400.117a(4)(j), the DHHS must reimburse 50 percent of a county's eligible annual expenditures from a county's Child Care Fund "for residential services of detention and long-term residential placements." *Id*. The reimbursement of annual expenses does not include reimbursement for a county's capital expenditures. *Ottawa Co v Family Independence Agency*, 265 Mich App 496, 498-499 (2005). In *Ottawa Co*, 265 Mich App at 498, eleven Michigan counties filed suit seeking reimbursement from the DHHS for 50 percent of the costs they incurred for capital expenditures that included building, equipping, and improving juvenile detention facilities. The Court of Appeals concluded that reimbursement of a county's expenditure is

[6] "Beginning October 1, 2021 and ending September 30, 2024, the state shall pay 100% of the cost to provide juvenile justice services when a court exercises jurisdiction over a juvenile who is 17 years of age, but under 18 years of age at the time of the offense. The costs must include all expenditures under [MCL 400.117a(4)(b)] until jurisdiction is terminated, for youth under [MCL 712A.2(a) and MCL 712A.2(d)]. There shall be no change in funding provided for juveniles who are under 17 years of age at the time of the offense." MCL 400.117a(4)(j).

conditional. *Id.* at 500. The DHHS "is obligated to establish standards for reimbursing the funds and may withhold reimbursement if certain expenditures violate its rules." *Id.* at 501. MCL 400.117a(12)[7] limits the DHHS's ability to reimburse a county by requiring reimbursements "based on care given to a specific, individual child." *Ottawa Co,* 265 Mich App at 501.[8] Relevant administrative rules and policies allow reimbursement of expenses necessary to provide direct services to children but severely limit reimbursement of capital expenditures because such expenditures are not attributable to the care of individual children. *Id.* at 502-503. The Court of Appeals also concluded that the DHHS's failure to reimburse the counties for their capital expenditures did not violate the Headlee Amendment, Const 1963, art 9, §29. *Ottawa Co,* 265 Mich App at 503.

The Child Care Fund is used only by counties that are not county juvenile agencies.[9] See MCL 400.117c(8).

The Child Care Fund *must* be used by the county to do all of the following:

> "(a) Adopt a validated risk screening tool to guide diversion and consent calendar decisions.
>
> (b) Adopt a validated risk assessment tool to use before disposition.
>
> (c) Adopt a detention screening tool to inform the use of secure detention.
>
> (d) Utilize research-based juvenile-specific probation standards as developed and approved by the state court administrative office.
>
> (e) Employ a local quality assurance specialist to support the county with implementing research-based practices, excluding counties or tribes receiving the basic grant as described in [MCL 400.117e]." MCL 400.117a(13).

The Child Care Fund *may* also be used to "utilize juvenile client management software to allow for statewide juvenile justice data aggregation, analysis, and reporting." MCL 400.117a(14). DHHS is required to promulgate rules, policies, and practices to implement the requirements of MCL 400.117a(13) and to oversee counties' and

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[7] Formerly MCL 400.117a(8). See 2018 PA 22, effective May 15, 2018.

[8] Formerly MCL 400.117a(12) at the time *Ottawa Co* was decided. See 2019 PA 114, effective October 1, 2021.

[9] "County juvenile agency" is defined in MCL 45.622. See MCL 400.117a(1)(a); see also Section 18.1(C).

tribes' compliance with these requirements. MCL 400.117a(15). DHHS, in consultation with the state court administrative office, must establish performance measures for evaluating county adherence to the requirements in MCL 400.117a(13). MCL 400.117a(16). Beginning October 1, 2025, DHHS "must prepare and submit an annual report to the legislature on yearly child care fund juvenile justice expenditures and related performance measures. *Id*.

C. County Juvenile Agency

Effective January 12, 1999, pursuant to 1998 PA 518, the Legislature enacted the County Juvenile Agency Act, MCL 45.621 *et seq*. Under this act and other applicable statutes, a juvenile may be committed to a "county juvenile agency" rather than to state wardship.[10] See MCL 45.627; MCL 769.1(3); MCL 803.301 *et seq*. However, because the act applies only to a county that was eligible for transfer of federal Title IV-E funds under a 1997 waiver, MCL 45.626, the act applies only to Wayne County. See House Legislative Analysis, SB 1185, December 9, 1998. Therefore, this subsection pertains only to Wayne County. However, Wayne County is not currently operating as a county juvenile agency. The information contained in this subsection has been included in the event that Wayne County begins to operate as a county juvenile agency in the future.

Wayne County must pay expenses for county juvenile agency services incurred in carrying out provisions of the Juvenile Code using the county's block grant and other funds made available for that purpose. MCL 712A.25(2); MCL 400.117a(4)(d). To receive block grant funds, the DHHS must distribute appropriated money to Wayne County in equal quarterly installments in the amount of the county's block grant as determined by MCL 400.117g. MCL 400.117a(4)(d). Wayne County is "not obligated under [MCL 712A.25(1)] to pay for juvenile justice services other than county juvenile agency services as required by . . . [MCL 400.117a]." MCL 712A.25(2). The DHHS is responsible for the costs of all juvenile justice services other than county juvenile agency services. MCL 400.117a(9).

"County juvenile agency services" are defined as:

> "all juvenile justice services for a juvenile who is within the court's jurisdiction under . . . [MCL 712A.]2(a) or [MCL 712A.2](d) . . . , or within the jurisdiction of the court of general jurisdiction under . . . MCL 600.606, if that court commits the juvenile to a county or court

[10] Additionally, effective January 12, 1999, 1998 PA 517 amended applicable provisions of the Youth Rehabilitation Services Act, MCL 803.301 *et seq*., to refer to "public" wardship rather than to "state" wardship. See, e.g., MCL 803.302(c); see also Section 16.10.

> juvenile facility under . . . MCL 764.27a[11]. If a juvenile who comes within the court's jurisdiction under . . . [MCL 712A.]2(a) or [MCL 712A.2](d) . . . is at that time subject to a court order in connection with a proceeding for which the court acquired jurisdiction under [MCL 712A.]2(b) or [MCL 712A.2](c) [(child abuse or neglect proceedings and waiver of court jurisdiction in divorce proceedings)], juvenile justice services provided to the juvenile before the court enters an order in the subsequent proceeding are not county juvenile agency services, except for juvenile justice services related to detention." MCL 400.117a(1)(b).

D. Transfer of Case to Juvenile's County of Residence

In juvenile delinquency proceedings, a case may be transferred from a county where the juvenile is brought before the court to the county in which he or she resides.[12] MCL 712A.2(d). See also MCR 3.926(B). When a disposition is ordered by a court other than the court in the county where the juvenile resides, the court ordering disposition is responsible for any costs incurred in connection with the order unless:

- the court in the county where the juvenile resides agrees to pay such dispositional costs, or
- the juvenile is made a public ward and the county of residence withholds consent to a transfer of the case. MCR 3.926(C).

MCR 3.926(C) applies to delinquency cases and to certain designated case proceedings in which the court decides to impose a juvenile disposition. MCR 3.901(B)(1); MCR 3.926(G). MCR 3.907 applies to delinquency proceedings and designated proceedings. MCR 3.901(B)(2).

If the juvenile is a public ward, the juvenile's county of residence "is liable to the state, rather than the county from which the youth was committed, if the . . . family division of circuit court of the county of residence withheld consent to a transfer of proceedings under . . . MCL 712A.2, as determined by the [DHHS]." MCL 803.305(1).

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[11] See Section 3.8 for a discussion of detention of juveniles in court or county juvenile facilities pending arraignment and trial in automatic waiver proceedings.

[12] See Section 2.14(C) for discussion of transfer to a juvenile's county of residence.

E. Federal Aid to Dependent Children in Foster Care

Michigan uses Title IV-E funds to pay for out-of-home placements for some juveniles who have been adjudicated delinquent. This source of funds may be used for court or public wards who meet eligibility requirements and are in eligible placements. Title IV-E of the Social Security Act, 42 USC 670 *et seq*., sets out requirements for distributing federal funds to states' child protection and foster care systems. For more information on this topic, see http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=29. See also the DHHS's Children's Foster Care Manual (FOM), FOM 902 *Funding Determinations and Title IV-E Eligibility*.

18.2 Costs Assessed Against Juvenile[13]

"[A] court cannot impose penalties or costs in a criminal case unless specifically authorized by statute." *In re Killich*, 319 Mich App 331, 336 (2017) (citing *People v Cunningham*, 496 Mich 145, 149-151 (2014), and additionally noting that although "delinquency proceedings under the Juvenile Code are not criminal cases[,] . . . when addressing a question implicating the Juvenile Code," a court may "look[] to the adult criminal code and cases that interpret it so long as they are not in conflict or duplicative of a Juvenile Code provision[]").

The court shall not order the juvenile or the juvenile's parent, guardian, or legal custodian to pay fines associated with a violation of a municipal ordinance or a state or federal law if another disposition under [MCL 712A.18] has been ordered." MCL 712A.18(1)(j). However, if the court finds that a juvenile comes under MCL 712A.30, it must "order the juvenile or the juvenile's parent to pay restitution as provided in" MCL 712A.30, MCL 712A.31, MCL 780.794, and MCL 780.795. MCL 712A.18(5).

MCL 780.905, governing the crime victim's rights assessment, provides, in relevant part:

> "(1) The court shall order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment as follows:
>
> (a) If the offense is a felony, $130.00.

[13] For information on ordering costs as part of sentencing in criminal cases, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 8.

> (b) If the offense is a misdemeanor or ordinance violation, $75.00.
>
> (2) The court shall order a defendant to pay only 1 assessment under [MCL 780.905(1)] per criminal case. . . .
>
> (3) The court shall order each juvenile for whom the court enters an order of disposition for a juvenile offense to pay an assessment of $25.00. The court shall order a juvenile to pay only 1 assessment under this subsection per case.
>
> (4) Except as otherwise provided under [the Crime Victims Rights Services Act], an assessment under [MCL 780.905] shall be used to pay for crime victim's rights services."

"Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown." MCR 1.110.

A court may order a juvenile within its jurisdiction to engage in community service, but "[t]he court shall not order the juvenile or the juvenile's parent, guardian, or legal custodian to pay for fees or costs associated with community service." MCL 712A.18(1)(i). In addition, "[t]he court shall not order the juvenile or the juvenile's parent, guardian, or legal custodian to pay for the costs of care, services, court-appointed attorney representation, or other costs or assessments related to the juvenile's court proceeding." MCL 712A.18(3).

An order directed to a juvenile's parent or anyone other than the juvenile is not effective and binding on that person unless the individual has been served a copy of the order as provided in MCL 712A.13 and given an opportunity for a hearing on the matter by summons or notice as provided in MCL 712A.12 or MCL 712A.13. MCL 712A.18(4).

An order directed to anyone other than the juvenile is not binding on that person unless he or she has been served a copy of the order and given an opportunity for a hearing on the matter. MCL 769.1(8). Service of the order must be either by personal service or first-class mail to the person's last-known address. *Id*.

The juvenile must not be placed outside of his or her home solely based on nonpayment of restitution or inability to perform community services. MCL 712A.18(7).

Money collected for juveniles placed in or committed to the DHHS or a county juvenile agency must be reported on an individual juvenile basis. MCL 712A.18(2).

In designated proceedings, if the court imposes a sentence of probation in the same manner as probation could be imposed upon an adult, or enters an order of disposition delaying imposition of sentence and places a juvenile on probation, the probation supervision and related services must not be performed by employees of the Department of Corrections. MCL 712A.9a[14]; MCL 712A.18(1)(o).

18.3 Methods of Paying For Costs of Care

A. Governmental Benefits

MCL 712A.18(1)(e) states in relevant part:

> "Except for commitment to the [Department of Health and Human Services (DHHS)] or a county juvenile agency, in an order of commitment under this subdivision to a state institution or agency described in . . . [the Youth Rehabilitation Services Act,] MCL 803.301 [*et seq.*] . . . , the court shall name the superintendent of the institution where the juvenile is committed as a special guardian to receive benefits due the juvenile from the government of the United States. An order of commitment under this subdivision to the [DHHS] or a county juvenile agency must name that agency as a special guardian to receive those benefits. The benefits received by the special guardian must be used to the extent necessary to pay for the portions of the cost of care in the institution or facility that the parent or parents are found unable to pay."

B. Bail Money

In delinquency cases, if conditions of bail have been met and the court imposes restitution as part of a juvenile's disposition, MCR 3.935(F)(4)(a) requires the application of bail money paid by a parent to be applied to the amount of ordered restitution and any balance returned.

C. Wage Assignments

If a parent or other adult legally responsible for the care of a juvenile fails or refuses to obey a reimbursement order under MCL 712A.18, and has been found guilty of contempt of court for such failure or

[14]Cites MCL 712A.18(1)(p), rather than MCL 712A.18(1)(o).

refusal, the court ordering reimbursement may order a wage assignment against that individual,[15] which must continue until the support is paid in full.[16] MCL 712A.18b. A wage assignment is effective one week after an employer is served a true copy of the order by personal service or by registered or certified mail. *Id.*

Upon receiving notice of a wage assignment, an employer must withhold the employee's earnings in the amount specified in the order of assignment until notified by the court that the obligation is paid in full.[17] MCL 712A.18b. An employer must not use the wage assignment as a basis for the discharging an employee or for any other disciplinary action against an employee. *Id.* "Compliance by an employer with the order of assignment operates as a discharge of the employer's liability to the employee as to that portion of the employee's earnings so affected." *Id.*

18.4 Orders for Reimbursement of Attorney Fees

"The court shall not order a juvenile or a juvenile's parent, guardian, or legal custodian to pay for the costs of care, services, court-appointed attorney representation, or other costs or assessments related to the juvenile's court proceeding." MCL 712A.18(3).

"An order directed to a person responsible for the juvenile's support under [MCL 769.1] is not binding on the person unless an opportunity for a hearing has been given and until a copy of the order is served on the person, personally or by first-class mail to the person's last known address." MCL 769.1(8).

Criminal defendants do not have a constitutional right to an ability-to-pay assessment before the court imposes a fee for a court-appointed attorney. *People v Jackson*, 483 Mich 271, 290 (2009), overruling *People v Dunbar*, 264 Mich App 240 (2004), to the extent it held otherwise. However, before a trial court attempts to enforce the imposition of a court-appointed attorney fee, it must provide notice to the defendant and give the defendant an opportunity to challenge the enforcement on the basis of indigency. *Jackson*, 483 Mich at 292. In conducting the ability-to-pay assessment, "[t]he operative question . . . will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*." *Id.* at 293.

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[15] See SCAO Form JC 39, *Order for Assignment of Wages*.

[16] SCAO guidelines for court-ordered reimbursement can be found at https://www.courts.michigan.gov/4a548b/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/cor.pdf.

[17] See SCAO Form JC 58, *Order Cancelling Wage Assignment*.

]MCL 769.1k(1)(b)(*iv*) provides, in relevant part, "[i]f a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, at the time of sentencing, the court may impose the expenses of providing legal assistance to the defendant." *People v Moore*, ___ Mich App ___, ___ (2025) (cleaned up). Const 1963, art 8, § 9, provides in part that "[a]ll fines assessed and collected in the several counties, townships and cities for any breach of the penal laws shall be exclusively applied to the support of such public libraries, and county law libraries as provided by law." *Moore*, ___ Mich App at ___ (quotation marks, citation, and emphasis omitted). In this case, as part of a sentence for felonious assault and felony-firearm convictions, "the trial court ordered defendant to pay $400 in attorney fees, among other fees and costs." *Id*. at ___. Defendant "argued that her sentence was invalid because MCL 769.1k(1)(b)(*iv*) imposed an unlawful fine in violation of Const 1963, art 8, § 9, and because the trial court failed to make the required factual findings before imposing attorney fees." *Moore*, ___ Mich App at ___. However, "[b]ecause the plain language of MCL 769.1k(1)(b)(*iv*) evidences the Legislature did not intend for it to be a fine and the attorney fees imposed directly relate to the actual cost of providing defendant with legal assistance, defendant fail[ed] to establish that MCL 769.1k(1)(b)(iv) constitutes a punitive fine subject to Const 1963, art 8, § 9." *Moore*, ___ Mich App at ___. Thus, "MCL 769.1k(1)(b)(*iv*) is not facially unconstitutional." *Moore*, ___ Mich App at ___.

Additionally, in *Moore*, defendant "argue[d] that the trial court failed to make required factual findings on the record before imposing attorney fees, including (1) the cost of providing legal assistance to defendant, (2) whether that cost was satisfied by the [Michigan Indigent Defense Counsel Act (MIDCA)], and (3) the effect of defendant's indigency on her ability to pay fees." *Id*. at ___. "A trial court 'must establish the cost of providing legal services to the specific defendant at issue when assessing attorney fees under MCL 769.1k(1)(b)(*iv*).'" *Moore*, ___ Mich App at ___, quoting *People v Lewis*, 503 Mich 162, 167 (2018). Here the trial court's findings were sufficient "because the trial court acknowledged the amount of work the case required and estimated that the cost of providing legal services to defendant was substantially more than the predetermined fee it imposed." *Moore*, ___ Mich App at ___. Further, "defendant did not claim indigency at sentencing and offers no evidence to establish that she was or should have been determined to be partially or totally indigent." *Id*. at ___. Therefore, "the trial court was not required to address whether defendant's attorney fees were satisfied by the MIDCA when it imposed them under MCL 769.1k(1)(b)(*iv*)." *Moore*, ___ Mich App at ___. Finally, "the trial court was not required to make findings regarding defendant's ability to pay when it imposed the $400 attorney fees because there is no constitutionally required ability-to-pay analysis until the fee is actually enforced." *Id*. at ___ (quotation marks and citation omitted). In sum, "the trial court did not abuse its discretion

in denying defendant's motion to correct an invalid sentence because the factual findings were sufficient on the record, and the trial court was not required to consider whether defendant's attorney fees were satisfied by the MIDCA or analyze defendant's ability to pay when imposing attorney fees." *Id*. at ___.

18.5 Allocation of Fines, Costs, Assessments, and Other Payments

Under MCL 712A.29(1), if a child is subject to restitution or payments arising out of the same order of disposition, money collected from a child or the child's parent(s) for the payment of restitution or other payments must be allocated as follows:

> "If a child is subject to payment of crime victim payments[18] or other payments, 100% of the money collected from that child, or the child's parent or parents, must first be applied to the payment of restitution to a victim or victim's estate before the balance can be applied to assessments to the crime victim rights fund." MCL 712A.29(2).

"The court shall not order a juvenile within the court's jurisdiction under [MCL 712A.2(a)(1)] or [MCL 712A.2(f)] or the juvenile's parent, guardian, or legal custodian to reimburse the court for any fine, fees, or costs related to the juvenile's court case." MCL 712A.29a(1). "Beginning October 1, 2024, the court shall not collect the balance of any court-ordered fines, fees, or costs previously assessed to a juvenile under [MCL 712A.29], or former [MCL 712A.18m], and only the portion of any court order that imposed those fines, fees, or costs is vacated and unenforceable." MCL 712A.29a(2).

[18] "As used in [MCL 712A.29], '*crime victim payment*' means restitution ordered under [MCL 780.751 to MCL 780.834], paid to the victim or the victim's estate, but not to a person who reimbursed the victim for his or her loss. *Crime victim payment* also includes assessments to the crime victim rights fund ordered under [MCL 780.905]." MCL 712A.29(3) (emphasis added).

Chapter 19: Selected Issues Regarding Imposition of Adult Sentence

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In this chapter. . .

This chapter discusses selected issues regarding imposition of adult sentences upon juveniles in traditional waiver, automatic waiver, and designated proceedings. It does not contain discussion of the procedural or substantive requirements for criminal sentences. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for a thorough discussion of adult sentencing procedures and issues, including sentencing hearing requirements under MCR 6.425 and application of the legislative sentencing guidelines.

Related issues are discussed in the following portions of this benchbook:

- Pretrial custody and detention of juveniles, Chapter 3;
- Sentencing in traditional waiver proceedings, Section 19.4(C)(4)(a);
- Sentencing and dispositional options, case review, and probation revocation in designated proceedings, Chapter 15, Parts D, E, and F;

- Sentencing options, case review, and probation revocation in automatic waiver proceedings, Chapter 16, Parts C, D, and E;
- Appeals, Chapter 20; and
- Fingerprinting and recordkeeping requirements, Chapter 21.

19.1 Applicable Court Rules and Statutes[1]

MCR 6.425, which contains the applicable procedural rules for criminal sentencing hearings, governs sentencing hearings in traditional waiver proceedings, as well as in designated and automatic waiver proceedings in which the court has decided to sentence the juvenile in the same manner as an adult. See MCR 3.950(E)(2); MCR 3.955(C); MCR 6.901(A); MCR 6.931(A).

Additionally, MCR 6.445(G) governs the imposition of sentence following probation revocation in traditional waiver proceedings, as well as in automatic waiver proceedings in which the juvenile has violated probation by being convicted of a felony or a misdemeanor punishable by more than one year's imprisonment. See MCR 3.950(E)(2); MCR 6.933(G)(1)(a); MCR 6.933(G)(3).[2]

The legislative sentencing guidelines, MCL 777.1 *et seq*., are applicable to juveniles who are sentenced in the same manner as adults for felony offenses enumerated in MCL 777.11 to MCL 777.19 that were committed on or after January 1, 1999. MCL 769.34(2); see also MCR 6.425(C). The minimum sentence imposed "may be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed." MCL 769.34(2).

Effective March 4, 2014, 2014 PA 22 added MCL 769.25 and MCL 769.25a to Chapter IX of the Code of Criminal Procedure in order to achieve compliance with *Miller v Alabama*, 567 US 460 (2012),[3] by establishing sentencing and resentencing procedures applicable to certain offenders under the age of 18 who are convicted of certain offenses carrying mandatory life-without-parole sentences. Also effective March 4, 2014,

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[1] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, for a thorough discussion of adult sentencing procedures and issues, including sentencing hearing requirements under MCR 6.425 and application of the legislative sentencing guidelines.

[2] See Chapter 16, Part E, for discussion of probation revocation in automatic waiver proceedings.

[3] In *Miller*, 567 US at 465, 489, the United States Supreme Court held that a homicide offender under the age of 18 may be sentenced to life imprisonment without the possibility of parole only if a judge or jury first has the opportunity to consider mitigating circumstances.

2014 PA 23 amended several provisions of the Michigan Penal Code governing offenses that are subject to the mandatory imposition of life-without-parole sentences to provide exceptions to these mandatory sentences as set out in MCL 769.25 and MCL 769.25a (see, e.g., MCL 750.316). See Section 19.3(C)(3) for discussion of the procedures that must be followed, in cases in which MCL 769.25 or MCL 769.25a apply, before a juvenile may be sentenced or resentenced to nonparolable life imprisonment.

Further, the Court reasoned that "no meaningful neurological bright line exists between age 17 and age 18," and "to treat those two classes of defendants differently in [Michigan's] sentencing scheme is disproportionate to the point of being cruel under [Michigan's] Constitution." *People v Parks*, 510 Mich 225, 266 (2022) (quotation marks and citation omitted). The *Parks* Court considered an 18-year-old defendant convicted of first-degree murder, and did not discuss the mandatory imposition of life without parole sentences for 18-year-old defendants convicted of other offenses. *Id.* at 268 (concluding that "mandatorily subjecting 18-year-old defendants convicted of first-degree murder to a sentence of life without parole violates the principle of proportionality derived from the Michigan Constitution, . . .and thus constitutes unconstitutionally cruel punishment under Const 1963, art 1, § 16"). Accordingly, "the Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like other older adults." *Parks*, 510 Mich at 244. The Court of Appeals concluded that the holding in *Parks* was substantive, not procedural, and applied its holding to order resentencing for a defendant who sought relief on collateral review. *People v Poole*, ___ Mich App ___, ___ (2024), aff'd ___ Mich ___ (2024) (defendant was an 18-year-old in 2001 when he committed the acts that resulted in a conviction of first-degree murder and a sentence of life without the possibility of parole).

Extending the holding in *People v Parks*, 510 Mich 225, 268 (2022), the Michigan Supreme Court held that "as applied to defendants who were 19 or 20 years old at the time of their crime, a *mandatory* LWOP sentence that does not allow for consideration of the mitigating factors of youth or the potential for rehabilitation is a grossly disproportionate punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023). In *Taylor*, one defendant was 19 years old at the time of his offense, and the other defendant (in a separate and unrelated case) was 20 years old when he committed his offense. *Taylor*, ___ Mich at ___. "Each defendant was sentenced to a legislatively mandated punishment of life in prison without the possibility of parole (LWOP)." *Id.* at ___. "Defendants argue[d] that the mandatory nature of their sentences

violate[d] Michigan's prohibition against 'cruel or unusual punishment' . . . ." *Taylor*, ___ Mich at ___. See Const 1963, art 1, § 16. "Determining what constitutes cruel or unusual punishment is guided by evolving standards of decency that mark the progress of a maturing society." *Id*. at ___ (quotation marks and citation omitted). "Inherent in this standard is the understanding that as society progresses, punishments that were once acceptable can later be considered cruel or unusual." *Taylor*, ___ Mich at ___. Additionally, "to evaluate the proportionality of a punishment under Michigan's Cruel or Unusual Punishment Clause, courts must consider: (1) the severity of the punishment relative to the gravity of the offense, (2) punishments imposed in the same jurisdiction for other offenses, (3) punishments imposed in other jurisdictions for the same offense, and (4) Michigan's traditional goal of and preference for rehabilitation." *Id*. at ___ (citations omitted).

Applying the standards from *People v Lorentzen*, 387 Mich 167, 176-181 (1972), and *People v Bullock*, 440 Mich 15, 33-34 (1992), the *Taylor* Court found that "[l]ate adolescents who are 19 or 20 years old, as a class, share with 18-year-olds the same mitigating characteristics of late-adolescent brain development." *Taylor*, ___ Mich at ___. As such, "[t]he same considerations that were discussed at length in *Parks* apply equally to this class of late adolescents." *Taylor*, ___ Mich at ___. "Mandatorily condemning such offenders to die in prison, without first considering the attributes of youth that late adolescents and juveniles share, no longer comports with the 'evolving standards of decency that mark the progress of a maturing society.'" *Id*. at ___, quoting *Lorentzen*, 387 Mich at 179. *Taylor*, ___ Mich at ___ (further holding that "[t]his decision also applies retroactively to all relevant criminal cases on collateral review"). However, imposition of a life without the possibility of parole sentence following a first-degree premeditated murder conviction does not violate the Michigan Constitution where the defendant was 21 years old at the time he committed the crime. *People v Adamowicz (On Second Remand)*, 346 Mich App 213, 219 (2023) (noting its holding is based on binding Michigan Supreme Court precedent and an examination of the factors set forth in *Parks*).[4]

Retroactive application of *People v Parks*, ___ Mich ___ (2025). The Michigan Supreme Court held that *Parks* is retroactive "to cases where the period for direct review had expired when *Parks* was decided." *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024). Previously, *Miller v Alabama*, 567 US 460 (2012), "held that mandatory life without parole for a juvenile convicted of a homicide offense constitutes cruel and unusual punishment as prohibited by the Eighth Amendment." *Poole*, ___ Mich at ___. In *Parks*, the Michigan Supreme

[4] *Adamowicz (On Second Remand)* was decided before *Taylor*.

Court "held that federal precedent concerning the Eighth Amendment's prohibition against 'cruel and unusual punishments' did not support extending *Miller*'s protections to 18-year-olds," but "that our state Constitution's broader prohibition against 'cruel or unusual punishment' under Const 1963, art 1, § 16 did support such an extension." *Poole*, ___ Mich at ___. Whether *Parks* would have retrospective or prospective application required an initial determination of whether "the *Parks* holding was merely procedural, or whether it concerned substantive rights of a fundamental nature." *Id*. at ___. "[S]ubstantive rules should normally be given retroactive application." *Id*. at ___. Also relevant to determining whether a decision should be applied retroactively or prospectively are the *Linkletter-Hampton* factors: "'(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.'" *Poole*, ___ Mich at ___, quoting *People v Hampton*, 384 Mich 669, 674 (1971) (utilizing the standard set in *Linkletter v Walker*, 381 US 618 (1965)). However, "[t]he importance of the *Linkletter-Hampton* factors is greatly circumscribed when substantive rules or rights are implicated in a holding, and retrospective application is favored." *Poole*, ___ Mich at ___. Only when the *Linkletter-Hampton* factors "strongly indicate otherwise" will a substantive rule be limited to prospective application. *Id*. at ___. Because *Parks* involved a substantive rule, it should be given retroactive application and its application to the defendant in *Poole* required that the defendant be resentenced according to MCL 769.25. *Poole*, ___ Mich at ___ (confirming retroactivity with *Linkletter-Hampton* factors and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

The court must advise the juvenile as provided in MCR 6.425(F) after a decision at a juvenile sentencing hearing. MCR 6.931(E)(6). "Requests for and appointment of appellate counsel are subject to the procedures in MCR 6.425(G)." MCR 6.931(E)(6).

19.2 Incarceration for Failure to Pay Court-Ordered Financial Obligations: Determination of Ability to Pay

Before incarcerating a defendant for failure to pay a court-ordered financial obligation, the court must determine the defendant's ability to pay without manifest hardship. MCR 6.425(D)(3) provides:

> "(3) Incarceration for Nonpayment.
>
> > (a)The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court finds, on the record, that the defendant is able to comply with the order without manifest hardship and that the

> defendant has not made a good-faith effort to comply with the order.
>
> (b)Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or all of the amount of money owed to the extent permitted by law.
>
> (c)Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:
>
> > (*i*)Defendant's employment status and history.
> >
> > (*ii*)Defendant's employability and earning ability.
> >
> > (*iii*)The willfulness of the defendant's failure to pay.
> >
> > (*iv*)Defendant's financial resources.
> >
> > (*v*)Defendant's basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.
> >
> > (*vi*) Any other special circumstances that may have bearing on the defendant's ability to pay."

The court must comply with the provisions of MCR 6.425(D)(3) before revoking probation or sentencing a probationer to prison or jail for failure to pay a court-ordered financial obligation. See MCR 6.425(D)(3)(a); MCR 6.445(G). Under MCL 780.766(11) and MCL 769.1a(11), "the defendant's ability to pay *is* considered when deciding whether a defendant's probation or parole should be revoked because of a failure to pay." *People v Neilly*, ___ Mich ___, ___ (2024) (holding that the trial court did not violate "federal and state prohibitions on ex post facto laws when, during defendant's resentencing proceedings, it ordered defendant to pay restitution pursuant to the current restitution statutes rather than the statutes in effect at the time of defendant's crimes" because "restitution is a civil remedy and not punishment"). "The restitution statutes also allow a defendant to repay restitution in the form of services, if the victim consents, providing the defendant greater flexibility in resolving the restitution order." *Id*. at ___, citing MCL 780.766(6) and MCL 769.1a(6). "The statutes also allow the defendant to petition the trial court to modify the method of payment in cases of undue hardship." *Neilly*, ___ Mich at ___, citing MCL 780.766(12) and MCL 769.1a(12).

A court must also comply with MCR 6.425(D)(3) before sentencing a person to a term of incarceration for nonpayment in a proceeding under MCR 3.606 for contempt of court. MCR 3.606(F).[5]

19.3 Required Credit for Time Spent in Custody Prior to Sentencing

A. Designated Proceedings

1. Sentence of Imprisonment Following Conviction

"If the court imposes a sentence of imprisonment [following conviction in a designated proceeding], the juvenile shall receive credit against the sentence for time served before sentencing." MCL 712A.18(1)(o).

2. Sentence of Imprisonment Following Review Hearing or Probation Revocation

In designated proceedings where the court enters a delayed sentence of imprisonment following conviction, the juvenile is entitled to credit for the time served on probation if the court later imposes a sentence of imprisonment following either a review hearing or a violation of probation. MCL 712A.18i(11); MCR 3.956(A)(5); MCR 3.956(B)(4).

"A juvenile does not satisfy the condition of 'time served on probation' for purposes of jail credit during the period of time when that juvenile willfully absconded from probation." *In re Halliburton*, ___ Mich App ___, ___ (2022). "'[T]ime served on probation' means actually serving the sentence of probation, including complying with the requirements of where that probation must be served." *Id*. at ___. "To serve a particular period of probation, a juvenile must not just be on probation, but must also go through, work through, i.e., complete, that particular period of probation." *Id*. at ___ (holding that respondent was entitled to credit for "time served on probation" while he was placed in a residential treatment center and when he was on a tether because he "was successfully going through and completing those specific periods of probation"). Thus, "when a juvenile willfully absconds from probation, the

[5] Similarly, in probation violation or contempt of court proceedings, a juvenile may not be detained or incarcerated solely for nonpayment of restitution. See MCR 3.928(D); MCR 3.944(F); MCR 3.956(C); MCR 6.933(J). "If the juvenile has the resources to pay and has not made a good-faith effort to pay restitution, the court may revoke or alter the terms and conditions of probation as provided in MCL 712A.30." MCR 3.944(F).

probation period is effectively tolled, and during that time of willful absconsion, the juvenile is not serving the probation and has earned no credit for 'time served' under the applicable statutes and court rules." *Id*. at ___.

B. Automatic Waiver Proceedings

1. Sentence of Imprisonment Following Review Hearing

If a juvenile is placed on probation and committed to state wardship following conviction in an automatic waiver proceeding, the juvenile is entitled to credit for the time served on probation and committed if a sentence of imprisonment is imposed following a review hearing. MCL 769.1b(7); MCR 6.938(E).

"A juvenile does not satisfy the condition of 'time served on probation' for purposes of jail credit during the period of time when that juvenile willfully absconded from probation." *In re Halliburton*, ___ Mich App ___, ___ (2022). "'[T]ime served on probation' means actually serving the sentence of probation, including complying with the requirements of where that probation must be served." *Id*. at ___. "To serve a particular period of probation, a juvenile must not just be on probation, but must also go through, work through, i.e., complete, that particular period of probation." *Id*. at ___ (holding that respondent was entitled to credit for "time served on probation" while he was placed in a residential treatment center and when he was on a tether because he "was successfully going through and completing those specific periods of probation"). Thus, "when a juvenile willfully absconds from probation, the probation period is effectively tolled, and during that time of willful absconsion, the juvenile is not serving the probation and has earned no credit for 'time served' under the applicable statutes and court rules." *Id*. at ___.

2. Sentence of Imprisonment Following Probation Revocation

If a juvenile is placed on probation and committed to state wardship following conviction in an automatic waiver proceeding, the juvenile is entitled to credit for the time served on probation if a sentence of imprisonment is imposed following probation revocation. MCL 771.7(1); MCR 6.933(G)(1)(a); MCR 6.933(G)(3); MCR 6.445(G).

C. Sentencing Credit Applicable to All Juvenile Criminal Defendants

A criminal defendant must be granted sentencing credit for:

- time spent in custody during competency evaluations and treatment, where sentence is imposed "in the pending criminal case or in any other case arising from the same transaction[,]" MCL 330.2042;
- time spent in a juvenile facility prior to sentencing "because of being denied or being unable to furnish bond for the offense of which he or she is convicted," MCL 764.27a(5);
- time spent in jail or prison on a void sentence that is set aside, where a new sentence is imposed for a conviction "based upon facts arising out of the earlier void conviction," MCL 769.11a; and
- time spent in jail "because of being denied or unable to furnish bond for the offense of which he [or she] is convicted," MCL 769.11b; see also *People v Prieskorn*, 424 Mich 327, 340 (1985) (defendant was not entitled to credit for time served on unrelated charges committed while out on bond); *People v Bailey*, 330 Mich App 41, 65 (2019) (defendant was not entitled to credit for time served on unrelated charges before being arraigned on current charges).

D. Sentencing Credit for a Juvenile Sentenced or Resentenced for a Crime Carrying a Penalty of Life Imprisonment Without Parole

Offenders under the age of 18 who are convicted of certain offenses carrying a mandatory penalty of life imprisonment without the possibility of parole may be subject to the sentencing requirements set out in MCL 769.25 or MCL 769.25a.[6] A defendant who is sentenced or resentenced under MCL 769.25 or MCL 769.25a must receive credit for time already served, "but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." MCL 769.25(10); MCL 769.25a(6). However, in *People v Wiley*, 324 Mich App 130, 149-150 (2018), the Court of Appeals held that "MCL 769.25a(6) violates the Ex Post Facto Clause of the United States and Michigan Constitutions, US Const art I, § 10; Const 1963, art 1, § 10, because it precludes [juveniles (or former juvenile offenders) who are being

[6] These provisions are discussed in Section 19.4(C)(3).

resentenced] from receiving disciplinary credits on their term-of-years sentences, and thus, it is a retroactive[7] statute that increases their potential sentences or punishments." See also *Hill v Snyder*, 308 F3d 893, 906 (CA 6, 2018).[8]

19.4 Cruel and/or Unusual Punishment

A. Eighth Amendment Prohibition of Cruel and Unusual Punishments

The Eighth Amendment of the United States Constitution, US Const, Am VIII, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment's prohibition of cruel and unusual punishments requires that a punishment be "'"graduated and proportioned"' to both the offender and the offense." *Miller v Alabama*, 567 US 460, 469 (2012) (citations omitted). "To determine whether a punishment is cruel and unusual, courts must look . . . to '"the evolving standards of decency that mark the progress of a maturing society."'" *Graham v Florida*, 560 US 48, 58 (2010) (citations omitted).

B. Michigan Constitutional Prohibition of Cruel *or* Unusual Punishments

"The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII. If a punishment 'passes muster under the state constitution, then it necessarily passes muster under the federal constitution.'" *People v Benton*, 294 Mich App 191, 204 (2011), quoting *People v Nunez*, 242 Mich App 610, 618-619 n 2 (2000).

In determining whether a penalty is cruel or unusual under the Michigan Constitution, relevant considerations include (1) "'the gravity of the offense and the harshness of the penalty[,]'" (2) "the penalt[ies] . . . imposed for . . . other crimes in Michigan[,]" (3) "'the sentences imposed for commission of the same crime in other jurisdictions[,]'" and (4) "the goal of rehabilitation." *People v Bullock*, 440 Mich 15, 33-34 (1992) (internal citations omitted). Additionally,

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[7] Because the United States Supreme Court determined that *Miller* applies retroactively in *Montgomery v Louisiana*, 577 US 190, 208-209 (2016), MCL 769.25a applies retroactively as well. See *People v Wiley*, 324 Mich App 130, 137 (2018).

[8] Though persuasive, Michigan state courts "are not . . . bound by the decisions of the lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

"the punishment . . . chosen or authorized by the Legislature [must not be] so grossly disproportionate as to be unconstitutionally 'cruel or unusual.'" *Id.* at 34-35 n 17. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, §16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review").

C. Life Imprisonment Without Eligibility for Parole

Certain homicide and nonhomicide crimes are generally punishable under Michigan law by mandatory life imprisonment without the possibility of parole. See MCL 791.234(6)(a)-(f)[9]; MCL 750.436(2)(e); MCL 750.543f. Previously, a juvenile who was sentenced as an adult for a conviction under one of these statutes was subject to this mandatory penalty. See MCL 712A.4; MCL 712A.18(1)(o); MCL 769.1. However, in two United States Supreme Court decisions, the Court held that (1) an offender under the age of 18 may not be sentenced to life imprisonment without the possibility of parole for a nonhomicide offense, *Graham*, 560 US 48,[10] and (2) an offender under the age of 18 may not be sentenced to *mandatory* life imprisonment without the possibility of parole for a homicide offense, *Miller*, 567 US 460.

MCL 769.25 and MCL 769.25a effectively eliminate the mandatory imposition of a sentence of life imprisonment without the possibility of parole for certain offenses when committed by an offender who

[9] MCL 791.234(6)(a)-(f) provides that prisoners who are sentenced to life imprisonment for certain enumerated offenses are not eligible for parole, and are instead subject to the provisions of MCL 791.244 (governing reprieves, commutations, and pardons) or MCL 791.244a (governing expedited reprieves, commutations, and pardons due to medical conditions). The enumerated offenses include first-degree murder, MCL 750.316; certain offenses involving the alteration, adulteration, misbranding, or mislabeling of a drug, medicine, or device with the intent to kill or to cause serious impairment of a body function of two or more individuals, resulting in death, MCL 333.17764(7); MCL 750.16(5); MCL 750.18(7); a violation of Chapter XXXIII of the Michigan Penal Code ("Explosives, Bombs, and Harmful Devices"), MCL 750.200—MCL 750.212a; and any other violation for which parole eligibility is expressly denied under state law. See also MCL 750.436(2)(e) (mingling a poison with a food or drug or placing a poison in a water supply, causing death); MCL 750.543f (terrorism causing death). Effective March 4, 2014, 2014 PA 22 and 2014 PA 23 amended numerous statutory provisions, including many of the above-noted penal statutes, in order to achieve compliance with *Graham*, 560 US 48 and *Miller*, 567 US 460, by eliminating mandatory life-without-parole sentencing for juvenile offenders. For additional discussion of the constitutionality of sentencing juveniles to life imprisonment without parole and the applicable procedures for imposing such a sentence under MCL 769.25 or MCL 769.25a, see Section 19.4(C).

[10] Apparently, no juvenile offender in Michigan was, at the time that *Graham*, 560 US 48, was decided, serving a nonparolable life sentence for a nonhomicide offense, despite statutory authorization. *Graham*, 560 US at 64, citing P. Annino, D. Rasmussen, & C. Rice, Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2 (Sept. 14, 2009), 12-14 (additional citations omitted).

was under the age of 18 at the time of the offense.[11] See Section 19.4(C) for discussion of MCL 769.25 and MCL 769.25a and the procedures for sentencing or resentencing an eligible juvenile offender.

1. Age of Juvenile

Only those individuals who are below the age of 18 at the time of their offenses are subject to application of Michigan's juvenile justice statutes governing delinquency, traditional waiver, automatic waiver, and designated proceedings. See MCL 600.606(1); MCL 712A.2(a)(1); MCL 712A.2d; MCL 712A.3; MCL 712A.4. Proceedings against defendants who commit crimes after reaching age 18 are conducted in courts of general criminal jurisdiction.

"[T]he common law of this state . . . provide[s] that a defendant is a juvenile for the purposes of *Miller*[, 567 US 460,] when he or she is under the age of 18, *as determined by his or her anniversary of birth*[,]" rather than "by the day preceding the anniversary of birth as at English common law." *People v Woolfolk*, 479 Mich 23, 26, 27 (2014) (aff'g 304 Mich App 450 (2014) and holding that "[the] defendant remained 'under the age of 18' at the time he committed [a] homicide offense [on the night before his 18th birthday] and [was] therefore entitled to be treated in accordance with the United States Supreme Court's rule in *Miller*").

However, "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under Const 1963, art 1, § 16." *People v Parks*, 510 Mich 225, 255 (2022).[12]

Extending the holding in *People v Parks*, 510 Mich 225, 268 (2022), the Michigan Supreme Court held that "as applied to defendants

[11] Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

who were 19 or 20 years old at the time of their crime, a *mandatory* LWOP sentence that does not allow for consideration of the mitigating factors of youth or the potential for rehabilitation is a grossly disproportionate punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023). In *Taylor*, one defendant was 19 years old at the time of his offense, and the other defendant (in a separate and unrelated case) was 20 years old when he committed his offense. *Taylor*, ___ Mich at ___. "Each defendant was sentenced to a legislatively mandated punishment of life in prison without the possibility of parole (LWOP)." *Id*. at ___. "Defendants argue[d] that the mandatory nature of their sentences violate[d] Michigan's prohibition against 'cruel or unusual punishment' . . . ." *Taylor*, ___ Mich at ___. See Const 1963, art 1, § 16. "Determining what constitutes cruel or unusual punishment is guided by evolving standards of decency that mark the progress of a maturing society." *Taylor*, ___ Mich at ___ (quotation marks and citation omitted). "Inherent in this standard is the understanding that as society progresses, punishments that were once acceptable can later be considered cruel or unusual." *Id*. at ___. Additionally, "to evaluate the proportionality of a punishment under Michigan's Cruel or Unusual Punishment Clause, courts must consider: (1) the severity of the punishment relative to the gravity of the offense, (2) punishments imposed in the same jurisdiction for other offenses, (3) punishments imposed in other jurisdictions for the same offense, and (4) Michigan's traditional goal of and preference for rehabilitation." *Id*. at ___ (citations omitted).

Applying the standards from *People v Lorentzen*, 387 Mich 167, 176-181 (1972), and *People v Bullock*, 440 Mich 15, 33-34 (1992), the *Taylor* Court found that "[l]ate adolescents who are 19 or 20 years old, as a class, share with 18-year-olds the same mitigating

[12]Note that MCL 769.25 and MCL 769.25a, at issue in *Parks*, address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

characteristics of late-adolescent brain development." *Taylor*, ___ Mich at ___. As such, "[t]he same considerations that were discussed at length in *Parks* apply equally to this class of late adolescents." *Taylor*, ___ Mich at ___. "Mandatorily condemning such offenders to die in prison, without first considering the attributes of youth that late adolescents and juveniles share, no longer comports with the 'evolving standards of decency that mark the progress of a maturing society.'" *Id*. at ___, quoting *Lorentzen*, 387 Mich at 179. "Accordingly, as applied to defendants who were 19 or 20 years old at the time of their crime, a *mandatory* LWOP sentence that does not allow for consideration of the mitigating factors of youth or the potential for rehabilitation is a grossly disproportionate punishment in violation of Const 1963, art 1, § 16." *Taylor*, ___ Mich at ___ (further holding that "[t]his decision also applies retroactively to all relevant criminal cases on collateral review").

2. Nonhomicide Offenses

A sentence of life imprisonment without the possibility of parole for a *nonhomicide* offense violates the Eighth Amendment of the United States Constitution when imposed upon a defendant who was under age 18 when the offense was committed. *Graham*, 560 US at 74-75, 82. Noting that juveniles are less mature, more vulnerable to negative influences, and more capable of rehabilitation than adults, and that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers[,]" the *Graham* Court concluded that "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life [upon an offender under the age of 18 who did not commit homicide] it must provide him or her with some realistic opportunity to obtain release before the end of that term." *Id.* at 68-69, 82. The Court explained:

> "A categorical rule avoids the risk that . . . a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide . . . [A] categorical rule gives all juvenile nonhomicide offenders a chance to demonstrate maturity and reform . . . A categorical rule against life without parole for juvenile nonhomicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender's crime is reinforced by the prison term." *Graham*, 560 US at 78-79.

3. Homicide Offenses

Previously, a juvenile who was convicted, in an automatic or traditional waiver proceeding, of first-degree murder—including felony murder, MCL 750.316(1)(b), and aiding and abetting first-degree murder, MCL 767.39—was subject under Michigan law to a *mandatory* sentence of life imprisonment.[13] See former MCL 750.316; see also MCL 712A.4; MCL 769.1(1)(e); MCL 769.1(1)(g). Additionally, a juvenile who was convicted of first-degree murder in a prosecutor-designated proceeding was subject to this mandatory penalty if the court decided to sentence the juvenile as an adult. See MCL 712A.18(1)(o); MCL 712A.18h. Moreover, under MCL 791.234(6)(a), any offender serving a life sentence for first-degree murder is ineligible for parole.[14]

In *Miller*, 567 US at 465, 479, 489, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole" for offenders under the age of 18 at the time of their crimes, and that "a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." See also *People v Skinner (Skinner II)*, 502 Mich 89, 104 (2018), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). Noting that *Graham*, 560 US 48,[15] "insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole[,]" the *Miller* Court concluded that a nonparolable sentence of life imprisonment may not be imposed on a juvenile for a homicide offense unless the sentencer has "take[n] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 US at 473, 480.

The *Miller* Court identified, as relevant considerations in determining whether to impose such a sentence, the offender's "chronological age and its hallmark features—among them,

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[13] However, MCL 769.25 and MCL 769.25a effectively eliminate the *mandatory* imposition of a sentence of life imprisonment without the possibility of parole for certain offenses, including first-degree murder, when committed by an offender who was under the age of 18 at the time of the offense. For discussion of the applicable procedures for imposing sentence under MCL 769.25 or MCL 769.25a, see Section 19.4(C). For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

[14] Certain other offenses are also generally subject to a mandatory sentence of life imprisonment without the possibility of parole. See MCL 791.234(6)(b)-(f); MCL 750.436(2)(e); MCL 750.543f.

[15] See Section 19.4(C)(1).

immaturity, impetuosity, and failure to appreciate risks and consequences[;]" the offender's "family and home environment[;]" "the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him [or her;]" the "incompetencies associated with youth[]" in dealing with police officers, prosecutors, and defense attorneys; and "the possibility of rehabilitation[.]" See *Miller*, 567 US at 477-478. Although rejecting the petitioners' invitation to impose a *categorical* bar on life sentences without parole for juveniles of any age, the *Miller* Court cautioned that, in light of "children's diminished culpability and heightened capacity for change, . . . appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." *Id.* at 479-480 (noting "the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption[]'") (citations omitted).

In *Montgomery v Louisiana*, 577 US 190, 195 (2016), the United States Supreme Court stressed that "[a]lthough *Miller*[, 567 US 460,] did not foreclose a sentencer's ability to impose life without parole on a juvenile, the [*Miller*] Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect '"irreparable corruption."'" (Citations omitted.) Although "*Miller* did not impose a formal factfinding requirement" regarding a juvenile's incorrigibility, this "does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole[; t]o the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment." *Montgomery*, 577 US at 211 (citation omitted). See also *Skinner II*, 502 Mich at 125, n 18; 128 ("MCL 769.25 requires trial courts to consider the *Miller* factors before imposing life without parole in order to ensure that only those juveniles who are irreparably corrupt are sentenced to life without parole"; however, "[w]hether a juvenile is irreparably corrupt is not a factual finding, [but] instead . . . is a moral judgment that is made after considering and weighing the *Miller* factors," and thus, "[t]he trial court is not obligated to explicitly find that defendant is irreparably corrupt" before imposing a sentence of life without parole, nor does it "have to explicitly find that defendant is 'rare.'").

"[N]either *Miller* nor *Montgomery* imposes a presumption *against* life without parole for those juveniles who have been convicted of first-degree murder on either the trial court or appellate court." *Skinner II*, 502 Mich at 131. "*Miller* and *Montgomery* simply require that the trial court consider 'an offender's youth

and attendant characteristics' before imposing life without parole." *Skinner II*, 502 Mich at 131, quoting *Miller*, 567 US at 483. See Section 19.4(C)(4)(a) for more information on the hearing process under MCL 769.25.

Addressing the issue of *Miller*'s retroactivity, the *Montgomery* Court held that because *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth,'" it "announced a substantive rule of constitutional law[, and, l]ike other substantive rules, is retroactive because it '"necessarily carr[ies] a significant risk that a defendant"'—here, the vast majority of juvenile offenders—'"faces a punishment that the law cannot impose upon him."'" *Montgomery*, 577 US at 208-209, 212 (noting that giving *Miller* retroactive effect "does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole[; rather, a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them") (citations omitted).

"[T]here is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and . . . it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing." *People v Taylor*, 510 Mich 112, 129 (2022). "MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence." *Taylor*, 510 Mich at 135. "The trial court . . . must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP." *Id*. at 136. "This is an exercise in discretion, not a fact-finding mission." *Id*. (noting that "our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence.").

While "trial courts must consider a juvenile defendant's youth to be a mitigating factor when sentencing them to term-of-years sentences under MCL 769.25 or MCL 769.25a[,]" they are not required to "articulate on the record how a defendant's youth affected the decision." *People v Boykin*, 510 Mich 171, 178 (2022).

"[T]he Michigan Constitution requires that 18-year-olds convicted of first-degree murder receive the same individualized sentencing procedure under MCL 769.25 as juveniles who have committed first-degree murder, instead of being subjected to a mandatory life-without-parole sentence like

other older adults." *People v Parks*, 510 Mich 225, 244 (2022).[16] In *Parks*, the Michigan Supreme Court held that "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment' under Const 1963, art 1, § 16." *Parks*, 510 Mich at 267, 268 (holding that because defendant "was sentenced without consideration of the attributes of youth, his sentence [was] unconstitutional, and he must be resentenced."). Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, §16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review").

See Section 19.4(C)(4) for discussion of sentencing juveniles to life-without-parole sentences under MCL 769.25 and MCL 769.25a.

4. Michigan "Juvenile Lifer" Statutory Sentencing and Resentencing Procedures: Legislative Compliance With *Miller*

MCL 769.25 and MCL 769.25a attempt to achieve compliance with *Miller*, 567 US 460, by (1) eliminating mandatory life-without-parole sentences for certain offenders under the age of 18 in cases that are not final for purposes of appellate review[17]; (2) establishing, in MCL 769.25, a procedure under which the prosecuting attorney, in a case that is not final for purposes of appellate review, may seek imposition of a life-without-parole

[16]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

sentence for an offender under the age of 18, and providing for the imposition of a term-of-years sentence if a life-without-parole sentence is not imposed; and (3) establishing, in MCL 769.25a, a procedure for the resentencing of defendants in cases that are final for purposes of appellate review, in the event that either the Michigan Supreme Court or the United States Supreme Court determined that *Miller* is to be given retroactive application (and, indeed, the United States Supreme Court held in *Montgomery*, 577 US 208-209, that *Miller* is to be applied retroactively, thereby triggering application of MCL 769.25a to cases on collateral review).

a. MCL 769.25: Prospective Application of *Miller*[18]

MCL 769.25 authorizes a prosecuting attorney to file, in a case that is not final for purposes of appellate review, a motion seeking a sentence of imprisonment for life without the possibility of parole for a conviction of first-degree murder or other enumerated offense that was committed when the defendant was less than 18 years old. MCL 769.25(1)-(3); MCL 769.25a(1).[19]

Except as otherwise provided in MCL 769.25a(2) and MCL 769.25a(3) (providing for resentencing in a case that is final for purposes of appellate review in the event that the Michigan Supreme Court or the United States Supreme Court determined that *Miller*, 567 US 460, is retroactively applicable, as, indeed, the United States Supreme Court has since held),[20] "the procedures set forth in [MCL 769.25] do not apply to any case that is final[21] for purposes of appeal on or before June 24, 2012." MCL 769.25a(1)-(3). Specifically, MCL 769.25 "applies to a criminal defendant who was less than 18

[17]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

[18] For a table summarizing the application of MCL 769.25 and MCL 769.25a, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

years of age at the time he or she committed an offense described in [MCL 769.25(2)] if either of the following circumstances exists:"

> "(a) The defendant is convicted of the offense on or after [March 4, 2014,] the effective date of the amendatory act that added [MCL 769.25].
>
> (b) The defendant was convicted of the offense before [March 4, 2014,] and either of the following applies:
>
> > (*i*) The case is still pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired.
> >
> > (*ii*) On June 25, 2012[,] the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired." MCL 769.25(1)(a)-(b).

"[W]hen a prosecutor seeks a [life imprisonment without the possibility of parole] sentence for a juvenile offender, the defendant must be afforded the opportunity *and the financial resources* to present evidence of mitigating factors relevant to the offender and the offense." *People v Williams*, 328 Mich App 408, 413 (2019) (finding that the trial court's limitation on expert funding for defendant's mitigation expert lacked support where it failed to articulate why "defendant's request for $42,650 was highly excessive" and "instead provide[d] $2,500 to defendant to retain expert witnesses") (quotation marks,

[19]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

[20] See Section 19.4(C)(4)(a) for discussion of MCL 769.25a.

alteration, and citation omitted). See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, for more information on expert witnesses, including funding.

Enumerated Offenses. MCL 769.25(2) provides that "[t]he prosecuting attorney may file a motion . . . to sentence a defendant described in [MCL 769.25(1)] to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:"

- first-degree murder, MCL 750.316;
- certain offenses involving the alteration, adulteration, misbranding, or mislabeling of a drug, medicine, or device with the intent to kill or to cause serious impairment of a body function of two or more individuals, resulting in death, MCL 333.17764(7); MCL 750.16(5); MCL 750.18(7);
- a violation of Chapter XXXIII of the Michigan Penal Code ("Explosives, Bombs, and Harmful Devices"), MCL 750.200—MCL 750.212a;
- willfully mingling a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product, or willfully placing a poison or harmful substance in a spring, well, reservoir, or public water supply, knowing or having reason to know that it may be ingested or used by a person to his or her injury, causing the death of another individual, MCL 750.436(2)(e);
- terrorism causing death, MCL 750.543f; or
- a violation of law involving the death of another person for which parole eligibility is expressly denied under state law.

[21] "A case is final . . . if any of the following apply:

(a) The time for filing an appeal in the state court of appeals has expired.

(b) The application for leave to appeal is filed in the state supreme court and is denied or a timely filed motion for rehearing is denied.

(c) If the state supreme court has granted leave to appeal, after the court renders its decision or after a timely filed motion for rehearing is denied." MCL 769.25a(1).

Motion and Response Requirements. If a prosecuting attorney intends to seek a sentence of imprisonment for life without parole for a defendant who was convicted on or after March 4, 2014 (the effective date of the amendatory legislation), the motion must be filed within 21 days after the defendant was convicted. MCL 769.25(3). If the defendant was convicted before March 4, 2014, but the conviction was not final as set out in MCL 769.25(1)(b), a motion for a sentence of life imprisonment without parole must be filed within 90 days after March 4, 2014. MCL 769.25(3). The motion must "specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole." *Id*. The defendant must file a response within 14 days after receiving notice of the prosecutor's motion. MCL 769.25(5).

If the motion is not timely filed, the court must sentence the defendant to a term of years as provided in MCL 769.25(9). MCL 769.25(4).

Victims' Rights. "Each victim shall be afforded the right under section 15 of the [Crime Victim's Rights Act], MCL 780.765, to appear before the court and make an oral impact statement at any sentencing or resentencing of the defendant under [MCL 769.25]." MCL 769.25(8).

Hearing Process. "[T]he decision to sentence a juvenile to life without parole [under MCL 769.25] is to be made by a judge[.]" *People v Skinner (Skinner II)*, 502 Mich 89, 137 (2018), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). "MCL 769.25 requires trial courts to consider the *Miller* factors before imposing life without parole in order to ensure that only those juveniles who are irreparably corrupt are sentenced to life without parole"; however, "[w]hether a juvenile is irreparably corrupt is not a factual finding, [but] instead . . . is a moral judgment that is made after considering and weighing the *Miller* factors" *Skinner II*, 502 Mich at 125, n 18. Accordingly "[t]he trial court is not obligated to explicitly find that defendant is irreparably corrupt" before imposing a sentence of life without parole, nor does it "have to explicitly find that defendant is 'rare.'" *Id*. at 128. Additionally, the decision to sentence a juvenile to LWOP does not require a separate factual finding of permanent incorrigibility, nor is the sentencing court required to provide an explanation with an implicit finding of permanent incorrigibility on the record. *Jones v*

Mississippi, 593 US ___, ___, ___ (2021) (the *Jones* decision does not disturb the *Miller* or *Montgomery* holdings).

"[T]here is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and . . . it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing." *People v Taylor*, 510 Mich 112, 129 (2022). "MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence." *Taylor*, 510 Mich at 135. "The trial court . . . must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP." *Id*. at 136. "This is an exercise in discretion, not a fact-finding mission." *Id*. (noting that "our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence.").

While "trial courts must consider a juvenile defendant's youth to be a mitigating factor when sentencing them to term-of-years sentences under MCL 769.25 or MCL 769.25a[,]" they are not required to "articulate on the record how a defendant's youth affected the decision." *People v Boykin*, 510 Mich 171, 178 (2022).

"MCL 769.25 does not violate the Sixth Amendment because neither [MCL 769.25] nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead, life without parole is authorized by the jury's verdict alone." *Skinner II*, 502 Mich at 97. Specifically, under MCL 769.25(6) the trial court must "conduct a hearing on the motion as part of the sentencing process[]" and consider the factors listed in *Miller*, 567 US 460,[22] and under MCL 769.25(7) the court must specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. Neither of these requirements violated the Sixth Amendment. See *Skinner II*, 502 Mich at 102. Because "the Sixth

[22] The *Miller* Court identified, as relevant considerations, the juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[;]" the offender's "family and home environment[;]" "the circumstances of the homicide offense, including the extent of [the offender's] participation in the conduct and the way familial and peer pressures may have affected him [or her;]" the "incompetencies associated with youth[]" in dealing with police officers, prosecutors, and defense attorneys; and "the possibility of rehabilitation[.]" See *Miller*, 567 US at 477-478.

Amendment only prohibits fact-finding that *increases* a defendant's sentence" and "does not prohibit fact-finding that *reduces* a defendant's sentence. Therefore, the requirement in MCL 769.25(6) that the court consider the *Miller* factors does not violate the Sixth Amendment." *Skinner II*, 502 Mich at 115, 116 (finding that the *Miller* factors "'counsel *against* irrevocably sentencing [juveniles] to a lifetime in prison'"), quoting *Miller*, 567 US at 480 (emphasis added; alteration in original). Similarly, MCL 765.29(7) does not violate the Sixth Amendment because it does not necessarily require the trial court to specify an aggravating circumstance before imposing a life-without-parole sentence; the trial court "could find that there are no mitigating or aggravating circumstances and *that* is why it is imposing a life-without-parole sentence," which "demonstrates that a life-without-parole sentence is authorized by the jury's verdict alone." *Skinner II*, 502 Mich at 117, n 12, 117. However, "a judge is not precluded from considering aggravating circumstances in deciding whether to sentence a juvenile to either a term of years or life without parole because both of those sentences are within the range prescribed by Michigan's statutory scheme." *Id*. at 118 n 14 (a factual finding by the court indicating that an aggravating circumstance exists does not expose the defendant to a sentence that exceeds the sentence authorized by the jury's verdict alone, and thus, does not violate the Sixth Amendment).

Considering Factors Other Than *Miller* Factors. "Although reliance on other criteria to the exclusion of, or without proper consideration of, *Miller v Alabama*, 567 US 460 (2012), would be an abuse of discretion, mere consideration of the traditional objectives of sentencing or other factors is not, per se, an error of law. See MCL 769.25(6)-(7)." *People v Garay*, 506 Mich 936, 936-937 (2020). Traditional objectives of sentencing include punishment, deterrence, protection, retribution, and rehabilitation. *Id*. at 936.

Life-Without-Parole Sentence: Standard of Review. A trial court's decision whether to sentence a juvenile to life without parole is reviewed for an abuse of discretion. *Skinner II*, 502 Mich at 137 (reversing *Hyatt*, 316 Mich App at 423, to the extent that it required a heightened standard of review). "The trial court remains in the best position to determine whether each particular defendant is deserving of life without parole. All crimes have a maximum

possible penalty, and when trial judges have discretion to impose a sentence, the imposition of the maximum possible penalty for any crime is presumably 'uncommon' or 'rare.'" *Skinner II*, 502 Mich at 137.

"'Any fact-finding by the trial court is to be reviewed for clear error' and . . . 'any questions of law are to be reviewed de novo[.]'" *Skinner II*, 502 Mich at 137, n 27, quoting *Hyatt*, 316 Mich App at 423.

Term-of-Years Sentence. If a nonparolable life sentence is not imposed, either following a sentencing hearing under MCL 769.25 or because the prosecutor does not file a timely motion, the court must impose a "term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years." MCL 769.25(9); see also MCL 769.25(4). The defendant must be given credit for time already served, "but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." MCL 769.25(10).

b. MCL 769.25a: Retroactive Application of *Miller*

MCL 769.25a[23] sets out procedures for resentencing certain eligible offenders whose convictions are final for purposes of appellate review. These procedures were to become applicable only in the event, and to the extent, that the Michigan Supreme Court or the United States Supreme Court determined that *Miller v Alabama*, 567 US 460 (2012), is retroactively applicable.[24] Indeed, after the enactment of MCL 769.25 and MCL 769.25a, the United States Supreme Court held that *Miller* is to be applied retroactively, thereby triggering application of MCL 769.25a to cases on collateral review. *Montgomery v Louisiana*, 577 US 190 (2016).[25]

MCL 769.25a(2) provides:

> "If the state supreme court or the United States supreme court finds that [*Miller*, 567 US 460], applies retroactively to all defendants who were under the age of 18 at the time of

[23] MCL 769.25a was added, effective March 4, 2014, by 2014 PA 22.

[24] See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

> their crimes, and that decision is final for appellate purposes, the determination of whether a sentence of imprisonment for a violation set forth in [MCL 769.25(2)] shall be imprisonment for life without parole eligibility or a term of years as set forth in [MCL 769.25(9)] shall be made by the sentencing judge or his or her successor as provided in [MCL 769.25a]. For purposes of [MCL 769.25a(2)], a decision of the state supreme court is final when either the United States supreme court denies a petition for certiorari challenging the decision or the time for filing that petition passes without a petition being filed."[26]

Because a decision requiring *Miller*'s retroactive application has been issued as contemplated in MCL 769.25a(2), the following procedures apply:

> "(a) Within 30 days after the date the supreme court's decision becomes final,[27] the prosecuting attorney shall provide a list of names to the chief circuit judge of that county of all defendants who are subject to the jurisdiction of that court and who must be resentenced under that decision.
>
> (b) Within 180 days after the date the supreme court's decision becomes final, the prosecuting attorney shall file motions for resentencing in all cases in which the prosecuting attorney will be requesting the court to impose a sentence of imprisonment for life without the possibility of parole. A

[25]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

> hearing on the motion shall be conducted as provided in [MCL 769.25].[28]
>
> (c) If the prosecuting attorney does not file a motion under [MCL 769.25a(4)(b)], the court shall sentence the individual to a term of imprisonment for which the maximum term shall be 60 years[29] and the minimum term shall be not less than 25 years or more than 40 years. Each victim shall be afforded the right under section 15 of the [Crime Victim's Rights Act], MCL 780.765, to appear before the court and make an oral impact statement at any resentencing of the defendant under [MCL 769.25a(4)(c)]." MCL 769.25a(4).

MCL 769.25a(5) sets out the following order of priority for conducting resentencing hearings under MCL 769.25a(4):

> "(a) Cases involving defendants who have served 20 or more years of imprisonment shall be held first.
>
> (b) Cases in which the prosecuting attorney has filed a motion requesting a sentence of imprisonment for life without the possibility of parole shall be held after cases described in [MCL 769.25a(5)(a)] are held.

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[26] See also MCL 769.25a(3), which is similar to MCL 769.25a(2) and provides for resentencing in the event that the Michigan Supreme Court or United States Supreme Court concludes that *Miller*, 567 US 460, "applies retroactively to all defendants who were convicted of *felony murder* under [MCL 750.316(1)(b)], and who were under the age of 18 at the time of their crimes[.]" (Emphasis added.) *Montgomery*, 577 US 190, did not limit retroactive application of *Miller* to juveniles convicted of felony murder; accordingly, MCL 769.25a(2) applies, rather than MCL 769.25a(3).Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022), is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

[27] A mandate was issued in *Montgomery*, 577 US 190, on February 26, 2016 (see Docket No. 14-280), rendering the decision final as of that date. See Sup Ct R 45.

[28] See Section 19.4(C)(4)(a) for discussion of the hearing requirements.

> (c) Cases other than those described in [MCL 769.25a(5)(a)-(b)] shall be held after the cases described in [MCL 769.25a(5)(a)-(b)] are held."

"[T]here is a rebuttable presumption against the imposition of juvenile LWOP sentences in Michigan and . . . it is the prosecution's burden to overcome this presumption by clear and convincing evidence at a *Miller* hearing." *People v Taylor*, 510 Mich 112, 129 (2022). "MCL 769.25 does not require the sentencing court to find a *particular fact* before it can impose an LWOP sentence." *Taylor*, 510 Mich at 135. "The trial court . . . must consider all the evidence before it and determine whether the presumption has been rebutted in order to impose LWOP." *Id*. at 136. "This is an exercise in discretion, not a fact-finding mission." *Id*. (noting that "our decision today does not foreclose a sentencing court's ability to sentence a juvenile offender to LWOP if it is determined that, considering all the information before it, LWOP is a constitutionally proportionate sentence.").

While "trial courts must consider a juvenile defendant's youth to be a mitigating factor when sentencing them to term-of-years sentences under MCL 769.25 or MCL 769.25a[,]" they are not required to "articulate on the record how a defendant's youth affected the decision." *People v Boykin*, 510 Mich 171, 178 (2022).

The decision to resentence a juvenile to LWOP does not require a separate factual finding of permanent incorrigibility, nor is the sentencing court required to provide an explanation with an implicit finding of permanent incorrigibility on the record. *Jones v Mississippi*, 593 US 113, 118 (2021) (the *Jones* decision does not disturb the *Miller* or *Montgomery* holdings). While "trial courts must consider a juvenile defendant's youth to be a mitigating factor when sentencing them to term-of-years sentences under MCL 769.25 or MCL 769.25a[,]" they are not required to "articulate on the record how a defendant's youth affected the decision." *People v Boykin*, 510 Mich 171, 178 (2022).

MCL 769.25a "allow[s] a defendant to be resentenced on concurrent sentences" and does not require a defendant

[29] Note that, contrary to a term-of-years sentence imposed in a prospective case under MCL 769.25(9) (providing for a maximum term of "*not less than* 60 years"), the maximum term imposed collaterally under MCL 769.25a(4)(c) "*shall be* 60 years[.]" (Emphasis added.)

who must be resentenced under Montgomery "to file a separate motion for relief from judgment in order to seek resentencing on his concurrent sentence[.]" *People v Turner*, 505 Mich 954, 954 (2020). "In the *Miller* context, a concurrent sentence for a lesser offense is invalid if there is reason to believe that it was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense. Accordingly, at a *Miller* resentencing, the trial court may exercise its discretion to resentence a defendant on a concurrent sentence" if it makes such a finding. *Turner*, 505 Mich at 954-955.

"[A] failure to consider the distinctive attributes of youth . . . when sentencing a minor to a term of years pursuant to MCL 769.25a, so undermines a sentencing judge's exercise of his or her discretion as to constitute reversible error," and while "there is no *constitutional* mandate requiring the trial court to specifically make findings as to the *Miller* factors except in the context of a decision whether or not to impose life without parole," "when sentencing a minor convicted of first-degree murder, when the sentence of life imprisonment without parole is not at issue, the court should be guided by a balancing of the [*People v Snow*, 386 Mich 586, 592 (1972)] objectives [(reformation of the offender; protection of society; punishment of the offender; and deterrence of others from committing like offenses)] and in that context is required to take into account the attributes of youth, such as those described in *Miller*." *People v Wines*, 323 Mich App 343, 352 (2018), rev'd in part on other grounds 506 Mich 954 (2020).[30] In *Wines*, the defendant was originally sentenced as a juvenile to life imprisonment without parole for his first-degree murder conviction, and following the United States Supreme Court *Montgomery* decision, was resentenced to the maximum possible term of 40 to 60 years. *Wines*, 323 Mich App at 354, 355. The trial court erred when it did not exercise its discretion to consider and balance the *Snow* factors, but instead "concluded that defendant should receive the maximum sentence the court could impose" based on the facts of the case, and "did not discuss whether defendant remained a threat to the safety of society, whether he was capable of reform, or whether sentencing defendant to 40 years,

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

rather than a lesser minimum term, would be likely to have a significantly different deterrent effect."

"The focus of the analysis necessarily shifts when a court considers an appropriate sentence for an adult who was sentenced to a lifetime of imprisonment for a crime committed as a juvenile. While sentencing a young person, a judge looks forward and endeavors to predict the future. *Miller* counsels that a careful examination of the offender's developmental characteristics, his or her family environment, and the circumstances surrounding the crime help guide a determination of whether that child will ever be capable of change. Resentencing an adult requires restructuring the evidentiary review; the older the adult, the larger the predictive canvas becomes. While the *Miller* factors remain highly relevant, a judge resentencing an offender who has served many years in prison has the benefit of actual data regarding whether the offender's life in prison is truly consistent with 'irreparable corruption,' the only ground *Miller* specifically identified for imposing a life-without-parole sentence." *People v Bennett*, 335 Mich App 409, 420 (2021).

"Mental illness is not a specific *Miller* factor . . . [b]ut it is imbedded within the first two factors: immaturity, impetuosity, and failure to appreciate risks and consequences; and the family and home environment." *Bennett*, 335 Mich App at 417, 429 ("[i]t is beyond dispute that the 'qualities of youth' encapsulated in the *Miller* factors include untreated mental illness born of an abusive childhood or exacerbated by living in an abusive home"). "Treated mental illness is not a signal of irreparable corruption" and "although untreated mental illness may predispose a person to violent behavior, successfully treated mental illness does not." *Id*. at 430, 434. "Our justice system generally regards an offender who commits a crime while suffering from an undiagnosed or untreated mental illness as *less* deserving of the harshest punishments[.]" *Id*. at 429.

In *Bennett*, the trial judge reimposed a life-without-parole sentence after "determin[ing] that because [defendant] [wa]s mentally ill–a condition that remained undiagnosed and untreated until [defendant's] incarceration–he 'might' be unable to care for himself if released." *Bennett*, 335 Mich App at 413, 434 (noting "[t]he court's unfounded speculation [found] no record support"). It is a due process requirement that "[a] sentencing judge's exercise of discretion must be based upon accurate information."

Id. at 434 (quotation marks and citation omitted). "Instead of fashioning a sentence grounded in the abundant evidence that [defendant had] become a productive, stable, and peaceful adult, the [trial] court resorted to a purely theoretical and uncertain prediction that because [defendant] is mentally ill, he 'might' 'cause a problem.'" *Id*. "To the extent that the resentencing court made a factual finding regarding [defendant's] risk of reoffending, it was clearly erroneous because no evidence supported it"; "[n]or did any evidence support any other ground for [defendant's] continued incarceration." *Id*.

A defendant who is resentenced under MCL 769.25a(4) must be given credit for time already served, "but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence." MCL 769.25a(6). However, in *People v Wiley*, 324 Mich App 130, 149-150 (2018), the Court of Appeals held that "MCL 769.25a(6) violates the Ex Post Facto Clause of the United States and Michigan Constitutions, US Const art I, § 10; Const 1963, art 1, § 10, because it precludes [juveniles (or former juvenile offenders) who are being resentenced] from receiving disciplinary credits on their term-of-years sentences, and thus, it is a retroactive[31] statute that increases their potential sentences or punishments." See also *Hill v Snyder*, 308 F3d 893, 906 (CA 6, 2018).[32] In contrast, "because restitution is a civil remedy and not a punishment," the Michigan Supreme Court held that the trial court did not violate "federal and state constitutional prohibitions on ex post facto laws when, during defendant's resentencing proceedings, it ordered defendant to pay restitution pursuant to the current restitution statutes rather than the statutes in effect at the time of defendant's crimes." *People v Neilly*, ___ Mich ___, ___ (2024) (rejecting defendant's argument that "the trial court had improperly increased the punishment for his crimes").

For a table summarizing the application of MCL 769.25 and MCL 769.25a, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

[31] Because the United States Supreme Court determined that *Miller* applies retroactively in *Montgomery v Louisiana*, 577 US 190, 208-209 (2016), MCL 769.25a applies retroactively as well. See *People v Wiley*, 324 Mich App 130, 137 (2018).

[32] Though persuasive, Michigan state courts "are not . . . bound by the decisions of the lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

D. Life with Possibility of Parole

A sentence of life imprisonment with the possibility of parole for second-degree murder, imposed for a crime committed when an offender was a juvenile, "violates the prohibition against cruel or unusual punishment in Const 1963, art 1, § 16." *People v Stovall*, 510 Mich 301, 308 (2022) (holding that "[b]ecause *Miller* and *Montgomery* serve as the 'foundation' or 'base' for the defendant's challenges to the constitutionality of his sentences, his motion is 'based on a retroactive change in law' and therefore overcomes the procedural bar [(against successive motions)] in MCR 6.502(G)"); see also *People v Eads*, ___ Mich App ___, ___ (2025) (holding that defendant's term-of-years sentence "violate[d] the Michigan Constitution's prohibition against cruel or unusual punishment, and it [was] also disproportionate given the sentencing court's failure to consider [defendant's] youth and its attendant characteristics as mitigating factors").

People v Bullock, 440 Mich 15, 30, 33-34 (1992), "set forth criteria to apply in a challenge to a statutory sentence: (1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation." *People v Nard*, ___ Mich App ___, ___ (2025). "There is no requirement that a trial court reduce its sentence out of consideration for a defendant's youth." *Id*. at ___. "Instead, recent caselaw requires only that the attributes of youth be taken into consideration." *Id*. at ___. "There is no authority that imposes a higher standard of articulation regarding youth beyond [the] general requirement that a trial court must adequately explain its sentence on the record in order to facilitate appellate review." *Id*. at ___ (cleaned up).In *Nard*, "defendant was convicted of two counts of second-degree murder for the brutal killing of two young boys (and rape of one) who were fishing at a local pond." *Id*. at ___. "For these crimes the trial court, in exercising the statutory discretion granted to it, sentenced defendant to two terms of life with the possibility of parole." *Id*. at ___. "But then, in *People v Stovall*, 510 Mich 301, 322 (2022), the Michigan Supreme Court held that sentencing juvenile offenders convicted of second-degree murder to serve terms of life, even with the possibility of parole, constituted cruel or unusual punishment." *Nard*, ___ Mich App at ___ (citation omitted). "As a result, . . . the trial court resentenced defendant to serve concurrent prison terms of 60 to 150 years for each conviction." *Id*. at ___. Defendant appealed the sentences, "present[ing] an as-applied challenge to his individualized [term-of-years] sentence, which requires [the Court] to consider the particular facts surrounding defendant's conviction and sentence." *Id*. at ___ (quotation marks and

citation omitted). Additionally, defendant argued that "the trial court erred by not adequately considering the mitigating factors of youth." *Id*. at ___. As to the harshness of punishment, the trial court "did not abuse its discretion in finding that defendant's intentional, brutal, and torturous killing of innocent and essentially helpless children outweighed the severity of this term-of-years sentence." *Id*. at ___. As to comparative punishments, "[d]efendant's sentence was not disproportionate to sentences that the Legislature has authorized for other serious crimes." *Id*. at ___. The Court noted that "Michigan's sentence for second-degree murder does not appear out of step with the majority of other jurisdictions in this country." *Id*. at ___. But in this case, the comparative-punishment factor suggests that "defendant's sentence was unduly harsh when compared to second-degree murder sentences for other juvenile offenders." *Id*. at ___. As to rehabilitation, defendant contended that his sentence, effectively life imprisonment, failed to account for his rehabilitative potential, which is a goal of granting parole. *Id*. at ___. The defendant's argument was not persuasive as he had already been paroled. *Id*. at ___. "In sum, the trial court adhered to its obligation to balance defendant's attributes of youth . . . and in doing so it handed down a sentence that was individualized to defendant and the circumstances of his crimes." *Id*. at ___.

Retroactive application of *People v Parks*, ___ Mich ___ (2025). The Michigan Supreme Court held that *Parks* is retroactive "to cases where the period for direct review had expired when *Parks* was decided." *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024). Previously, *Miller v Alabama,* 567 US 460 (2012), "held that mandatory life without parole for a juvenile convicted of a homicide offense constitutes cruel and unusual punishment as prohibited by the Eighth Amendment." *Poole*, ___ Mich at ___. In *Parks*, the Michigan Supreme Court "held that federal precedent concerning the Eighth Amendment's prohibition against 'cruel and unusual punishments' did not support extending *Miller*'s protections to 18-year-olds," but "that our state Constitution's broader prohibition against 'cruel or unusual punishment' under Const 1963, art 1, § 16 did support such an extension." *Poole*, ___ Mich at ___. Whether *Parks* would have retrospective or prospective application required an initial determination of whether "the *Parks* holding was merely procedural, or whether it concerned substantive rights of a fundamental nature." *Id*. at ___. "[S]ubstantive rules should normally be given retroactive application." *Id*. at ___. Also relevant to determining whether a decision should be applied retroactively or prospectively are the *Linkletter-Hampton* factors: "'(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.'" *Poole*, ___ Mich at ___, quoting *People v Hampton*, 384 Mich 669, 674 (1971) (utilizing the standard set in *Linkletter v Walker*, 381 US 618 (1965)). However, "[t]he importance

of the *Linkletter-Hampton* factors is greatly circumscribed when substantive rules or rights are implicated in a holding, and retrospective application is favored." *Poole*, ___ Mich at ___. Only when the *Linkletter-Hampton* factors "strongly indicate otherwise" will a substantive rule be limited to prospective application. *Id*. at ___. Because *Parks* involved a substantive rule, it should be given retroactive application and its application to the defendant in *Poole* required that the defendant be resentenced according to MCL 769.25. *Poole*, ___ Mich at ___ (confirming retroactivity with *Linkletter-Hampton* factors and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).

See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, for additional information on postjudgment motions.

E. Term-of-Years Sentence for Second-Degree Murder

A term-of-years sentence imposed under MCL 769.25a(4)(c) *must* include "a maximum sentence of 60 years' imprisonment." *People v Meadows*, 319 Mich App 187, 190-191 (2017) (holding that the trial court erred in imposing a 45-year maximum sentence for a juvenile offender who was resentenced under MCL 769.25a(4)(c)).

"Courts sentencing juvenile defendants to a term-of-years sentence under MCL 769.25a are required only to make a record demonstrating that the court considered the defendant's youth and treated it as a mitigating factor." *People v Copeland*, ___ Mich App ___, ___ (2024). "When a juvenile defendant is sentenced to a term of years, there is no requirement that the sentencing court consider the *Miller* factors, expressly or otherwise." *Copeland*, ___ Mich App at ___ (noting "courts sentencing juvenile defendants to a term of years have discretion to consider the *Miller* factors when fashioning an appropriate sentence, which in turn 'enhances an appellate court's ability to review the proportionality' of the sentence," quoting *Boykin*, 510 Mich at 194 n 9). Further, "there is no requirement that a trial court resentencing a defendant to a term-of-years sentence under MCL 769.25a articulate on the record its consideration of the mitigating qualities of youth within *Snow*'s sentencing criteria." *Copeland*, ___ Mich App at ___. "More generally, there are no magic words or phrases that a trial court must use to show that it adequately considered the mitigating qualities of youth within *Snow*'s sentencing criteria." *Copeland*, ___ Mich App at ___. "A trial court need only articulate a justification for the sentence imposed in a manner sufficient to facilitate appellate review, even when resentencing a juvenile defendant to a term-of-years sentence under MCL 769.25a." *Copeland*, ___ Mich App at ___.

In *Copeland*, the "defendant was not a juvenile at the time of his resentencing, but instead had already served over 20 years in prison." *Id*. at ___. The trial court did not err when it considered the *Snow* factors with the benefit of hindsight "because the principle of proportionality requires sentencing courts to tailor their sentences to each defendant's individual circumstances." *Copeland*, ___ Mich App at ___ (noting "the trial court made a record explaining how it considered defendant's youth and treated it as a mitigating factor when tailoring defendant's sentence"). The Court of Appeals also rejected defendant's argument "that his sentence [was] disproportionate because, despite finding that several factors mitigated in defendant's favor, the court still imposed a sentence near the maximum minimum." *Id*. at ___. Although "defendant's sentence [was] on the high-end of [the] minimum-sentence range, the abuse-of-discretion standard recognizes that there is no single correct outcome, but a range of reasonable and principled outcomes." *Id*. at ___. "With this in mind, and in light of the trial court's extensive discussion about what it considered before imposing the sentence, particularly its explicit consideration of defendant's youth as a mitigating factor," the *Copeland* Court concluded "that the trial court did not abuse its discretion by imposing a minimum sentence of 38 years and 3 months based on the record before it." *Id*. at ___.

However, a defendant was entitled to resentencing where the trial "court openly acknowledged that [defendant's] background and the circumstances of the murder demonstrated that [defendant] was immature and impulsive, lacked discipline and self-restraint, and had been negatively influenced by gang members from a young age." *People v Eads*, ___ Mich App ___, ___ (2025). "The trial court . . . dismissed the very notion that such characteristics might have a mitigating effect and instead considered them as *aggravating* factors in support of a significant departure sentence—an approach plainly contrary to *Miller* and its progeny." *Id*. at ___. In this case, defendant "was found guilty of second-degree murder and possession of a firearm during the commission of a felony (felony-firearm) for crimes he committed as a juvenile." *Id*. at ___ (citations omitted). "The trial court sentenced [defendant] as an adult and, departing upward from the guidelines, imposed consecutive terms of 50 to 75 years' imprisonment for second-degree murder and two years' imprisonment for felony-firearm." *Id*. at ___. Defendant, "despite his juvenile status and all that has now been recognized to come with it, received a sentence for second-degree murder that would require him to outlive his life expectancy before even becoming eligible for parole and would deny him a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at ___. After *Miller* and the enactment of MCL 769.25a, a defendant convicted of first-degree murder as a juvenile was entitled "to resentencing such that he or she, by default, could

not receive a term-of-years sentence with a minimum higher than 40 years or a maximum higher than 60 years." *Eads*, ___ Mich App at ___. In *Eads*, defendant received "a minimum sentence *10 years* higher and a maximum sentence *15 years* higher than [MCL 769.25a(4)(c)'s] upper limits—for committing a lesser offense as a juvenile." *Eads*, ___ Mich App at ___. "[I]ronically, [defendant] fared worse than he would have if the jury had convicted him of [first-degree murder]." *Id*. at ___. Defendant's "term-of-years sentence for second-degree murder . . . violate[d] the Michigan Constitution's prohibition against cruel or unusual punishment, and it [was] also disproportionate given the sentencing court's failure to consider [defendant's] youth and its attendant characteristics as mitigating factors.*Id*. at ___.

"[I]n light of *Miller v Alabama*, 567 US 460 (2012), and the legal developments that have followed, [defendant's] term-of-years sentence of 75 to 150 years for second-degree murder violates the Michigan Constitution's prohibition against cruel or unusual punishment." *People v Echols*, ___ Mich App ___, ___ (2025). "In *Miller*, the United States Supreme Court recognized that juveniles are constitutionally different from adults for purposes of sentencing and held that mandatory life without parole (LWOP) for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments." *Echols*, ___ Mich App at ___ (cleaned up). In this case, defendant, who was one month past his eighteenth birthday, argued that "his term-of-years sentence of 75 to 150 years for second-degree murder for an offense he committed when he was 18 years old violates the Michigan Constitution's prohibition against cruel or unusual punishment." *Echols*, ___ Mich App at ___. Additionally, defendant argued that his sentence was unconstitutional under the state's principle of proportionality. *Id*. at ___.

"Under this sentence, [defendant would] not even become *eligible* for parole for the first time until well past the life expectancy of individuals incarcerated as adults, let alone as youths, and several decades beyond when he would have first become parole-eligible under the life sentence deemed unconstitutional in [*People v Stovall*, 510 Mich 301 (2022)]." *Echols*, ___ Mich App at ___. "Had [defendant] been convicted of first-degree murder as originally charged, he would now be entitled to a resentencing hearing and would be facing a default term-of-years sentence limited to a minimum of 25 to 40 years and a maximum of 60 years." *Id*. at ___. "Instead, defendant, for committing a *lesser* offense than first-degree murder, is left with a *minimum* sentence that is *15 years higher*—and a maximum sentence that is *90 years higher*—than the default 60-year statutory upper limit for first-degree murder, and without any of the significant procedural safeguards that must be satisfied to exceed the statutory limits for first-degree murder." *Id*. at ___ (cleaned up). "Such a sentence is out

of line with other jurisdictions' punishments . . . and leaves [defendant] without any more meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation than a juvenile sentenced to parolable life." *Id*. at ___ (quotation marks and citation omitted). In sum, defendant's "75-to-150-year term-of-years sentence for second-degree murder violates the Michigan Constitution's prohibition against cruel or unusual punishment, and [defendant] is entitled to resentencing as a result." *Id*. at ___. [T]he Court did not resolve the proportionality challenge, noting that defendant's "sentence could not meet [Michigan's] proportionality requirement given that it [was] . . . unconstitutionally cruel or unusual." *Id*. at ___; see also *id*. at ___ (also noting that the trial court must ensure that its resentencing is both constitutional and proportional; among other things, the court must consider "defendant's youth and its attendant characteristics at the time of the offense as potentially mitigating—and not aggravating—factors").

See also *People v Campbell*, ___ Mich App ___, ___ (2025). In *Campbell*, "[d]efendant, who was 18 years old at the time of the offenses, argue[d] that his sentences of 65 to 100 years' imprisonment for his second-degree murder and AWIM [assault with intent to murder] convictions violate the principle of proportionality." *Id*. at ___. "A sentence is reasonable if it adheres to the 'principle of proportionality,' which requires the sentence to be 'proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *Id*. at ___ (2025), quoting *People v Steanhouse*, 500 Mich 453, 474 (2017). "[A] sentencing court must consider the offender's youth and treat it as a mitigating factor when imposing a term-of-years sentence on a juvenile defendant." *Campbell*, ___ Mich App at ___. Here, "[d]efendant's *minimum* sentence of 65 years for second-degree murder exceeds the suggested *maximum* sentence for an offender who was 18 years old when he committed first-degree murder." *Id*. at ___. Additionally, "[i]t is clear from the record that the trial court did not consider the mitigating factors of defendant's youth during sentencing" pursuant to the holding in *Miller v Alabama*, 567 US 460 (2012). Thus, "[d]efendant was entitled to be sentenced in a manner that duly accounted for the individualized circumstances of defendant and the offenses, which included his youth and its attendant characteristics as potentially *mitigating* factors." *Id*. at ___ (quotation marks and citation omitted).

F. Mandatory Minimum 25-Year Sentence for Certain CSC-I Offenders

"[T]he 25-year mandatory minimum [sentence] prescribed by MCL 750.520b(2)(b) [for first-degree criminal sexual conduct committed by a defendant who is 17 years of age or older against a victim who is less than 13 years of age] is [not] cruel or unusual when applied to a

[17-year-old] juvenile offender[,]" because the mandatory sentence "provides 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' for juvenile offenders." *People v Payne*, 304 Mich App 667, 675-676 (2014)[33] (quoting *Graham v Florida*, 560 US 48, 75 (2010), and noting that "[a]lthough a minimum sentence of 25 years is unquestionably substantial, it is simply not comparable to the sentences of death and life without parole found unconstitutional when applied to juveniles in *Miller*[*v Alabama*, 567 US 460 (2012),] *Graham*, [560 US 48,] and *Roper*[*v Simmons*, 543 US 551 (2005)][]").[34]

G. Extradition of Juvenile

"[A] detainee awaiting extradition[] has not incurred a punishment under [either] the Eighth Amendment[]" or Const 1963, art 1, § 16. *In re Boynton*, 302 Mich App 632, 635, 652, 654-655 (2013) (holding that the trial court properly permitted the juvenile respondent's extradition under the Uniform Criminal Extradition Act (UCEA), MCL 780.1 *et seq.*, to the state of Georgia to face accusations of delinquent behavior allegedly committed in that state when he was 12 years old, and further concluding that his claim that "removal from his family" and "extradition at 'the tender age of 15'" would constitute cruel and unusual punishment "must be addressed by the courts of the state of Georgia, not the courts of Michigan[]").

19.5 Alternative Sentences for Major Controlled Substance Offenses

Several statutory and court rule provisions require the court to consider alternative sentences for juveniles convicted under MCL 333.7401(2)(a)(*i*) and MCL 333.7403(2)(a)(*i*), which formerly imposed mandatory penalties for adults. As discussed below, however, because those mandatory penalties no longer exist, the alternative sentence requirements are no longer of any practical concern.

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[33] The *Payne* Court additionally rejected as irrelevant the defendant's assertion that "although his chronological age was 17½ years at the time of the offense, he lacked the mental maturity of a 17½-year-old because of his developmental delays, intellectual difficulties, and premature birth." *Payne*, 304 Mich App at 676 n 3 (quoting *United States v Marshall,* 736 F3d 492, 498 (CA 6, 2013), and noting that "'[u]nder the [United States] Supreme Court's jurisprudence concerning juveniles and the Eighth Amendment, the only type of "age" that matters is chronological age[]'").

[34] Note that MCL 750.520b(2)(c), which previously prescribed a mandatory sentence of life imprisonment without the possibility of parole for certain repeat CSC offenders 17 years of age or older against a victim less than 13 years of age, has been amended by 2014 PA 23, effective March 4, 2014, to apply only to offenders *18* years of age or older. MCL 750.520b(2)(b), which does not impose a life-without-parole sentence, has not been amended.

A. Mandatory Sentences Under Former §7401(2)(a)(*i*) and Former §7403(2)(a)(*i*)

Before 1997, any offender convicted under either MCL 333.7401(2)(a)(*i*) (manufacturing, creating,[35] delivering, or possessing with the intent to manufacture, create, or deliver 650 grams or more [now 1000 grams or more][36] of a schedule 1 or 2 narcotic drug or a cocaine-related substance) or MCL 333.7403(2)(a)(*i*) (simple possession of 650 grams or more [now 1000 grams or more] of a schedule 1 or 2 narcotic or a cocaine-related substance) was subject to a mandatory sentence of nonparolable life imprisonment, without exception for juveniles.[37]

Effective January 1, 1997, 1996 PA 249 amended MCL 333.7401(2)(a)(*i*) and MCL 333.7403(2)(a)(*i*) to eliminate the mandatory penalty of nonparolable life imprisonment for juvenile offenders and to permit the court to impose an alternative sentence of imprisonment of "not less than 25 years" for juvenile offenders in designated, automatic waiver, and traditional waiver proceedings.

Effective October 1, 1998, 1998 PA 319 amended MCL 333.7401(2)(a)(*i*) to eliminate the mandatory penalty of life imprisonment for adult offenders with an alternative sentence option for juveniles and to instead impose a mandatory, nonparolable minimum penalty of 20 years' imprisonment for all offenders; however, MCL 333.7403(2)(a)(*i*) was not similarly amended at that time, and it continued to impose a mandatory sentence of life imprisonment for adult offenders and an alternative sentence of at least 25 years' imprisonment for juveniles.

Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a)(*i*)-(*iv*) and MCL 333.7403(2)(a)(*i*)-(*iv*) to eliminate all mandatory sentences under these subsections, as well as the provision in former MCL 333.7401(3) that made these mandatory sentences nonparolable, and to allow the imposition of a sentence of "imprisonment for life or any term of years or a fine of not more than $1,000,000.00, or both[]" against any offender under MCL 333.7401(2)(a)(*i*) or MCL 333.7403(2)(a)(*i*). Additionally, 2002 PA 665 abolished the penalty of lifetime probation for violations of MCL 333.7401(2)(a)(*iv*) and MCL 333.7403(2)(a)(*iv*).

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[35] Effective April 1, 1994, 1994 PA 38 amended MCL 333.7401(2)(a)(*i*) to add the word "create" to the list of conduct proscribed under that subsection.

[36] Effective March 1, 2003, 2002 PA 665 amended MCL 333.7401(2)(a)(*i*) (and the corresponding simple possession offense set out in MCL 333.7403[2][a][*i*]) to reclassify the minimum amount of the controlled substance required from 650 grams to 1000 grams.

[37] See former MCL 333.7401(3), which, until amended by 2002 PA 665, provided that "[a]n individual subject to a mandatory term of imprisonment under [MCL 333.7401](2)(a) or [MCL 333.]7403(2)(a)(*i*)[-](*iv*) is not eligible for probation, suspension of that sentence, or parole during that mandatory term, except to the extent that those provisions permit probation for life[.]"

B. Conviction Under §7403(2)(a)(*i*) in Designated, Automatic Waiver, or Traditional Waiver Proceedings

In designated proceedings, if a juvenile is convicted of a violation or a conspiracy to commit a violation of MCL 333.7403(2)(a)(*i*) (possession of 1000 grams or more of a mixture containing a schedule 1 or 2 narcotic or cocaine), "the court may impose the alternative sentence permitted under [MCL 333.7403(2)(a)(*i*)] if the court determines that the best interests of the public would be served." MCL 712A.18(1)(o).

In automatic waiver proceedings, MCL 769.1(5) and MCR 6.931(E)(3) require the circuit court, when sentencing a juvenile for a violation or conspiracy to commit a violation of MCL 333.7403(2)(a)(*i*), to consider, in addition to an adult sentence or probation and commitment, an alternative sentence of at least 25 years' imprisonment.

Similarly, in traditional waiver proceedings, MCL 769.1(11) requires the court, when sentencing a juvenile for a violation or conspiracy to commit a violation of MCL 333.7403(2)(a)(*i*), to consider, in addition to an adult sentence, an alternative sentence of at least 25 years' imprisonment.

However, effective March 1, 2003, 2002 PA 665 amended MCL 333.7403(2)(a)(*i*) to eliminate the mandatory penalty of life imprisonment for adults and the alternative penalty of at least 25 years' imprisonment for juveniles, and to allow the imposition of a sentence of "imprisonment for life or any term of years" in all cases. Therefore, to the extent that they require consideration of alternative sentences, MCL 712A.18(1)(o), MCL 769.1(5), MCL 769.1(11), and MCR 6.931(E)(3) are now of no practical import.

C. Lifetime Probation

In an automatic waiver proceeding in which the court imposes probation and commits the juvenile to state wardship, "[t]he court shall not place the juvenile on life probation for conviction of a controlled substance violation, as set forth in MCL 771.1(4)." MCR 6.931(F)(5).

However, effective March 1, 2003, 2002 PA 665 and 666 abolished the penalty of lifetime probation for violations of MCL 333.7401(2)(a)(*iv*) and MCL 333.7403(2)(a)(*iv*) and deleted the text of former MCL 771.1(4), which also authorized the imposition of lifetime probation for these offenses. Accordingly, MCR 6.931(F)(5) is no longer of any practical import.

MCL 333.7401(4) and MCL 333.7403(3) now provide that if an individual was sentenced to lifetime probation under MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*) "as [they] existed before March 1, 2003 and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation[,]" or "the individual may petition the court seeking resentencing[.]"

D. Probation Without Judgment of Guilt

For a limited number of controlled substance offenses, MCL 333.7411 authorizes a judge to place a defendant, with his or her consent, on probation and to dismiss the case and discharge the defendant without entering a judgment of guilt if the defendant fulfills the probation conditions. Under MCL 333.7411(1), a defendant who has no prior controlled substance convictions and no prior discharge and dismissal under §7411 may be sentenced to probation under §7411 if he or she is charged with:

- simple possession of a controlled substance under MCL 333.7403(2)(a)(*v*) or MCL 333.7403(2)(b)-(d),
- use of a controlled substance pursuant to MCL 333.7404, or
- possession or use of an imitation controlled substance under MCL 333.7341 for a second time.[38]

Probation conditions may include payment of a probation supervision fee, participation in a drug treatment court, and completion of a course of instruction or rehabilitative program. MCL 333.7411(1); MCL 333.7411(5). However, if a juvenile is convicted of possession or use of an imitation controlled substance for a second time, MCL 333.7341(4), the court *must* order the juvenile "to undergo screening and assessment by a person or agency designated by the office of substance abuse services, to determine whether the [juvenile] is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs." MCL 333.7411(6). The juvenile must pay for the costs of the screening, assessment, and any ordered rehabilitation. *Id.*

[38] A first-time violator of MCL 333.7341 is subject only to a civil fine and costs. MCL 333.7341(4). See also MCL 333.7411(4).

Chapter 20: Review of Referee Recommendations & Appeals

20.1. Court Rules Governing Appeals From Family Division 20-2
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In this chapter. . .

This chapter briefly discusses the procedures for appealing from orders and judgments entered in all of the types of proceedings discussed in this benchbook. Applicable standards of review are also addressed. This chapter does not contain discussion of appellate procedure.

20.1 Court Rules Governing Appeals From Family Division

"Except as modified by [MCR 3.993], chapter 7 of the Michigan Court Rules governs appeals from the family division of the circuit court." MCR 3.993(C)(1). Appeals involving minor personal protection actions must generally comply with MCR 3.993 and MCR subchapter 7.200. MCR 3.709(A).

Subchapter 7.200 of the Michigan Court Rules governs appeals to the Court of Appeals, and subchapter 7.300 governs appeals to the Supreme Court. Discussion of these rules is beyond the scope of this benchbook.

20.2 Appeals From Family Division Orders

A. Orders Appealable by Right

MCR 3.993(A) provides that the following Family Division orders are appealable to the Court of Appeals by right:

> "(1) any order removing a child from a parent's care and custody,
>
> (2) an initial order of disposition following adjudication in a child protective proceeding,
>
> (3) an order of disposition placing a minor under the supervision of the court in a delinquency proceeding,
>
> (4) an order granting a motion to waive jurisdiction as provided in MCR 3.950(E)(1)(c).
>
> (5) an order terminating parental rights,
>
> (6) any order required by law to be appealed to the Court of Appeals,
>
> (7) any order involving an Indian child that is subject to potential invalidation under [MCL 712B.39 (MIFPA)] or [25 USC 1914 (ICWA)], which includes, but is not limited to an order regarding:
>
> > (a) recognition of the jurisdiction of a tribal court pursuant to MCL 712B.7, MCL 712B.29, or 25 USC 1911;
> >
> > (b) transfer to tribal court pursuant to MCL 712B.7 or 25 USC 1911;

(c) intervention pursuant to MCL 712B.7 or 25 USC 1911;

(d) extension of full faith and credit to public acts, records, and judicial proceedings of an Indian tribe pursuant to MCL 712B.7 or 25 USC 1911;

(e) removal of a child from the home, placement into foster care, or continuance of an out-of-home placement pursuant to MCL 712B.9, MCL 712B.15, MCL 712B.25, MCL 712B.29, or 25 USC 1912;

(f) termination of parental rights pursuant to MCL 712B.9, MCL 712B.15, or 25 USC 1912;

(g) appointment of counsel pursuant to MCL 712B.21 or 25 USC 1912;

(h) examination of reports pursuant to MCL 712B.11 or 25 USC 1912;

(i) voluntary consent to or withdrawal of a voluntary consent to a foster care placement or to a termination of parental right pursuant to MCL 712B.13, MCL 712B.25, MCL 712B.27, or 25 USC 1913;

(j) foster care, pre-adoptive, or adoptive placement of an Indian child pursuant to MCL 712B.23; and

(8) any final order."[1]

An appeal under [MCR 3.993(A)(3)[2]] may be taken only from "an 'order of disposition.'" *In re McCarrick*, 307 Mich App 436, 461 (2014).

"In any appeal as of right, an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts." MCR 3.993(A).

B. Orders Appealable by Leave

"All orders not listed in [MCR 3.993](A) are appealable to the Court of [A]ppeals by leave." MCR 3.993(B).

[1] See MCR 7.202(6) for the applicable definition of "final order."

[2] Formerly MCR 3.993(A)(1). See ADM File No. 2015-21, effective June 12, 2019.

C. Advice of Right to Appeal

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[3]

If a case has been designated, and the court determines that it will impose an adult or delayed sentence, it must conduct the sentencing hearing in accordance with MCR 6.425. including the appointment of appellate counsel as provided in MCR 6.425(G). MCR 3.955(C); MCR 6.425(F).[4]

If the court waives jurisdiction over a juvenile in a traditional waiver proceeding, the court must advise the juvenile of the right to appeal the waiver decision and of the right to appointed appellate counsel in accordance with MCR 3.993(D)(5). MCR 3.950(E)(1)(c)(i)-(iii).[5]

D. Request and Appointment of Counsel

The court must advise the juvenile as provided in MCR 6.425(F) after a decision at a sentencing hearing. MCR 6.931(E)(6). "Requests for and appointment of appellate counsel are subject to the procedures in MCR 6.425(G)." MCR 6.931(E)(6).

"To preserve an appeal by right from an order listed in [MCR 3.993(A)], a request for appointment of appellate counsel must be made within 21 days after notice of the order is given or an order is entered denying a timely-filed postjudgment motion." MCR 3.993(D)(1). "Except as provided in MCR 3.993(C)(3), if a request for appointment of appellate counsel is filed within 6 months of entry of the order to be appealed and the court finds that the respondent is financially unable to retain an attorney, the court must

> (a) in child protective proceedings, appoint an attorney within 14 days after the respondent's request is filed.
>
> (b) in all other proceedings subject to [MCR 3.993], appoint an attorney as provided in [MCR 3.993(D)(5)].

The chief judge of the court shall bear primary responsibility for ensuring that the appointment is made within the deadline stated in this rule." MCR 3.993(D)(2).

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[3] See Section 10.11 for additional information on MCR 3.937.

[4] See Section 20.2(D) for information on request and appointment of counsel.

[5] See Section 20.2(D) for information on request and appointment of counsel.

"All requests for the appointment of appellate counsel must be granted or denied on forms approved by [SCAO]. If the order being appealed is appealable by right and the request for appointment of appellate counsel was filed within the time provided in [MCR 3.993(D)(1)], the order described in [MCR 3.993(D)(2)] must be entered on a form entitled 'Claim of Appeal and Order Appointing Counsel.'" MCR 3.993(D)(3). The court must immediately send the Court of Appeals a copy of the order appointing counsel, a copy of the judgment or order being appealed, and a complete copy of the register of actions in the case, and the court must file proof that the order appointing counsel was served "on the respondent(s), appointed counsel for the respondent(s), the court reporter(s)/ recorder(s), petitioner, the prosecuting attorney, the lawyer-guardian ad litem for the child(ren) under MCL 712A.13a(1)(f), and the guardian ad litem or attorney (if any) for the child(ren)." MCR 3.993(D)(4). Entry of an order appointing counsel pursuant to MCR 3.993(D) "constitutes a timely filed claim of appeal for the purposes of MCR 7.204." MCR 3.993(D)(4).

"If the court appoints appellate counsel for respondent, the court must order the complete transcripts of all proceedings prepared at public expense." MCR 3.993(E).

E. Proceedings Subject to Appointment of Appellate Counsel via Michigan Assigned Counsel System

"A request for the appointment of appellate counsel in a proceeding subject to [MCR 3.993(D)(5)[6]] must be deemed filed on the date it is received by the court or the Michigan Appellate Assigned Counsel System (MAACS), whichever is earlier." MCR 3.993(D)(5)(a).

"Within 7 days after receiving a juvenile's request for a lawyer, or within 7 days after the disposition of a postjudgment motion if one is filed, the trial court must submit the request, the order to be appealed, the register of actions, and any additional requested information to MAACS under procedures approved by the Appellate Defender Commission for the preparation of an appropriate order granting or denying the request." MCR 3.993(D)(5)(b). "The court must notify MAACS if it intends to deny the request." *Id*.

"Within 7 days after receiving a request and related information from the trial court, MAACS must provide the court with a proposed order appointing appellate counsel or denying the appointment of appellate counsel." MCR 3.993(D)(5)(c). "A proposed appointment order must

[6] MCR 3.993(D)(5) "is not applicable to child protective proceedings." MCR 3.993(D)(5).

name the State Appellate Defender Office or an approved private attorney who is willing to accept an appointment for the appeal." *Id*.

"Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the juvenile is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 6 months." MCR 3.993(D)(5)(d). "An order denying a request for the appointment of appellate counsel must include a statement of reasons and must inform the juvenile that the order denying the request may be appealed by filing an application for leave to appeal in the Court of Appeals under MCR 7.205." MCR 3.993(D)(5)(d).

"The trial court must serve MAACS with a copy of its order granting or denying a request for a lawyer." MCR 3.993(D)(5)(e). "Unless MAACS has agreed to provide the order to any of the following, the trial court must also serve a copy of its order on the juvenile, the juvenile's parents, the juvenile's attorney, the petitioner, and, if the order includes transcripts, the court reporter(s)/recorder(s)." *Id*.

F. Order Revoking Juvenile Probation

If the Family Division revokes juvenile probation and places the minor under the supervision of the court, the probation revocation order is appealable by right under MCR 3.993(A)(3).[7] However, if the juvenile did not appeal from the initial disposition, errors in the initial proceeding may not be raised on appeal from the probation revocation. *In re Madison*, 142 Mich App 216, 219 (1985), citing *People v Pickett*, 391 Mich 305, 316-317 (1974).[8]

G. Suspension of Order on Appeal

MCL 600.1041 provides, in relevant part:

> "The pendency of an appeal from the family division of circuit court in a matter involving the disposition of a juvenile or, in a case where the family division has ancillary jurisdiction, from an order entered pursuant to the mental health code . . . shall not suspend the order unless the court to which the appeal is taken specifically orders the suspension."

[7] Formerly MCR 3.993(A)(1). See ADM File No. 2015-21, effective June 12, 2019.

[8] See Chapter 11 for a discussion of probation violations in delinquency cases.

H. Delayed Appeals

> "An application for a delayed appeal from an order of the family division of circuit court in a matter involving the disposition of a juvenile shall be filed within 6 months after entry of the order." MCL 600.1041.

20.3 Appeals in Minor Personal Protection Order (PPO) Proceedings

MCR 3.709 provides:

> "**(A) Rules Applicable.** Except as provided by this rule, appeals involving personal protection order matters must comply with subchapter 7.200. Appeals involving minor personal protection actions under the Juvenile Code must additionally comply with MCR 3.993.
>
> **(B) From Entry of Personal Protection Order.**
>
> (1) Either party has an appeal of right from
>
> (a) an order granting or denying a personal protection order after a hearing under [MCR 3.705(B)(6)], or
>
> (b) the ruling on respondent's first motion to rescind or modify the order if an ex parte order was entered.
>
> (2) Appeals of all other orders are by leave to appeal.
>
> **(C) From Finding After Violation Hearing.**
>
> (1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.
>
> (2) All other appeals concerning violation proceedings are by application for leave."

Generally, "an extension of a PPO by itself is normally only appealable by leave granted . . . ." *In re SB*, ___ Mich App ___, ___ (2024). However, if "the court clearly contemplate[s] the PPO's extension as a condition of its sentence, respondent's appeal of the extension is an appeal from respondent's sentence for criminal contempt entered after the contested hearing, which would then be by right." *Id.* at ___ (concluding MCR 3.708(H)(5), containing substantially similar language to the language in MCR 3.709(C)(1), permitted "the trial court to modify or extend the PPO

sua sponte under its authority to impose 'other conditions' *as part of sentencing in connection with a violation of the PPO*").

20.4 Appeals in Designated Proceedings

Designated proceedings are criminal proceedings that occur within the Family Division of the Circuit Court. MCL 712A.2d(7); MCR 3.903(A)(6). Conviction in a designated proceeding has "the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7).

A criminal defendant has an appeal by right to the Court of Appeals following conviction in circuit court, except that an appeal by a defendant who pleads guilty or nolo contendere is by application for leave to appeal. Const 1963, art 1, § 20; MCL 770.3(1)(a); MCL 770.3(1)(d); MCR 7.203(A)(1).[9]

Following conviction in a designated proceeding, if the court enters an order of disposition[10] placing the juvenile under the supervision of the court, the juvenile may appeal by right under MCR 3.993(A)(3).

20.5 Appeals in Traditional Waiver Proceedings

A juvenile may appeal by right to the Court of Appeals from an order granting the prosecutor's motion to waive jurisdiction in a traditional waiver proceeding under MCL 712A.4 and MCR 3.950. See MCR 3.950(E)(1)(c)(*i*)-(*ii*) (requiring the Family Division, upon entry of an order waiving jurisdiction, to advise the juvenile that he or she is "entitled to appellate review of the decision to waive jurisdiction[]" and that he or she "must seek review of the decision in the Court of Appeals within 21 days of the order to preserve the appeal of right[]").

A juvenile subject to a traditional waiver proceeding also has an appeal by right to the Court of Appeals following conviction in circuit court, except that an appeal by a defendant who pleads guilty or nolo contendere is by application for leave to appeal. Const 1963, art 1, § 20; MCL 770.3(1)(a); MCL 770.3(1)(d); MCR 7.203(A)(1).[11]

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[9] See Section 20.9(B) for additional discussion of appeals from plea-based convictions.

[10] See Chapter 15, Part D, for discussion of the Family Division's dispositional and sentencing options following conviction in a designated proceeding.

[11] See Section 20.9(B) for additional discussion of appeals from plea-based convictions.

20.6 Appeals in Automatic Waiver Proceedings

A juvenile subject to an automatic waiver proceeding under MCL 712A.2(a)(1) and MCR 6.901 *et seq*. has an appeal as of right to the Court of Appeals following conviction, except that an appeal by a defendant who pleads guilty or nolo contendere is by application for leave to appeal. Const 1963, art 1, § 20; MCL 770.3(1)(a); MCL 770.3(1)(d); MCR 7.203(A)(1).[12]

A juvenile may also appeal by right to the Court of Appeals from the imposition of a sentence of incarceration after a finding that the juvenile violated probation. MCR 6.933(I).

20.7 Standards of Review

A. Delinquency Proceedings

Orders of disposition are reviewed for an abuse of discretion. See *In re Ricks*, 167 Mich App 285, 295 (1988); *In re Scruggs*, 134 Mich App 617, 621-622 (1984).

B. Designated Proceedings

There are no binding appellate decisions addressing the appropriate standard of review of either the Family Division's decision to designate a case or its sentencing or dispositional determination in a designated proceeding.

See, however, *In re Curry*, unpublished opinion per curiam of the Court of Appeals, issued December 3, 2002 (Docket No. 238793), in which the panel adopted, for purposes of reviewing a sentencing or dispositional decision in a designated proceeding, the standard of review applicable to reviewing a sentencing decision in an automatic waiver proceeding:

> "We conclude that the [bifurcated] procedure applicable when reviewing a trial court's decision to impose an adult or juvenile sentence under MCL 769.1(3) and MCR 6.931 applies equally to a trial court's decision whether to enter a juvenile dispositional order, a delayed sentence, or an adult sentence under [(former)] MCL 712A.18(1)(n) [(now MCL 712A.18(1)(o))] and [(former)] MCR 5.955 ([now MCR 3.955)]. *People v Thenghkam*, 240 Mich App 29 (2000).

[12] See Section 20.9(B) for additional discussion of appeals from plea-based convictions.

> Hence, we first review the trial court's factual findings . . . for clear error. . . . Second, we review the trial court's sentencing decision for an abuse of discretion. . . . 'This second part of the analysis scrutinizes how the court weighed its factual findings to come to the ultimate sentencing decision.'" *In re Curry*, slip op at 2-3 (internal citations omitted).

In imposing sentence or disposition in a designated proceeding, the court need not explicitly address each of the factors set out in MCL 712A.18(1)(o).[13] *People v Petty*, 469 Mich 108, 116-118 (2003). The *Petty* Court, although it did not specifically set forth the standard of review applicable to decisions under MCL 712A.18(1)(o), abrogated *Thenghkam*, 240 Mich App at 41-42, 48, in which the Court of Appeals had construed the nearly identical inquiry under the automatic waiver statute, MCL 769.1(3), as requiring the trial court to articulate specific findings with regard to each of the enumerated best-interests factors. The *Petty* Court stated as follows:

> "Instead of concentrating primarily on the sufficiency of the trial court's factual determinations vis-à-vis the criteria listed in MCL 712A.18(1)(o)(*i*)-(*vi*), a plain reading of the statute requires that a court deliberately consider whether to enter an order of disposition, impose a delayed sentence, or impose an adult sentence in light of the six factors enumerated in subsection [1(o)(*i*)-(*vi*)]. As evidence that it complied with the statute, the trial court, on the record, must acknowledge its discretion to choose among the three alternatives. Hence, a court should consider the enunciated factors . . . to *assist* it in choosing one option over the others. A trial court need not engage in a lengthy 'laundry list' recitation of the factors. Rather, the focus of the hearing should be on the three options, i.e., an adult sentence, a blended sentence, or a juvenile disposition, as outlined in the [relevant] court rules. For this reason, we repudiate the Court's reasoning in *Thenghkam* to the extent it conflicts with this explicit three-part inquiry.
>
> As a result, trial courts will no longer be forced to undertake a mechanical recitation of the statutory criteria. Rather, a court must logically articulate on the record why it has chosen one alternative over the other two, in light of the criteria articulated in [MCL 712A.18(1)(o)]. By so doing, a court performs the analysis required by the Legislature, while establishing

[13] *Petty* discussed former MCL 712A.18(1)(n); that provision has been redesignated as MCL 712A.18(1)(o).

> an adequate record to permit appellate review." *Petty*, 469 Mich at 117-118.

C. Traditional Waiver Proceedings

The Family Division's decision whether to waive jurisdiction under MCL 712A.4 is reviewed for an abuse of discretion. *People v Fultz*, 453 Mich 937 (1996). See also *In re Fultz*, 211 Mich App 299, 306 (1995), rev'd on other grounds 453 Mich 937 (1996)[14] (holding that an order denying a motion to waive jurisdiction is reviewed under a "bifurcated standard": factual findings are reviewed for clear error, while the decision to waive or retain jurisdiction is reviewed for an abuse of discretion).

D. Automatic Waiver Proceedings

The standard of review of a circuit court's decision to sentence a juvenile as an adult or to place the juvenile on probation and commit him or her to state wardship following conviction in an automatic waiver proceeding is set out in *Thenghkam*, 240 Mich App at 41-42:

> "This Court employs a bifurcated procedure to review a trial court's decision to sentence a minor as a juvenile or as an adult. First, we review the trial court's factual findings . . . for clear error. . . . Second, we review the ultimate decision whether to sentence the minor as a juvenile or as an adult for an abuse of discretion." (Internal citations omitted.)

However, in *People v Petty*, 469 Mich 108, 116-118 (2003), the Michigan Supreme Court abrogated *Thenghkam*, 240 Mich App at 41-42, 48, to the extent that it required the sentencing court to provide a recitation of all of the statutory factors in making a decision regarding the sentencing of a juvenile following conviction in an automatic waiver proceeding. See Section 16.16 for a discussion of *Petty*, 469 Mich at 116-118.

The "proportionality standard" established in *People v Milbourn*, 435 Mich 630, 635 (1990), which applies to review of a criminal sentence, must not be considered when deciding whether to sentence a juvenile as an adult or to sentence the juvenile to probation and commit him or her to state wardship. See *Thenghkam*, 240 Mich App at 49-50 n 21.

The Court of Appeals may not consider posthearing reports or other information concerning a juvenile that was prepared after the juvenile

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

sentencing hearing (for example, updated service plans and psychiatric reports) when reviewing the sentencing court's decision to impose sentence or probation and state wardship. *People v Lyons (On Remand)*, 203 Mich App 465, 469-470 (1994).

E. Harmless Error

The harmless error rule applies to corrections of error in both juvenile delinquency and criminal proceedings. See MCL 769.26; MCR 2.613(A); MCR 3.902(A).

20.8 Prosecuting Attorney's Right to Appeal

A. Delinquency Cases

As petitioner in a delinquency case, the prosecuting attorney is a party to the proceeding. MCR 3.903(A)(19)(a)(i); MCR 3.914(B)(1). As a party, the prosecuting attorney may appeal to the Court of Appeals by right from any of the following Family Division orders:

> "(1) any order removing a child from a parent's care and custody,
>
> (2) an initial order of disposition following adjudication in a child protective proceeding,
>
> (3) an order of disposition placing a minor under the supervision of the court in a delinquency proceeding,
>
> (4) an order granting a motion to waive jurisdiction as provided in MCR 3.950(E)(1)(c),
>
> (5) an order terminating parental rights,
>
> (6) any order required by law to be appealed to the Court of Appeals,
>
> (7) any order involving an Indian child that is subject to potential invalidation under [MCL 712B.39 (MIFPA)] or [25 USC 1914 (ICWA)], which includes, but is not limited to an order regarding:
>
> > (a) recognition of the jurisdiction of a tribal court pursuant to MCL 712B.7, MCL 712B.29, or 25 USC 1911;
> >
> > (b) transfer to tribal court pursuant to MCL 712B.7 or 25 USC 1911;

(c) intervention pursuant to MCL 712B.7 or 25 USC 1911;

(d) extension of full faith and credit to public acts, records, and judicial proceedings of an Indian tribe pursuant to MCL 712B.7 or 25 USC 1911;

(e) removal of a child from the home, placement into foster care, or continuance of an out-of-home placement pursuant to MCL 712B.9, MCL 712B.15, MCL 712B.25, MCL 712B.29, or 25 USC 1912;

(f) termination of parental rights pursuant to MCL 712B.9, MCL 712B.15, or 25 USC 1912;

(g) appointment of counsel pursuant to MCL 712B.21 or 25 USC 1912;

(h) examination of reports pursuant to MCL 712B.11 or 25 USC 1912;

(i) voluntary consent to or withdrawal of a voluntary consent to a foster care placement or to a termination of parental right pursuant to MCL 712B.13, MCL 712B.25, MCL 712B.27, or 25 USC 1913;

(j) foster care, pre-adoptive, or adoptive placement of an Indian child pursuant to MCL 712B.23; and

(8) any final order." MCR 3.993(A)(1)-(4).

An appeal under [MCR 3.993(A)(3)[15]] may be taken only from "an 'order of disposition.'" *In re McCarrick*, 307 Mich App 436, 461 (2014).

"In any appeal as of right, an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts." MCR 3.993(A).

B. Criminal Cases

The scope of the prosecuting attorney's right of appeal in criminal cases is set out in MCL 770.12. A prosecutor has no right to appeal outside the express provisions of that statute. *People v Torres*, 452 Mich 43, 51 (1996); *People v Cooke*, 419 Mich 420, 426-427 (1984). MCL 770.12 generally authorizes prosecutorial appeal from judgments and orders if the prohibition against double jeopardy would not bar further proceedings against the defendant.

[15]Formerly MCR 3.993(A)(1). See ADM File No. 2015-21, effective June 12, 2019.

1. Appeals by Right

MCL 770.12(1) provides that, if further proceedings against the defendant are not barred by the constitutional protection against double jeopardy, the prosecuting attorney may take an appeal of right from either:

> "(a) A final judgment or final order of the circuit court . . . except a judgment or order of the circuit court . . . on appeal from any other court.
>
> (b) A final judgment or order of a court or tribunal from which appeal of right has been established by law."

The prosecuting attorney may appeal by right from a decision to impose a juvenile sentence in an automatic waiver proceeding. See *People v Brown (Gregory)*, 205 Mich App 503, 504 (1994). Furthermore, resentencing a juvenile after he or she has completed a void juvenile sentence following conviction in an automatic waiver proceeding does not violate the constitutional prohibition against double jeopardy. *People v Thenghkam*, 240 Mich App 29, 69-71 (2000), abrogated in part on other grounds by *People v Petty*, 469 Mich 108 (2003)[16] (where, in an automatic waiver proceeding, the sentencing court abused its discretion in imposing a juvenile sentence for the juvenile's convictions of second-degree murder and possession of a firearm during the commission of a felony, the juvenile sentence was invalid, and double jeopardy principles did not prohibit resentencing the juvenile following completion of the void sentence).

2. Appeals by Leave

MCL 770.12(2) provides that, if further proceedings are not barred by the constitutional protection against double jeopardy, the prosecuting attorney may take an appeal by leave from any of the following:

> "(a) A judgment or order of the circuit court. . . that is not a final judgment appealable of right.
>
> (b) A final judgment entered by the circuit court . . . on appeal from any other court.
>
> (c) Any other judgment or order appealable by law or rule.

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

> (d) A judgment or order when an appeal of right could have been taken but was not timely filed.
>
> (e) A final order or judgment based upon a defendant's plea of guilty or nolo contendere."

20.9 Appointment of Appellate Counsel

A. Appeals from Family Division

A juvenile in a delinquency, designated, or traditional waiver proceeding in the Family Division "has a right to an attorney at each stage of the proceeding." MCL 712A.17c(1). See also MCR 3.915(A)(1); MCR 3.951(A)(2)(b)(*i*). MCL 712A.17c(2) requires the court to appoint counsel for a juvenile "if 1 or more of the following apply:

> "(a) The child's parent refuses or fails to appear and participate in the proceedings.
>
> (b) The child's parent is the complainant or victim.
>
> (c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.
>
> (d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.
>
> (e) The court determines that the best interests of the child or the public require appointment."

MCR 3.915(A)(2)(a)-(e) contains substantially similar language. See also MCR 3.951(A)(2)(b)(i) (specifying that the court must advise the juvenile "of the right to an attorney at all court proceedings, including the arraignment").

MCR 3.950(E)(1)(c)(iii) requires the Family Division to notify a juvenile of the right to appointed counsel to appeal from a decision to waive jurisdiction over the juvenile in a traditional waiver proceeding in accordance with MCR 3.993(D)(5).

The court must advise a juvenile of their appellate rights set forth in MCR 3.937 at the conclusion of a dispositional hearing under MCR 3.943 or any delinquency hearing at which the court orders that the juvenile be removed from a parent's care and custody. MCR 3.937(A).[17]

B. Appeals in Criminal Cases

An indigent criminal defendant is entitled to appointed counsel in his or her first appeal of right. *Douglas v California,* 372 US 353, 355-357 (1963). See also *People v Campbell*, 499 Mich 896, 896 (2016) (citing *Douglas*, 372 US 353, and holding that a defendant who files a motion for new trial during his or her appeal of right is "entitled to counsel during the proceeding and entitled to raise a claim of ineffective assistance of [appellate] counsel").

Additionally, "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas,[18] who seek access to first-tier review in the Michigan Court of Appeals." *Halbert v Michigan*, 545 US 605, 610, 619 (2005) ("Whether formally categorized as the decision of an appeal or the disposal of a leave application, the Court of Appeals' ruling on a plea-convicted defendant's claims provides the first, and likely the only, direct review the defendant's conviction and sentence will receive[]").

The *Halbert* Court additionally held that the defendant did not waive his right to appointed counsel for first-level appellate review by entering his plea, because at that time he "had no recognized right to appointed appellate counsel he could elect to forgo[,]" and because "the trial court did not tell [him], simply and directly, that in his case, there would be no access to appointed counsel." *Halbert,* 545 US at 623-624. In *People v James*, 272 Mich App 182, 194-195 (2006), the Court of Appeals ruled that the discussion of validity of waiver in *Halbert,* 545 US at 623-624, was not dictum and, therefore, must be followed by Michigan courts. Accordingly, the *James* Court held that the defendant in that case "did not waive his right to the appointment [of appellate counsel] at the time of entering his guilty plea on the basis of the circuit court's mere advisement that waiver would occur[.]" *James*, 272 Mich App at 198.

Furthermore, requiring a defendant to waive his or her right to appointed appellate counsel as a plea condition constitutes an Equal Protection and Due Process violation. *People v Billings*, 283 Mich App 538, 545-547 (2009). Noting that the United States Supreme Court in *Halbert*, 545 US at 624 n 8, "unambiguously indicate[d] that [it] would hold unconstitutional the practice of imposing a waiver of appointed appellate counsel as a plea condition[,]" the *Billings* Court concluded that requiring defendants to waive the right to appellate counsel as a plea condition constitutes an Equal Protection violation because "moneyed defendants tendering guilty pleas would have greater

[17] See Section 10.11 for additional information on MCR 3.937.

[18] In Michigan, an appeal by a defendant who pleads guilty or nolo contendere is only by application for leave to appeal. Const 1963, art 1, § 20; MCL 770.3(1)(d); MCR 7.203(A)(1)(b).

access to first-tier appellate review than indigent defendants solely on the basis of the moneyed defendants' financial status." *Billings*, 283 Mich App at 545-546.

Defendants whose convictions are final are not afforded retroactive relief under *Halbert*, 545 US 605, under either federal or state retroactivity jurisprudence. *People v Maxson*, 482 Mich 385, 402-403 (2008).

"In a case involving a conviction following a guilty plea, the denial of appointed appellate counsel on the basis of the defendant's failure to comply with the 42-day deadline for requesting counsel in MCR 6.425(G)(1)(c) does not violate *Halbert*[, 545 US 605]." *People v McCoy*, 483 Mich 898, 898 (2009).

20.10 Restoration of Appellate Rights

MCR 3.993 governs the restoration of appellate rights in juvenile cases and provides as follows:

> "A respondent may file a motion to restore their appellate rights as provided in this subrule. If a respondent was denied the right to appellate review or the appointment of appellate counsel due to errors by the respondent's prior attorney or the court, or other factors outside the respondent's control, the trial court must issue an order restarting the time in which to file an appeal or request counsel, except that the court must not issue any order that would extend the time for appealing an order terminating parental rights beyond 63 days from entry of the order terminating rights.
>
> > (1) A motion premised on the respondent being denied the right to appellate review must be filed within a reasonable time after an order identified in subrule (A) was entered or, if applicable, within a reasonable time after the respondent's claim of appeal was dismissed. For purposes of this paragraph, a motion filed within 2 years after the date an order identified in subrule (A) was entered or a motion filed within 1 year after the date on which the respondent's claim of appeal was dismissed is presumed reasonable.
> >
> > (2) A motion premised on the respondent being denied the appointment of appellate counsel must be filed within a reasonable time after being denied the appointment of appellate counsel. For purposes of this paragraph, a motion filed within 2 years of the date an

order denying appointment of counsel was entered is presumed reasonable.

(3) A motion under this subrule will not be considered if it alleges grounds for relief that were resolved against that respondent in a prior proceeding or appeal.

(4) A respondent filing an appeal after receiving an order issued under this subrule must provide the Court of Appeals with a copy of the order when filing the appeal with the claim of appeal or application for leave to appeal. The Court of Appeals can excuse this requirement for good cause.

(5) In determining a 'reasonable time' under this subrule, the court must consider whether factors existed outside the respondent's control that contributed to the delay in filing a motion under this subrule."

Chapter 21: Recordkeeping and Reporting Requirements

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In this chapter...

This chapter discusses recordkeeping and reporting requirements regarding juveniles in delinquency and criminal proceedings. Part A discusses the courts' recordkeeping obligations, confidentiality of and access to records, retention and destruction of exhibits and records, and the use of evidence and records concerning juveniles in subsequent proceedings. Part B addresses reporting requirements concerning the Michigan Department of State Police and the Secretary of State and the maintenance and destruction of records, including fingerprints and other biometric data, by these agencies. Part C discusses statutory requirements for the setting aside of juvenile adjudications and convictions. Part D briefly discusses registration under the Sex Offenders Registration Act (SORA), DNA profiling, and communicable disease testing requirements, topics that are more thoroughly addressed in the Michigan Judicial Institute's *Sexual Assault Benchbook*.

Among the specific topics addressed in this chapter are the following:

- What records must the Family Division keep regarding juveniles within its jurisdiction?
- Who has access to those records and for what purposes?
- When may such records be destroyed?
- What information must be reported to the Department of State Police and the Secretary of State?
- What is the effect of "setting aside" an adjudication or conviction?
- When must a juvenile provide a DNA sample?
- When must a juvenile be tested for venereal or HIV disease, and who has access to the test results?

Part A: Recordkeeping

21.1 Family Division Records and Recordkeeping Obligations

"The court, under the direction of the chief judge, has responsibility for the management of all records necessary to adequately support the business of the court. It requires the systematic control of those records from the point they are created, received, or filed to the point they are transferred to the Archives of Michigan or destroyed in accordance with approved record retention and disposal schedules. This is accomplished through the assistance of staff support, including, but not limited to, court administrators, registers of probate, clerks of the court, probation officers, and friends of the court, all of whom are required to comply with various laws, court rules, and standards pertaining to management of the judiciary's court records." Michigan Trial Court Records Management Standards, *Introduction*.

For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

A. Personal Identifying Information (PII)

"[P]ersonal identifying information is protected and shall not be included in any public document or attachment filed with the court on or after April 1, 2022," unless otherwise provided by the Michigan Court Rules. MCR 1.109(D)(9)(a).

1. Protected PII Defined

An individual's protected PII includes the following:

- date of birth,
- Social Security number or national identification number,
- driver's license number or number of state-issued personal identification card,
- passport number, and
- financial account numbers. MCR 1.109(D)(9)(a)(*i*)-(*v*).

2. Filing and Accessing Protected PII

a. Filing a Document Containing Protected PII

When law or court rule requires protected PII, as it is defined in MCR 1.109(D)(9)(a), to be filed with the court, or when the court finds the information necessary to identify a specific individual in a case, the PII must be provided using the form and manner required by the State Court Administrative Office (SCAO).[1] MCR 1.109(D)(9)(b)(*i*).

Protected PII provided to the court in compliance with the requirements of MCR 1.109(D)(9)(b) must be entered into the case management system according to standards established by the SCAO. MCR 1.109(D)(9)(e). "The information shall be maintained for the purposes for which it was collected and for which its use is authorized by federal or state law or court rule; however, it shall not be included or displayed as case history under MCR 8.119(D)(1).

Except as otherwise provided in the court rules, when a party is required to provide protected PII in a public document to be filed with the court, the party must redact the protected PII from the document and file the PII form approved by SCAO.[2] MCR 1.109(D)(9)(b)(*iii*). Unredacted protected PII may be included on Uniform Law Citations filed with the court and on proposed orders submitted to the court. *Id*. If a party submits a proposed order to the court that is required to contain unredacted protected PII once issued by the court, the party must not attach the proposed order to another document. *Id*.

The SCAO form must contain the information redacted from the document and must assign an appropriate reference to the information contained in the SCAO form that uniquely associates each item redacted from the document with the corresponding personal identifying information provided on the SCAO form.[3] MCR 1.109(D)(9)(b)(*iii*). When a reference is made in a case to the identifier representing the personal identifying

[1] SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

[2] SCAO Form MC 97, *Protected Personal Identifying Information* (for an individual who is a defendant, respondent, or decedent), and SCAO Form MC 97a, *Addendum to Protected Personal Identifying Information* (for an individual who is a plaintiff, petitioner, or other individual).

information on the SCAO form, the reference to the identifier is understood to refer to the complete information related to the identifier appearing on the form. *Id*. The SCAO form may include fields for the PII, and the information inserted into the fields will be protected.[4] *Id*.

Providing a Social Security number. When a Social Security number is required to be filed with the court, the number must be limited to the last four digits, except when the documents being filed are required by the Friend of the Court and will not be placed in the court's legal file under MCR 8.119(D). MCR 1.109(D)(9)(b)(*ii*).[5]

b. Amending Protected PII

An individual may amend as of right the protected PII provided in the SCAO form. MCR 1.109(D)(9)(b)(*iii*).

c. Access to a Document Containing Protected PII

Limited access to protected PII. Protected PII under MCR 1.109(D) is nonpublic. MCR 1.109(D)(9)(b)(*iv*). Protected PII is available for purposes of case activity or as otherwise required by law or court rule. *Id*. The protected PII provided is available only to the parties in a case, to interested persons described in the court rules, and to other persons, entities, or agencies authorized by law or court rules to access nonpublic records that have been filed with the court. *Id*.

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[3]A specific form for protecting personal identifying information must be filed when a petition is filed in child protective proceedings. See SCAO Form MC 97b, *Protected Personal Identifying Information*. SCAO Form MC 97b is the form listing the birthdates, which are protected PII under MCR 1.109(D)(9)(a), of the children and other parties named on a petition to initiate child protective proceedings. Birthdates appear on SCAO Form MC 97b in fields designated by number and letter. Those number and letter combinations are noted on SCAO Form JC 04b so that actual birthdates do not appear on the petition; instead, the petition contains only the letter and number designation that corresponds to a party's particular birthdate as it is listed on SCAO Form 97b.

[4]Local court forms are prohibited from containing fields in which protected PII may be entered. MCR 1.109(D)(9)(c). A court must not reject a document to be filed, dismiss a case, or otherwise take negative action against a party if the party has failed to provide protected PII on a local court form. *Id*.

[5]See also MCR 1.109(D)(10)(b), which provides that a court's dissemination of social security numbers is limited to the purposes permitted under federal or state law. If a request is filed on or after March 1, 2006, for a copy of a public document, "the court must review the document and redact all social security numbers on the copy." *Id*. "This requirement does not apply to certified copies or true copies when they are required by law, or copies made for those uses for which the social security number was provided." *Id*.

3. Consenting to the Access of Protected PII

A party may stipulate in writing to permit any person, entity, or agency to access to his or her protected PII. MCR 1.109(D)(9)(b)(*v*)(A). Any person, entity, or agency attempting to access the protected PII must provide the court with the stipulation permitting access. *Id*.

a. Access to a Party's Date of Birth

Obtaining authority to access a party's date of birth. For the purpose of confirming a particular person's identity and with the person's consent, an individual may be authorized to access a party's date of birth without having to present a stipulation as is required under MCR 1.109(D)(9)(b)(*v*)(A) in order to access protected PII. MCR 1.109(D)(9)(b)(*v*)(B)(1).

Possession of the party's consent. The individual authorized to access a birthdate must retain possession of the consent, or the consent must be retained by the entity for which the individual works, or the person or organization (or someone acting on their behalf) seeking a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1).

b. List of Individuals Authorized to Access a Party's Date of Birth

SCAO list of authorized individuals. The SCAO will maintain a list of the individuals having the authority to access a party's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(1). To appear on the SCAO list, an individual must provide in writing the name of the entity for which the individual works and an assurance that on each occasion the individual seeks to confirm a party's birthdate, it will be in the course of the individual's work and with the consent of the person whose date of birth is sought. *Id*. The assurance must be updated within every six months from the date of the original submission. *Id*.

Additional information required for placement on the SCAO list. In addition, an individual attempting to be placed on the SCAO list of individuals authorized to access birthdates must provide proof of his or her employer's or hiring entity's professional liability insurance in effect during the time the individual is seeking the person's date of birth. MCR 1.109(D)(9)(b)(*v*)(B)(2). The proof of insurance is

nonpublic and must be updated upon the expiration or termination of the insurance policy. *Id*.

Court's duty to verify identity. A court must verify the identity of an individual claiming to be authorized to obtain a person's birthdate by matching the name appearing on the individual's state-issued identification card with the individual's name on the SCAO list. MCR 1.109(D)(9)(b)(*v*)(B)(3). Courts and SCOA may create secure, individualized accounts that allow authorized individuals to access a party's date of birth electronically. *Id*. After confirming the identity of the individual seeking information about a person's birthdate, a court must supply the authorized individual with a public register of actions or other public document that includes the person's date of birth. *Id*.

4. No Exemptions for Service of Protected PII

Except by a court order issued under MCR 1.109(D)(9)(b)(*vii*) making the PII confidential, there is no exemption from the requirement that a court or a party serve a nonpublic document that was filed with the court and includes the protected PII that must be provided to the court as stated in MCR 1.109(D)(9)(b)(*i*). MCR 1.109(D)(9)(b)(*vi*).

5. Protected PII May Be Made Confidential

For just cause found, a court may, on its own motion or by motion of a party, order that PII be made confidential. MCR 1.109(D)(9)(b)(*vii*). The order must identify the person, party, or entity whose access to the PII is restricted. *Id*. When a party's home address or telephone number is made confidential, the court order must provide an alternative address for service on the party or an alternative phone number by which the party may be contacted about case activity. *Id*.

6. Failing to Comply With Requirements to Protect PII

If a party files his or her protected PII in a public document and does not provide the information in the form and manner established by the SCAO under MCR 1.109(D)(9), the party waives the protection available for his or her PII. MCR 1.109(D)(9)(d)(*i*). When a party fails to comply with the requirements of MCR 1.109(D) the court, on its own initiative or by a party's motion, may have the improperly filed documents sealed and order that new documents with redactions be prepared and filed. MCR 1.109(D)(9)(d)(*ii*).

7. Redacting Protected and Unprotected PII

a. Protected PII in Documents Filed With a Court

A person whose protected PII appears in a document filed with the court may request in writing that the protected PII be redacted;[6] if a person makes such a request, the clerk of the court must promptly process the request. MCR 1.109(D)(10)(c)(*i*). No motion fee is required for the request, the request must specify the protected PII to be redacted, and the document must be maintained as a nonpublic document in the case file. *Id*.

b. Unprotected PII in Public Documents Filed With a Court

PII not protected under MCR 1.109 may be redacted or made confidential or nonpublic. MCR 1.109(D)(10)(c)(*ii*). A party or a person having unprotected PII in a public document filed with the court may, in an ex parte motion using the appropriate SCAO-approved form,[7] request that the court direct the court clerk to redact the information specified by the party or person or to make the information confidential or nonpublic. *Id*. The court has discretion to hold a hearing on the motion. *Id*. The court must enter an order to redact the information or to make the information confidential or nonpublic "if the party or person's privacy interest outweighs the public's interest in the information."[8] *Id*.

c. Protected PII in an Exhibit Offered for Hearing or Trial

Protected PII may be redacted from an exhibit offered at a hearing or a trial when a person or party having protected PII in the exhibit requests in writing to have the PII redacted. MCR 1.109(D)(10)(c)(*iii*). No motion fee is required. *Id*. The person or party seeking redaction must identify in the request the specific protected PII to be redacted, and the request must be maintained as a nonpublic document in the case file. *Id*. The court must order the information redacted "if the party or person's

[6] SCAO Form MC 97r, *Request for Redaction of Protected Personal Identifying Information*.

[7] SCAO Form MC 97m, *Ex Parte Motion to Protect Personal Identifying Information*.

[8] SCAO Form MC 97o, *Order Regarding Ex Parte Motion to Protect Personal Identifying Information*.

privacy interest outweighs the public's interest in the information." *Id*.

d. Unredacted Protected PII in Transcripts Filed With a Court

Unredacted protected PII may be included on transcripts filed with the court; however, the clerk of the court must redact protected PII if a person submits a written request identifying the page and line number for each place in the transcript where the PII is located. MCR 1.109(D)(10)(c)(*iv*).

8. Responsibility for Redaction

The parties and their attorneys are *solely* responsible for excluding or redacting the PII listed in MCR 1.109(D)(9) from all documents filed with or offered to the court. MCR 1.109(D)(10)(a). There is no requirement that at the time of filing, a court clerk review, redact, or screen documents for PII, whether protected or unprotected, without regard to whether the documents are filed electronically or on paper. *Id*.

Except as otherwise provided in the court rules, a court clerk is not required to redact protected PII from documents filed with or offered to the court[9] before providing a copy of the document requested, whether in-person or via the internet, or before making available at the courthouse via a publicly accessible computer that gives a person direct access to the document. MCR 1.109(D)(10)(a).

9. Certifying a Record

"The clerk of the court may certify a redacted record as a true copy of an original record on file with the court by stating that information has been redacted in accordance with law or court rule, or sealed as ordered by the court." MCR 1.109(D)(10)(d).

10. Maintaining a Document After Redacting PII

Documents from which PII has been redacted, or to which access has been restricted, must be maintained according to the standards established by the SCAO. MCR 1.109(D)(10)(e).

[9]This provision applies equally to documents filed with or offered to the court before or after April 1, 2022. MCR 1.109(D)(10)(a).

B. Records and Register of Actions

The clerk of the court[10] is required to maintain case records; a register of actions (case history), searchable by case number or party name; and a case file[11] for each case. See MCR 1.109; MCR 8.119.[12]

Case Records. "The following definitions apply to case records as defined in MCR 8.119(D) and [MCR 8.119(E)]:

> (1) 'Confidential' means that a case record is nonpublic and accessible only to those individuals or entities specified in statute or court rule. A confidential record is accessible to parties only in the manner specified in statute or court rule.
>
> (2) 'Nonpublic' means that a case record is not accessible to the public. A nonpublic case record is accessible to parties and only those other individuals or entities specified in statute or court rule. A record may be made nonpublic only pursuant to statute or court rule. A court may not make a record nonpublic by court order.
>
> (3) 'Redact' means to obscure individual items of information within an otherwise publicly accessible document.
>
> (4) 'Redacted document' means a copy of an original document in which items of information have been redacted.
>
> (5) 'Sealed' means that a document or portion of a document is sealed by court order pursuant to MCR 8.119(I). Except as required by statute, an entire case may not be sealed." MCR 1.109(H).

Court Records. "For purposes of [MCR 8.119], records are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G)." MCR 8.119(A). See also MCR 3.925(A)(25) ("'[r]ecords' are as defined in MCR 1.109 and MCR 8.119"). In general, "[c]ourt records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules." MCR 1.109(A)(1). MCR 8.119(I)(5), in turn, provides that "'court records'

[10] The county clerk is the clerk of the court for the circuit court, including the Family Division. MCL 600.1007.

[11] A case file is not required for civil infractions. MCR 8.119(D)(1).

[12] Cases filed under the Juvenile Code in the Family Division are governed by the rules of practice and procedure contained in Michigan Court Rules subchapters 3.900, 1.100, and 8.100. MCR 3.901(A)(1).

includes all documents and records of any nature that are filed with or maintained by the clerk in connection with the action." MCR 3.903(A)(25) provides that "'[r]ecords' . . . include, but are not limited to, pleadings, complaints, citations, motions, authorized and unauthorized petitions, notices, memoranda, briefs, exhibits, available transcripts, findings of the court, registers of action, consent calendar case plans, and court orders."[13] In addition, MCR 1.109(A)(1)(a) provides that "[c]ourt records include, but are not limited to:

> "(*i*) documents, attachments to documents, discovery materials, and other materials filed with the clerk of the court,
>
> (*ii*) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records."[14]
>
> **Note:** "Discovery materials that are not filed with the clerk of the court are not court records. Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding are not court records." MCR 1.109(A)(2). "[M]aterials that are intended to be used as evidence at or during a trial" in juvenile proceedings "[must] not be filed with the clerk of the court, but [must] be submitted to the judge for introduction into evidence as exhibits[,]" except as otherwise required by statute or court rule. MCR 3.930(A).[15]

Case File. A *file* is "a repository for collection of the pleadings and other documents and materials related to a case." MCR 3.903(A)(8). The clerk of the court is required to maintain a case file of each action, except for civil infractions, "for all pleadings, process, written opinions and findings, orders, and judgments filed in the action, and any other materials prescribed by court rule, statute, or court order to

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[13] Records may be filed using facsimile communication equipment. MCR 2.406(B); MCR 3.929. "Filing of records by the use of facsimile communication equipment in juvenile proceedings is governed by MCR 2.406." MCR 3.929.

[14] "A document [is] a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to 8 1/2 x 11 inch paper without manipulation." MCR 1.109(B). See also MCR 1.109(D)(1), providing that "documents prepared for filing in the courts" must be "transmitted through an approved electronic means and maintained as a digital image." For more information on e-filing, see the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 1.

[15] See Section 21.7(B) for discussion of disposal of exhibits.

be filed with the clerk of the court." MCR 8.119(D)(1)(b); see also MCR 8.119(D)(1). "The clerk of the court may only reject documents submitted for filing that do not comply with [MCR 1.109(D)(1)-(2)], are not signed in accordance with MCR 1.109(E), or are not accompanied by a required filing fee or a request for fee waiver under MCR 2.002(B), unless already waived or suspended by court order." MCR 8.119(C). "Documents prepared or issued by the court for placement in the case file are not subject to rejection by the clerk of the court and shall not be stamped filed but shall be recorded in the case history as required in [MCR 8.119(D)(1)(a)] and placed in the case file." MCR 8.119(C).

Register of Actions (Case History). A *register of actions* is "the case history of all cases, as defined in [MCR 3.903(A)(1)], maintained in accordance with Michigan Supreme Court Records Management Standards." MCR 3.903(A)(26). The clerk of the court must create and maintain a register of actions (case history) for each case in the court's automated case management system, and the system must be searchable by case number or party name ("previously known as numerical and alphabetical indices"). MCR 8.119(D)(1)(a). "The case history shall contain both pre- and post-judgment information and shall, at a minimum, consist of the data elements prescribed in the Michigan Trial Court Records Management Standards." MCR 8.119(D)(1)(a). Each entry must "show the nature of each item filed, each item issued by the court, and the returns showing execution. The case history entry of each item filed shall be dated with the date of filing (if relevant) and the date and initials of the person recording the action, except where the entry is recorded by the electronic filing system." *Id*. If the entry is recorded by the electronic filing system, "the entry shall indicate that the electronic filing system recorded the action. The case history entry of each order, judgment, opinion, notice, or other item issued by the court shall be dated with the date of issuance and the initials of the person recording the action." *Id*.

MCR 3.925(E) provides:

> "The court shall destroy its case files and other court records only as prescribed by the records retention and disposal schedule established under MCR 8.119(K). Destruction of a case record does not negate, rescind, or set aside an adjudication."

C. County Clerk's Obligations

1. Custodial Function

"[T]he clerk has a constitutional obligation to have the care and custody of the circuit court's records and . . . the circuit court

may not abrogate this authority." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 158 (2003), citing *In the Matter of Head Notes to the Opinions of the Supreme Court*, 43 Mich 640, 643 (1880). In *Lapeer Co Clerk*, 469 Mich at 160, the Michigan Supreme Court further explained the clerk's custodial function:

> "The circuit court clerk's role of having the care and custody of the records must not be confused with *ownership* of the records. As custodian, the circuit court clerk takes care of the records for the circuit court, which owns the records. Nothing in the constitutional custodial function gives the circuit court clerk independent ownership authority over court records. Accordingly, the clerk must make those records available to their owner, the circuit court. The clerk is also obligated to make the records available to members of the public, when appropriate."

2. Ministerial Function

"The clerk's noncustodial ministerial duties are directed by the [Michigan Supreme] Court, as the determination of the precise noncustodial ministerial duties to be performed is a matter of court administration entrusted exclusively to the judiciary under Const 1963, art 3, § 2[,] Const 1963, art 6, § 1, [and] Const 1963, art 6, § 5." *Lapeer Co Clerk*, 469 Mich at 170-171. "This authority includes the discretion to create duties, abolish duties, or divide duties between the clerk and other court personnel, as well as the right to dictate the scope and form of the performance of such noncustodial ministerial duties." *Id.* at 164.

D. Recording Proceedings in the Family Division

"A record of all hearings must be made. All proceedings on the formal calendar[16] must be recorded by stenographic recording or by mechanical or electronic recording as provided by statute or MCR 8.108. A plea of admission or no contest, including any agreement with or objection to the plea, must be recorded." MCR 3.925(B).

"In any case in which a record of the hearing is kept by a recording device, a transcription of the hearing need not be made in the absence of a request by an interested party." MCL 712A.17a. Such a recording

[16] MCR 3.903(A)(10) defines "[f]ormal calendar" as "judicial proceedings other than a delinquency proceeding on the consent calendar, a preliminary inquiry, or a preliminary hearing of a delinquency or child protective proceeding."

"shall be maintained as prescribed by rules of the [Michigan Supreme Court]." *Id*.[17]

21.2 Access to Family Division Records and Confidential Files[18]

A. Access to Public Records

MCR 1.109(F) provides that "[r]equests for access to public court records shall be granted in accordance with MCR 8.119(H)." MCR 8.119(H) provides, in part:

> "Except as otherwise provided in [MCR 8.119](F),[19] only case records as defined in [MCR 8.119](D)[20] are public records, subject to access in accordance with these rules."[21]

Additionally, MCR 8.119(H)(7) provides that "[u]nless access to a case record or information contained in a record as defined in [MCR 8.119](D) is restricted by statute, court rule, or an order [sealing a record] pursuant to [MCR 8.119](I),[22] any person may inspect that record and may obtain copies as provided in [MCR 8.119](J)."[23]

MCR 8.119(G) provides, in part, that "[a]ll court records not included in [MCR 8.119(D)-(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119](H)."

MCL 712A.28(2) provides, in part:

> "Beginning June 1, 1988, the [Family Division] shall maintain records of all cases brought before it and as provided in the juvenile diversion act[, MCL 722.821 *et*

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[17] See also MCL 600.1428(1), requiring the State Court Administrative Office (SCAO) to "establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with [S]upreme [C]ourt rules." For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

[18] See Section 21.9(B) for discussion of dissemination of juvenile history record information.

[19] MCR 8.119(F) provides that "[c]ourt recordings, log notes, jury seating charts, and all other records such as tapes, backup tapes, discs, and any other medium used or created in the making of a record of proceedings and kept pursuant to MCR 8.108 are court records and are subject to access in accordance with [MCR 8.119(H)(8)(b)]." MCR 8.119(F) references former MCR 8.119(H)(2)(b), which has been renumbered MCR 8.119(H)(8)(b). See ADM File No. 2002-37 and ADM File No. 2017-28, effective May 11, 2022. MCR 8.119(H)(8)(b), in turn, requires every court, by administrative order, to "establish a policy for whether to provide access for records defined in [MCR 8.119](F) and if access is to be provided, outline the procedure for accessing those records[.]"

[20] See Section 21.1(B) for additional discussion of case records.

> *seq*]. Except as otherwise provided in [MCL 712A.28(2)], records of a case brought before the [Family Division] shall be open to the general public."[24]

MCL 712A.28(3) provides, in part:

> "'Beginning January 1, 2021, except as otherwise provided, records of a case brought before the [Family Division] are not open to the general public and are open only to persons having a legitimate interest."[25]

Similarly, MCR 3.925(D)(1) provides that "[r]ecords of a case brought before the court under . . . MCL 712A.1 *et seq*., are only open to persons having a legitimate interest. 'Persons having a legitimate interest' includes, but is not limited to, the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the juvenile's guardian ad litem, counsel for the juvenile, the department or a licensed child caring institution or child placing agency under contract with the department to provide for the juvenile's care and supervision if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, a member of a local foster care review board established under . . . MCL 722.131 to [MCL] 722.139a, the Indian child's tribe if the juvenile is an Indian child, and a court of this state."

Records created before June 1, 1988, are open only by court order to persons with a legitimate interest, "except that diversion records shall be open only as provided in the juvenile diversion act[, MCL 722.821 *et seq*]."[26] MCL 712A.28(1).

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[21] MCR 8.119(H)(4) provides that "[i]f a request is made for a public record that is maintained electronically, the court is required to provide a means for access to that record"; "[h]owever, the records cannot be provided through a publicly accessible website if protected personal identifying information has not been redacted from those records." "If a public document prepared or issued by the court on or after April 1, 2022, or a Uniform Law Citation filed with the court on or after April 1, 2022, contains protected personal identifying information, the information must be redacted before it can be provided to the public, whether the document is provided upon request via a paper or electronic copy, or direct access via a publicly accessible computer at the courthouse. Upon receipt by the court on or after April 1, 2022, protected personal identifying information included in a proposed order shall be protected by the court as required under MCR 8.119(H) as if the document was prepared or issued by the court." MCR 8.119(H)(5). See Section 21.1(A) for discussion of protected personal identifying information.

[22] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

[23] MCR 8.119(J) governs access and reproduction fees.

[24] For discussion of exceptions to the general rule that records are open to the general public, see Section 21.3 (discussing access to records of proceedings that are closed under MCL 712A.17) and Section 21.4 (discussing access to diversion records).

[25] For discussion of exceptions to the general rule that records are open to the general public, see Section 21.3 (discussing access to records of proceedings that are closed under MCL 712A.17) and Section 21.4 (discussing access to diversion records).

[26] See Section 4.3 and Section 21.4 for discussion of diversion.

B. Confidential Files

1. Definition of "Confidential File"

MCR 3.903(A)(3) defines "[c]onfidential file" as:

> "(a) records of a case brought before the court under . . . MCL 712A.1 *et seq.*, including, but not limited to,
>
> (*i*) the diversion record of a minor pursuant to the Juvenile Diversion Act, MCL 722.821 *et seq.*;[27]
>
> (*ii*) the separate statement about known victims of juvenile offenses, as required by the Crime Victim's Rights Act, MCL 780.751 *et seq.*;[28]
>
> (*iii*) the testimony taken during a closed proceeding pursuant to MCR 3.925(A)(2) and MCL 712A.17(7);[29]
>
> (*iv*) the dispositional reports pursuant to MCR 3.943(C)(3) and MCR 3.973(E)(4);[30]
>
> (*v*) biometric data required to be maintained pursuant to MCL 28.243;[31]
>
> (*vi*) reports of sexually motivated crimes, MCL 28.247;
>
> (*vii*) test results of those charged with certain sexual offenses or substance abuse offenses, MCL 333.5129;[32]
>
> (b) the contents of a social file maintained by the court, including materials such as:
>
> (*i*) youth and family record fact sheet;

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[27] See Section 4.3 and Section 21.4 for discussion of diversion.

[28] See Section 21.6 for confidentiality provisions under the Crime Victim's Rights Act.

[29] See Section 7.14 and Section 21.3 for discussion of closed delinquency proceedings.

[30] MCR 3.943(C)(3) permits the admission, at dispositional hearings, of "materials prepared pursuant to a court-ordered examination, interview, or course of treatment." See Section 10.7. MCR 3.973(E)(4) governs the use of written reports at dispositional hearings in child protective proceedings.

[31] See Sections 21.10, 21.11, and 21.12 for more information.

[32] See Section 21.18.

(*ii*) social study;

(*iii*) reports (such as dispositional, investigative, laboratory, medical, observation, psychological, psychiatric, progress, treatment, school, and police reports);

(*iv*) Department of Human Services records;

(*v*) correspondence;

(*vi*) victim statements;

(*vii*) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver."

2. Access to Social Files

Social files are accessible only by persons who are found by the court to have a legitimate interest. MCR 3.925(D)(2).

"'Persons having a legitimate interest' includes, but is not limited to, the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the juvenile's guardian ad litem, counsel for the juvenile, the department or a licensed child caring institution or child placing agency under contract with the department to provide for the juvenile's care and supervision if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, a member of a local foster care review board established under . . . MCL 722.131 to [MCL] 722.139a, the Indian child's tribe if the juvenile is an Indian child, and a court of this state." MCR 3.925(D)(1). To determine whether a person has a legitimate interest, the court must consider:

- the nature of the proceedings;
- the welfare and safety of the public;
- the interest of the juvenile; and
- any restriction imposed by state or federal law. MCR 3.925(D)(2).

Types of records subject to restrictions under state and federal law include:

- educational records and communications, 20 USC 1232g(b)(1); MCL 600.2165;

- records of recipients of mental health services, MCL 330.1748;[33]
- records of patients participating in substance abuse programs, 42 USC 290dd-2;[34] and
- prescription records, MCL 333.17752.

MCR 8.119(D) provides, in part:

> "Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I)[35] must be designated accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under [MCR 8.119](I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

See also MCR 3.930(C), which provides that "[i]f the court retains discovery materials filed pursuant to MCR 1.109(D) or an exhibit submitted pursuant to [MCR 3.930] after a hearing or trial and the material is confidential as provided by MCR 3.903(A)(3) or order of the court [sealing a record] pursuant to MCR 8.119(I),[36] the court must continue to maintain the material in a confidential manner."[37]

3. Disclosure Under the Freedom of Information Act

If a juvenile successfully completes participation in drug treatment court[38] and the proceedings are discharged and dismissed, all records regarding the juvenile's participation are closed to public inspection and are exempt from disclosure

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[33] See Section 10.7 for discussion of abrogation of privileges, including privileges otherwise applicable to "materials prepared pursuant to a court-ordered examination, interview, or course of treatment[,]" MCR 3.943(C)(3), in dispositional hearings.

[34] See Section 10.7 for discussion of abrogation of privileges, including privileges otherwise applicable to "materials prepared pursuant to a court-ordered examination, interview, or course of treatment[,]" MCR 3.943(C)(3), in dispositional hearings.

[35] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

[36] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

[37] See Section 21.7(B) for discussion of disposal of exhibits.

[38] "'Drug treatment court' means a court supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol." MCL 600.1060(c).

under the Freedom of Information Act (FOIA), MCL 15.321 *et seq*. MCL 600.1076(6).[39]

Similarly, all records regarding the participation of a juvenile in a juvenile mental health court,[40] whether resulting in discharge and dismissal or in the juvenile's failure to successfully complete the program, are closed to public inspection and are exempt from public disclosure under the FOIA. MCL 600.1099k(4).

4. Immunity for Persons or Agencies Furnishing Information to the Court

MCR 3.924 provides:

> "Persons or agencies providing testimony, reports, or other information at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court."[41]

21.3 Sealing Records & Access to Records of Closed Proceedings

"Unless access to a case record or information contained in a record as defined in [MCR 8.119](D) is restricted by statute, court rule, or an order [sealing a record] pursuant to [MCR 8.119](I),[42] any person may inspect that record and may obtain copies as provided in [MCR 8.119](J)."[43] MCR 8.119(H)(7).[44]

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[39] Additionally, MCL 600.1076(9) states that "if the record of proceedings as to the defendant is deferred under [MCL 600.1076], the record of proceedings during the period of deferral [is] closed to public inspection." However, in all cases in which a judgment of guilt or adjudication of responsibility is not entered under MCL 600.1076, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge; this nonpublic record is open, for limited purposes as set out in MCL 600.1076(10)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 600.1076(10). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for additional discussion of drug treatment court proceedings and records.

[40] Effective March 28, 2019, 2018 PA 590 added Chapter 10C, MCL 600.1099b *et seq*., to the Revised Judicature Act to establish juvenile mental health courts. See Section 1.8 for more information.

[41] A more complete discussion of immunity from liability is beyond the scope of this benchbook.

[42] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

[43] MCR 8.119(J) governs access and reproduction fees.

A. Sealing Records

Upon motion of a party, the court may seal court records, other than a court order or opinion, as provided in MCR 8.119(I). MCR 8.119(I)(1) provides that, "[e]xcept as otherwise provided by statute or court rule, a court may not enter an order that seals court records, in whole or in part, in any action or proceeding, unless:

> (a) a party has filed a written motion that identifies the specific interest to be protected,
>
> (b) the court has made a finding of good cause, in writing or on the record, which specifies the grounds for the order, and
>
> (c) there is no less restrictive means to adequately and effectively protect the specific interest asserted."

MCR 8.119(I)(2) provides that, "[i]n determining whether good cause has been shown, the court must consider[:]

> (a) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and
>
> (b) the interest of the public."

Additionally, "[t]he court must provide any interested person the opportunity to be heard concerning the sealing of the records." MCR 8.119(I)(3). "Materials that are subject to a motion to seal a record in whole or in part must be made nonpublic temporarily pending the court's disposition of the motion." MCR 8.119(I)(4).

MCR 8.119(I)(9) provides that "[a]ny person may file a motion to set aside an order that disposes of a motion to seal the record, to unseal a document filed under seal pursuant to MCR 2.302(C), or an objection to entry of a proposed order." If the motion is denied, "the moving or objecting person may file an application for leave to appeal in the same manner as a party to the action." *Id.*[45]

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[44] "Except as otherwise provided in [MCR 8.119](F), only case records as defined in [MCR 8.119](D) are public records, subject to access in accordance with these rules." MCR 8.119(H). See MCR 8.119(H) for information on accessing public records; see MCR 8.119(J) for information on access and reproduction fees. Note that MCR 8.119(F) refers to court recordings, log notes, jury seating charts, and media, which "are court records and are subject to access in accordance with [MCR 8.119](H)(8)(b)[(requiring every court to establish a policy regarding access to records defined in MCR 8.119(F))]." MCR 8.119(F) references former MCR 8.119(H)(2)(b), which has been renumbered MCR 8.119(H)(8)(b). See ADM File No. 2002-37 and ADM File No. 2017-28, effective May 11, 2022.

[45] MCR 8.116(D)(2) similarly allows "[a]ny person" to "file a motion to set aside an order that limits access to a court proceeding . . . or an objection to entry of such an order[,]" and to file an application for leave to appeal in the same manner as a party if the court denies the motion or objection.

B. Access to Records of Closed Proceedings in Delinquency Cases[46]

MCL 712A.17 permits a court to close the hearing of a case brought under the Juvenile Code if it determines that doing so will protect the welfare of a juvenile witness or victim.

MCL 712A.28(2)-(3) provide that if a hearing in a delinquency case is closed to the general public under MCL 712A.17, the records of that hearing shall be open only by order of the court to persons having a legitimate interest,[47] except as otherwise provided in MCL 780.799 (requiring a victim "be provided with a certified copy of the order of an adjudicative hearing for purposes of obtaining relief under [MCL 600.2913,]" the "parental liability statute").

MCR 8.119(D) provides, in part:

> "Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I)[48] must be designated accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under [MCR 8.119](I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

C. Juvenile Competency Evaluation Reports

Virtually identical provisions within the Mental Health Code, MCL 330.2060—MCL 330.2074, and the Juvenile Code, MCL 712A.18n—MCL 712A.18s, govern competency evaluations and determinations in juvenile delinquency cases.[49]

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[46] See Section 7.14 for discussion of closing delinquency proceedings to the general public.

[47] 'Persons having a legitimate interest' includes, but is not limited to, the juvenile, the juvenile's parent, the juvenile's guardian or legal custodian, the juvenile's guardian ad litem, counsel for the juvenile, the department or a licensed child caring institution or child placing agency under contract with the department to provide for the juvenile's care and supervision if related to an investigation of child neglect or child abuse, law enforcement personnel, a prosecutor, a member of a local foster care review board established under . . . MCL 722.131 to [MCL] 722.139a, the Indian child's tribe if the juvenile is an Indian child, and a court of this state." MCL 712A.28(5)(d).

[48] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

[49] See Section 7.10 for discussion of juvenile competency determinations.

Following a juvenile competency evaluation, "[a]fter the case proceeds to adjudication or the juvenile is found to be unable to retain competence," the court must order the sealing of all of the reports that are submitted in the competency evaluation process under MCL 330.2062—MCL 330.2068 or MCL 712A.18n—MCL 712A.18q. MCL 330.2070(5); MCL 712A.18r(5).

The court may order that reports that are sealed under MCL 330.2070(5) or MCL 712A.18r(5) be opened only for the following purposes:

- for further competency or criminal responsibility evaluations, MCL 330.2070(5)(a); MCL 712A.18r(5)(a);
- to assist in mental health treatment ordered under the Mental Health Code, if the records are considered to be necessary, MCL 330.2070(5)(c); MCL 712A.18r(5)(c); or
- for statistical analysis, data gathering, or scientific study or other legitimate research, MCL 330.2070(5)(b); MCL 330.2070(5)(d)-(e); MCL 712A.18r(5)(b); MCL 712A.18r(5)(d)-(e).

Reports that are opened for the purposes of statistical analysis, data gathering, or scientific study "shall remain confidential." MCL 330.2070(6); MCL 712A.18r(6).

"Any statement that a juvenile makes during a competency evaluation, or any evidence resulting from that statement, is not subject to disclosure." MCL 330.2070(7); MCL 712A.18r(7).

21.4 Access to Juvenile Diversion Records[50]

The Juvenile Diversion Act, MCL 722.821 *et seq.*, requires the Family Division "in the county in which a diverted minor resides or is found" to "keep a separate diversion record for that minor." MCL 722.827. Such a record is a "[c]onfidential file," MCR 3.903(A)(3)(a)(*i*),[51] and is therefore open only to a person with a "legitimate interest," MCR 3.925(D)(2).

MCL 712A.28(2) and MCL 712A.28(3) provide that "[d]iversion records are open only as provided in the juvenile diversion act." See also MCL 712A.28(1). Under the Juvenile Diversion Act, a diversion record is "open

[50] See Section 4.3 for a detailed discussion of diversion.

[51] See also MCR 3.925(D)(2), providing that "[c]onfidential files are defined in MCR 3.903(A)(3) and include the social case file and those records in the legal case file made confidential by statute, court rule, or court order."

to a law enforcement agency or court intake worker for only the purpose of deciding whether to divert a minor," MCL 722.828(2), and is otherwise open "only by order of the court to a person who has a legitimate interest," MCL 722.828(1). A diversion record must "not be used by any person, including a court official or law enforcement official, for any purpose except in making a decision on whether to divert a minor." MCL 722.829(1).

MCR 8.119(D) provides, in part:

> "Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I)[52] must be designated accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under [MCR 8.119](I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

21.5 Confidentiality of Public Wards' Records

MCL 803.308 provides:

> "All records of a youth agency pertaining to a public ward are confidential and shall not be made public except as follows:
>
> (a) If the person is less than 18 years of age, by the agency's authorization when necessary for the person's best interests.
>
> (b) If the person is 18 years of age or older, by his or her consent."

A public ward is either:

- a youth accepted for care by a youth agency who is at least 12 years of age when committed to the youth agency under MCL 712A.18(1)(e),[53] if the court acquired jurisdiction over the youth under MCL 712A.2(a) or MCL 712A.2(d),

[52] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

[53] MCL 712A.18(1)(e) permits the Family Division to enter an order of disposition committing a juvenile to a public institution, facility, or agency.

and the act for which the youth is committed occurred before his or her eighteenth birthday, or

- a youth accepted for care by a youth agency who is at least 14 years old when committed to the youth agency under MCL 769.1,[54] if the act for which the youth is committed occurred before his or her eighteenth birthday. MCL 803.302(c)(*i*)-(*ii*).

A youth agency is either the DHHS or a county juvenile agency,[55] whichever has responsibility over a public ward. MCL 803.302(d).

MCR 8.119(D) provides, in part:

> "Documents and other materials made nonpublic or confidential by court rule, statute, or order of the court [sealing a record] pursuant to [MCR 8.119](I)[56] must be designated accordingly and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court under [MCR 8.119](I) that makes a document or other materials in that case nonpublic or confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed."

21.6 Confidentiality Provisions Under the Crime Victim's Rights Act

Victims of crime have a state constitutional right to be treated with "respect for their dignity and privacy throughout the criminal justice process." Const 1963, art 1, § 24. The Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, protects this right by limiting public access to certain information concerning victims of crime.[57]

A. Confidentiality Provisions Under the "Felony Article" of the CVRA[58]

For offenses falling within the felony article of the CVRA, MCL 780.758(2) limits access to the victim's contact information:

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[54] MCL 769.1 governs sentencing in automatic waiver proceedings.

[55] See Section 16.17(B) and Section (C) for discussion of county juvenile agencies.

[56] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

[57] MCR 8.119(D) provides, in part, that "[d]ocuments and other materials made nonpublic or confidential by court rule, statute, or order of the court . . . must be designated accordingly and maintained to allow only authorized access."

> "The work address and address of the victim must not be in the court file or ordinary court documents unless contained in a transcript of the trial or it is used to identify the place of the crime. The work telephone number and telephone number of the victim must not be in the court file or ordinary court documents except as contained in a transcript of the trial."

Under MCL 780.769(1) of the felony article, "a victim of the defendant's course of conduct that gave rise to the conviction[]" may request notification from a sheriff or the Department of Corrections (DOC) of certain postconviction events, such as escape or parole. MCL 780.769(2) provides that the victim's address and telephone number maintained by a sheriff or the DOC for notification purposes are exempt from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., "and shall not be released."

Under MCL 780.758(3), information and visual representations of a crime victim are subject to the following:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim are exempt from disclosure under the [FOIA], unless the address is used to identify the place of the crime.
>
> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim, are exempt from disclosure under the [FOIA], and, if the picture, photograph, drawing, or other visual representation is from a court proceeding that is made available to the public through streaming on the internet or other means, the picture, photograph, drawing, or visual representation may be blurred.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent to commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed is exempt from disclosure under the [FOIA]:
>
> (*i*) The victim's name and address.

[58] Article 1 (the "felony article") of the CVRA applies to crimes, when committed by adults, that are punishable by imprisonment for more than one year or that are expressly designated by law as felonies, MCL 780.752(1)(b), and to juveniles who are within the jurisdiction of the circuit court in automatic waiver proceedings, MCL 780.752(1)(g). See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for more information.

> (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
>
> (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused."

However, MCL 780.758(3) "does not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.758(4).

B. Confidentiality Provisions Under the "Juvenile Article" of the CVRA[59]

For any offense falling under the juvenile article of the CVRA, "[t]he investigating agency that files a complaint or submits a petition seeking to invoke the [Family Division's] jurisdiction for a juvenile offense shall file with the complaint or petition a separate statement listing any known victims of the juvenile offense and their addresses and phone numbers." MCL 780.784. This separate statement is not a matter of public record. *Id*.

A victim falling within the juvenile article of the CVRA may request notification from a sheriff or the DOC of certain postconviction events concerning a juvenile who has been sentenced to imprisonment, such as his or her release, transfer, or escape. MCL 780.798(4). Under MCL 780.798(5), the victim's address and telephone number maintained by a sheriff or the DOC for notification purposes are exempt from disclosure under the FOIA "and shall not be released."

Under MCL 780.788(2), the following information and visual representations of a crime victim are subject to the following:

> "(a) The home address, home telephone number, work address, and work telephone number of the victim are exempt from disclosure under the [FOIA].

[59] Article 2 (the "juvenile article") of the CVRA applies to juveniles who are subject to the jurisdiction of the Family Division in delinquency, designated, or traditional waiver proceedings, MCL 780.781(1)(e), for a violation of law "for which a juvenile offender, if convicted as an adult, may be punished by imprisonment for more than 1 year or an offense expressly designated by law as a felony[]" or for other enumerated offenses, MCL 780.781(1)(g). See the Michigan Judicial Institute's *Crime Victim Rights Benchbook* for more information.

> (b) A picture, photograph, drawing, or other visual representation, including any film, videotape, or digitally stored image of the victim, are exempt from disclosure under the [FOIA], and, if the picture, photograph, drawing, or other visual representation is from a court proceeding that is made available to the public through streaming on the internet or other means, the picture, photograph, drawing, or visual representation may be blurred.
>
> (c) The following information concerning a victim of child abuse, criminal sexual conduct, assault with intent to commit criminal sexual conduct, or a similar crime who was less than 18 years of age when the crime was committed is exempt from disclosure under the [FOIA]:
>
> > (*i*) The victim's name and address.
> >
> > (*ii*) The name and address of an immediate family member or relative of the victim, who has the same surname as the victim, other than the name and address of the accused.
> >
> > (*iii*) Any other information that would tend to reveal the identity of the victim, including a reference to the victim's familial or other relationship to the accused."

However, MCL 780.788(2) "does not preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services." MCL 780.788(3).

21.7 Retention and Destruction of Family Division Files, Records, and Exhibits

A. Destruction of Files and Records

MCR 8.119(K) provides, in part:

> "For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case file and other case records, (3) court recordings, log notes, jury seating charts, and recording media, and (4) nonrecord material.[60] The records of the trial courts shall be retained in the medium prescribed by MCR 1.109."[61]

MCR 8.119(K) further provides, in part:

> "The records of a trial court may be not be disposed of except as authorized by the records retention and disposal schedule and upon order by the chief judge of that court. Before disposing of records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such in the Michigan trial courts approved records retention and disposal schedule. An order disposing of court records shall comply with the retention periods established by the State Court Administrative Office [(SCAO)] and approved by the state court administrator, Attorney General, State Administrative Board, Archives of Michigan, and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.811."

Statutes and court rules provide for the mandatory or permissible destruction of certain Family Division files and records. MCR 3.925(E) provides:

> "Retention and Destruction of Court Records. The court shall destroy its case files and other court records only as prescribed by the records retention and disposal schedule established under MCR 8.119(K). **Destruction of a case record does not negate, rescind, or set aside an adjudication**."[62] (Emphasis added.)

See also MCL 600.1428(3), providing that "[a] record,[63] regardless of its medium, shall not be disposed of until the record has been in the custody of the court for the retention period established [by SCAO] under [MCL 600.1428(1)[64]]."

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[60] MCR 8.119(D)-(G) address these various types of records. MCR 8.119(G) provides that "[a]ll court records not included in [MCR 8.119(D)-(F)] are considered administrative and fiscal records or nonrecord materials and are not subject to public access under [MCR 8.119](H). These records are defined in the approved records retention and disposal schedule for trial courts." See Section (A) for additional discussion of records. For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

[61] "Court records are defined by MCR 8.119 and [MCR 1.109(A), and] . . . are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules." MCR 1.109(A)(1); see also MCR 3.903(A)(25). "Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and the[] court rules." MCR 1.109(A)(1). For additional information on court records, see Section (A).

[62] See Section 21.14 for the requirements to set aside an adjudication.

[63] For purposes of MCL 600.1428, "'record' means information of any kind that is recorded in any manner and that has been created by a court or filed with a court in accordance with [S]upreme [C]ourt rules." MCL 600.1428(4).

1. Diversion Case Records

A juvenile diversion record must be destroyed within 28 days after the juvenile becomes 18 years of age. MCL 722.828(3).

2. Consent Calendar Case Files

MCL 712A.2f(11) provides:

> "Upon the juvenile's successful completion of the consent calendar case plan, the court shall close the case and shall destroy all records of the proceeding in accordance with the records management policies and procedures of the state court administrative office, established in accordance with supreme court rules."

See also MCR 3.932(C)(11), which provides:

> "[Consent calendar] case records shall only be destroyed in accordance with the approved record retention and disposal schedule established by the State Court Administrative Office."

For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

B. Disposal of Exhibits

"Exhibits that are maintained by the court reporter or other authorized staff pursuant to MCR 2.518 or MCR 3.930 during the pendency of a proceeding are not court records." MCR 1.109(A)(2); see also MCR 3.930(A).

The Michigan Trial Court Records Management Standards govern how exhibits introduced during court proceedings should be received and maintained. MCR 3.930(A). "At the conclusion of a trial or hearing, the court shall direct the parties to retrieve the exhibits submitted by them except that any weapons and drugs shall be returned to the confiscating agency for proper disposition." MCR 3.930(B). Additionally, "[i]f the exhibits are not retrieved by the

[64] MCL 600.1428(1) requires SCAO to "establish and maintain records management policies and procedures for the courts, including a records retention and disposal schedule, in accordance with [S]upreme [C]ourt rules[,]" and to "develop[] and maintain[the retention and disposal schedule] as prescribed in . . . MCL 399.811." For additional information on records management, and for links to records retention and disposal schedules, see the State Court Administrative Office's Records Management website.

parties as directed, within 56 days after conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties." *Id.*

"If the court retains discovery materials filed pursuant to MCR1.109(D) or an exhibit submitted pursuant to [MCR 3.930] after a hearing or trial and the material is confidential as provided by MCR 3.903(A)(3) or order of the court [sealing a record] pursuant to MCR 8.119(I),[65] the court must continue to maintain the material in a confidential manner." MCR 3.930(C).

21.8 Use of Evidence and Records in Subsequent Delinquency or Criminal Proceedings

A provision of the Juvenile Code restricts the use of evidence from juvenile delinquency cases in subsequent judicial proceedings. MCL 712A.23 provides:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]."

A. Evidence Obtained in Traditional Waiver Proceedings

MCL 712A.23 does not affect the admissibility at trial of physical evidence offered during a traditional waiver proceeding:

> "It is our conclusion that the intent of [MCL 712A.23] is to proscribe the actual testimony taken at the juvenile proceedings. It is not meant to preclude the physical evidence, nor is it meant to exclude a witness who testified at the juvenile proceedings from testifying on the same subject matter at a subsequent trial for the same offense. What is forbidden is the use of testimonial evidence from the juvenile hearing either as substantive evidence or to impeach at a subsequent trial." *People v Hammond*, 27 Mich App 490, 494 (1970).

See also *People v Pennington*, 113 Mich App 688, 697-698 (1982), holding that the trial court did not err in allowing the admission of the waiver-hearing testimony of an accomplice as substantive

[65] See Section 21.3(A) for discussion of sealing records under MCR 8.119(I).

evidence, where the accomplice asserted his Fifth Amendment privilege against self-incrimination at trial. "The waiver hearing serves to determine if there is cause to try the juvenile as an adult. It is not a disposition of a case against a juvenile." *Id.* at 697.

B. Designated Proceedings

The conviction of a juvenile in a designated proceeding has "the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7). Accordingly, the prohibition contained in MCL 712A.23 does not apply to evidence obtained at trial in a designated proceeding or to a conviction in such a proceeding.

C. Sentencing

1. Imposing Sentence on Adult Offender

MCL 712A.23 does not prevent consideration of a juvenile offense record when imposing sentence upon an adult defendant. *People v Smith (Ricky)*, 437 Mich 293, 304 (1991), citing *People v McFarlin (Gary)*, 389 Mich 557, 575 (1973) ("the presentence report should include information concerning juvenile history, including a disposition by a juvenile court, and . . . it is proper to consider this information as a factor in sentencing an adult offender").

2. Imposing Sentence In Traditional Waiver Proceeding

MCL 712A.23 does not prevent consideration of a juvenile offense record when imposing sentence upon a juvenile defendant in a traditional waiver proceeding. *People v Coleman*, 19 Mich App 250, 256 (1969), abrogated on other grounds by *People v McFarlin (Gary)*, 41 Mich App 116 (1972), rev'd on other grounds 389 Mich 557 (1973)[66] (the term "evidence" in MCL 712A.23 "connotes testimony and matters actually presented at trial[, and t]he post-conviction examination of juvenile records in order to impose a fair and just sentence is not a use of such records as 'evidence'").

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

3. Determining Sentence in Automatic Waiver Proceeding

MCL 769.1(3)(c) provides that "[t]he juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior[]" must be considered by the judge at the juvenile sentencing hearing in an automatic waiver proceeding, and this factor, together with the seriousness of the sentencing offense, is accorded more weight than the other enumerated factors. Furthermore, as noted in Section 21.8(C), MCL 712A.23 does not prevent consideration of a juvenile offense record when imposing sentence upon an adult defendant, *Smith (Ricky)*, 437 Mich at 304, or when imposing sentence upon a juvenile defendant in a traditional waiver proceeding, *Coleman*, 19 Mich App at 256. Accordingly, MCL 712A.23 presumably does not preclude consideration of a juvenile offense record in determining whether to sentence a juvenile as an adult in an automatic waiver proceeding.

4. Uncounseled Adjudications

A sentencing court must not consider prior convictions or juvenile adjudications if the convictions or adjudications were obtained in violation of the constitutional right to counsel. *United States v Tucker*, 404 US 443, 448-449 (1972); *People v Moore*, 391 Mich 426, 436-438 (1974); *People v Hannan (After Remand)*, 200 Mich App 123, 128-130 (1993). However, because "[t]he constitutional right to the assistance of counsel is triggered by a defendant's interest in his physical liberty," a sentencing court may consider an uncounseled prior juvenile adjudication if no incarceration ultimately resulted from the adjudication. *People v Daoust*, 228 Mich App 1, 17-20 (1998), overruled in part on other grounds by *People v Miller (Michael)*, 482 Mich 540 (2008)[67] (internal citation omitted). Additionally, a sentencing court may consider a defendant's juvenile record that has been set aside. *Smith (Ricky)*, 437 Mich at 302-304 ("[w]hen . . . a juvenile offender appears in court again as an adult, his juvenile offense record may be considered in imposing sentence . . . [because t]he law contemplates a differentiation in sentencing between first-time offenders and recidivists, juvenile or adult").[68]

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

[68] See Sections 21.14 and 21.15 for the requirements to set aside an adjudication or conviction.

a. Raising a Challenge Under *Tucker*[69]

In order to raise a challenge to the use of a prior adjudication or conviction for sentencing purposes,

> "the defendant must (1) present prima facie proof that a previous conviction was violative of [the constitutional right to counsel], such as a docket entry showing the absence of counsel or a transcript evidencing the same; or (2) present evidence that he has requested such records from the sentencing court and it has failed to reply or has refused to furnish copies of records within a reasonable period of time, say four weeks." *Moore,* 391 Mich at 440-441.[70]

Once the defendant has presented such evidence, "the burden will then be upon the prosecutor to establish the constitutional validity of the prior conviction. Thus, if the prosecutor contends that the defendant waived counsel, the burden will be on him to show affirmative record evidence of waiver." *Moore*, 391 Mich at 441. Unless the prosecutor shows such evidence within one month of the defendant's motion, the matter must be set for a hearing. *Id.* at 441. See also *People v Carpentier*, 446 Mich 19, 35, 38 (1994) (where a juvenile record has been set aside, a criminal defendant who challenges the use of the juvenile record in determining sentence for a subsequent conviction bears the burden of proving that his or her previous adjudication was obtained in violation of the right to counsel).

b. Required Record Regarding Representation of Juvenile

MCR 3.925(G) provides:

> "When the juvenile offense record of an adult convicted of a crime is made available to the appropriate agency, as provided in MCL 791.228(1), the record must state whether, with regard to each adjudication, the juvenile

[69] *United States v Tucker*, 404 US 443.

[70] In *People v Carpentier*, 446 Mich 19, 31-32 (1994), the Michigan Supreme Court "reaffirm[ed] that *Moore*[, 391 Mich at 440-441,] articulates the proper procedures to be followed where a defendant collaterally challenges a prior conviction for lack of counsel or a proper waiver of counsel."

> had an attorney or voluntarily waived an attorney."

MCL 791.228(1), in turn, states:

> "The [Department of Health and Human Services (DHHS)] and the [Family Division] shall furnish to the [Department of Corrections (DOC)] information, on request, concerning any individual having a previous record as a juvenile probationer who comes within the jurisdiction of the [DOC]."

5. Conduct Not Resulting in Conviction or Adjudication

A sentencing judge may consider uncharged criminal conduct or allegations of criminal conduct that resulted in a prior acquittal, as long as the defendant has an opportunity to challenge the accuracy of the allegations and the judge finds their accuracy supported by a preponderance of the evidence. *People v Ewing (After Remand),* 435 Mich 443, 446, 451-455 (1990) (opinion by Brickley, J.); *id.* at 462-463, 473-474 (opinion by Boyle, J.). Criminal conduct occurring while the defendant was a juvenile but not resulting in adjudication may also be considered. *People v Cross,* 186 Mich App 216, 217-218 (1990).

D. Evidence and Statements Obtained in Juvenile Competency Proceedings[71]

1. Statements

Statements made by a juvenile during a competency evaluation:

- are inadmissible in any proceeding to determine the juvenile's responsibility, MCL 330.2070(2); MCL 712A.18r(2);
- are inadmissible in any proceeding to determine the juvenile's responsibility for charges based on any other events or transactions, MCL 330.2070(3); MCL 712A.18r(3); and
- may not be used for any purpose other than assessment of competency, unless the juvenile or his or her guardian, following an opportunity to

[71] See Section 7.10 for discussion of juvenile competency evaluations and determinations.

consult with his or her attorney, provide written consent, MCL 330.2070(4); MCL 712A.18r(4).

2. Evidence

Any evidence obtained during a competency evaluation is not admissible in any proceeding to determine the juvenile's responsibility. MCL 330.2070(2); MCL 712A.18r(2).

Any evidence resulting from a juvenile's statement, made during a competency evaluation, that concerns any other event or transaction is not admissible in any proceeding to determine the juvenile's responsibility for any other charges that are based on that event or transaction. MCL 330.2070(3); MCL 712A.18r(3).

E. Statements or Information Obtained During Preadmission Screening or Participation in Juvenile Mental Health Court

Any statement or other information obtained as a result of participating in a preadmission screening and assessment for admission into a juvenile mental health court may not be used in any future juvenile delinquency proceeding. MCL 600.1099e(4).

"Any statement or other information obtained as a result of participating in assessment, treatment, or testing while in a juvenile mental health court . . . must not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal controlled substance use. MCL 600.1099i(3).[72]

Part B: Juvenile History Record Information, Biometric Data Collection, and Reporting to Department of State Police and Secretary of State

21.9 Juvenile History Record Information

A. Required Juvenile History Record Information

The Michigan Department of State Police maintains criminal identification and criminal history information regarding juveniles

[72] See Section 1.8 for discussion of juvenile mental health courts.

adjudicated of or arrested for certain offenses in Michigan. MCL 28.242(1) provides that "[t]he commanding officer [of the Department of State Police] shall procure and file for purposes of juvenile identification juvenile history record information on all juveniles who have been adjudicated to have committed a juvenile offense within this state."

MCL 28.241a(g) defines "[j]uvenile history record information" as:

> "name; date of birth; personal descriptions including identifying marks, scars, amputations, and tattoos; aliases and prior names; social security number, driver's license number and other identifying numbers; and information on juvenile offense arrests and adjudications or convictions."

MCL 28.241a(h) defines "[j]uvenile offense" as:

> "an offense committed by a juvenile that, if committed by an adult, would be a felony, a criminal contempt conviction under . . . MCL 600.2950 [or MCL] 600.2950a, a criminal contempt conviction for a violation of a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i, or a misdemeanor."

A "[m]isdemeanor" is either "[a] violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine[]" or "[a] violation of a local ordinance that substantially corresponds to state law and that is not a civil infraction." MCL 28.241a(j)(*i*)-(*ii*).

B. Dissemination of Juvenile History Record Information

MCL 28.242a(2)-(3) governs the dissemination of juvenile history record information in response to a name-based or fingerprint-based search of the criminal history record information database.

MCL 28.242a(2) provides, in part:

> "Except as provided in [MCL 28.242a(3)], all juvenile history record information that is associated with a state identification number and is supported by biometric data[73] shall be disseminated in response only to a

[73] See Section 21.10 for discussion of biometric data collection.

> fingerprint-based search of the criminal history record information database."

However, MCL 28.242a(2) "does not allow the dissemination of juvenile history record information that is nonpublic or is prohibited by law from being disseminated." MCL 28.242a(2).

MCL 28.242a(3) governs the dissemination of juvenile history record information to persons or entities "authorized to access the law enforcement information network[(LEIN)]." MCL 28.242a(3) provides, in part:

> "All juvenile history record information that is associated with a state identification number and that is supported by biometric data shall be disseminated in response to either a name-based or a fingerprint-based search of the criminal history record information database solely to a person or entity authorized to access the law enforcement information network."

However, MCL 28.242a(3) "does not allow the dissemination of juvenile history record information that is prohibited by law[74] from being disseminated." MCL 28.242a(3).

See Part A for additional discussion of access to juvenile records.

21.10 Collection of Biometric Data From Juveniles

A. Biometric Data Collection Requirements

MCL 28.243 requires law enforcement agencies to collect an individual's "biometric data" upon arrest for a felony or other qualifying offense and to forward the biometric data to the Department of State Police. "'Biometric data' means all of the following:

> (*i*) Fingerprint images recorded in a manner prescribed by the [Department of State Police ("department")].
>
> (*ii*) Palm print images, if the arresting law enforcement agency has the electronic capability to record palm print images in a manner prescribed by the department.
>
> (*iii*) Digital images recorded during the arrest or booking process, including a full-face capture, left and

[74] Note that, unlike MCL 28.242a(2), MCL 28.242a(3) does not prohibit the dissemination of *nonpublic* juvenile history record information.

right profile, and scars, marks, and tattoos, if the arresting law enforcement agency has the electronic capability to record the images in a manner prescribed by the department.

(*iv*) All descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

MCL 28.243(1)-(2) provides, in part:

"(1) . . . [U]pon the arrest of a person for a felony or for a misdemeanor violation of state law for which the maximum possible penalty exceeds 92 days' imprisonment or a fine of $1,000.00, or both, or a misdemeanor authorized for DNA collection under . . . [MCL 28.176(1)(b)],[75] or for criminal contempt under . . . MCL 600.2950 [or MCL] 600.2950a, or criminal contempt for a violation of a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i, or for a juvenile offense,[76] other than a juvenile offense for which the maximum possible penalty does not exceed 92 days' imprisonment or a fine of $1,000.00, or both, or for a juvenile offense that is a misdemeanor authorized for DNA collection under . . . [MCL 28.176(1)(b)],[77] the arresting law enforcement agency in this state shall collect the person's biometric data and forward the biometric data to the [Department of State Police ("department")] within 72 hours after the arrest. The biometric data must be sent to the department on forms furnished by or in a manner prescribed by the department, and the department shall forward the biometric data to the director of the Federal Bureau of Investigation on forms furnished by or in a manner prescribed by the director.

(2) A law enforcement agency shall collect a person's biometric data under [MCL 28.243(2)] if the person is arrested for a misdemeanor violation of state law for

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[75] MCL 28.176(1) requires the Department of State Police to permanently retain a DNA identification profile obtained from a sample in the manner prescribed under the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, from offenders convicted or found responsible of the certain enumerated offenses. See Section 21.17(A); Section 21.17(B); Section 20.17(D)(1).

[76] See Section 21.9 for the definition of "juvenile offense."

[77] MCL 28.176(1) requires the Department of State Police to permanently retain a DNA identification profile obtained from a sample in the manner prescribed under the DNA Identification Profiling System Act, MCL 28.171 *et seq.*, from offenders convicted or found responsible of the certain enumerated offenses. See Section 21.17(A); Section 21.17(B); Section 20.17(D)(1).

> which the maximum penalty is 93 days or for criminal contempt under . . . MCL 600.2950 [or MCL] 600.2950a, or criminal contempt for a violation of a foreign protection order that satisfies the conditions for validity provided in . . . MCL 600.2950i, if the biometric data have not previously been collected and forwarded to the department under [MCL 28.243(1)]. A law enforcement agency shall collect a person's biometric data under [MCL 28.243(2)] if the person is arrested for a violation of a local ordinance for which the maximum possible penalty is 93 days' imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum possible term of imprisonment is 93 days. If the person is convicted of any violation, the law enforcement agency shall collect the person's biometric data before sentencing if not previously collected. The court shall forward to the law enforcement agency a copy of the disposition of conviction, and the law enforcement agency shall forward the person's biometric data and the copy of the disposition of conviction to the department within 72 hours after receiving the disposition of conviction in the same manner as provided in [MCL 28.243(1)]. If the person is convicted of violating a local ordinance, the law enforcement agency shall indicate on the form sent to the department the statutory citation for the state law to which the local ordinance substantially corresponds."

A juvenile's biometric data need not be collected solely because he or she has been arrested for violating MCL 257.904(3)(a) (individual's first conviction of driving or allowing someone else to drive the individual's motor vehicle with a suspended or revoked license or without a license) or a corresponding local ordinance. MCL 28.243(3).

An arrest record must be removed from the internet criminal history access tool (ICHAT) "if an individual is arrested for any crime and the charge or charges are dismissed before trial[.]" MCL 764.26a(1)(a). Additionally, "[i]f the prosecutor of the case agrees at any time after the case is dismissed, or if the prosecutor of the case or the judge of the court in which the case was filed does not object within 60 days from the date an order of dismissal was entered for cases in which the order of dismissal is entered after [June 12, 2018], all of the following apply:

> (*i*) [t]he arrest record, all biometric data, and fingerprints shall be expunged or destroyed as appropriate[;]

> (*ii*) [a]ny entry concerning the charge shall be removed from LEIN[; and]
>
> (*iii*) [u]nless a DNA sample or profile, or both, is allowed or required to be retained by the department of state police under . . . MCL 28.176, the DNA sample or profile, or both, obtained from the individual shall be expunged or destroyed." MCL 764.26a(1)(b). See also MCL 28.243(8).

The department of state police must comply with the requirements set forth in MCL 764.26a upon receipt of an appropriate order of the district court or the circuit court. MCL 764.26a(2). See also MCL 28.243(9).

B. Family Division's Obligation to Ensure Collection of Biometric Data

When authorizing a petition, and before entering an order of disposition or placing the case on the consent calendar, a court must examine the court file and determine whether the juvenile's biometric data[78] has been collected and forwarded to the Department of State Police as required by MCL 28.243. See MCR 3.932(C)(3); MCR 3.936(B). See also MCL 712A.11(5); MCL 712A.18(10). MCR 3.936(B) provides:

> "At the time that the court authorizes the filing of a petition alleging a juvenile offense and before the court enters an order of disposition on a juvenile offense or places the case on the consent calendar, the court shall examine the confidential files and verify that the juvenile has had biometric data collected. If it appears to the court that the juvenile has not had biometric data collected, the court must:
>
> > (1) direct the juvenile to go to the law enforcement agency involved in the apprehension of the juvenile, or to the sheriff's department, so biometric data may be collected; or
> >
> > (2) issue an order to the sheriff's department to apprehend the juvenile and to collect the biometric data of the juvenile." MCL 712A.11(5) contains substantially similar requirements.

[78] "Biometric data" includes fingerprint and palm print images, "[d]igital images recorded during the arrest or booking process," and "descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

Similarly, MCR 3.943 requires the Family Division, before entering an order of disposition, to verify that the juvenile has had biometric data collected:

> "The [Family Division] shall not enter an order of disposition for a juvenile offense until the court verifies that the juvenile has had biometric data collected. If the juvenile has not had biometric data collected, the court shall proceed as provided by MCR 3.936." MCR 3.943(E)(4). MCL 712A.18(10) contains substantially similar requirements.

These biometric data collection requirements also apply to designated proceedings. See MCR 3.951(A)(2)(c)(*i*) and MCR 3.951(B)(2)(c)(*i*) (requiring the Family Division to comply with MCR 3.936 upon authorization of a petition in a designated case); MCR 3.955(E) (requiring the Family Division to comply with MCR 3.943 if it does not sentence a juvenile as an adult in a designated case).

Biometric data "must be placed in the confidential files, capable of being located and destroyed on court order." MCR 3.932(C).

C. Court's Obligation to Ensure Fingerprinting in Waiver Cases

If jurisdiction over a juvenile is waived to the court of general criminal jurisdiction, the district court must examine the court file at the time of arraignment to determine whether the juvenile has been fingerprinted as required by MCL 28.243.[79] MCL 764.29(1). If the juvenile has not had the required fingerprints taken before arraignment, the magistrate must order the juvenile to submit himself or herself to the arresting agency or order the juvenile committed to the custody of the sheriff so that fingerprints may be taken. MCL 764.29(2)(a)-(b).

Similarly, at sentencing in an automatic waiver or traditional waiver case, the court must ensure that the juvenile's fingerprints have been taken. MCL 769.1(2); MCL 769.16a(5). See also MCL 769.16a(6), which requires the sentencing court to comply with the fingerprinting requirements of the SORA.[80]

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[79] Effective December 14, 2012, 2012 PA 374 amended MCL 28.243 and several related provisions governing the collection of fingerprints and other criminal history and juvenile history record information by law enforcement agencies to refer to "biometric data" rather than "fingerprints[.]" "Biometric data" includes fingerprint and palm print images, "[d]igital images recorded during the arrest or booking process," and "descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

D. Forwarding Biometric Data to the Department of State Police

If a court orders the collection of a person's biometric data under MCL 712A.11, MCL 712A.18, MCL 764.29, or MCL 769.1, the law enforcement agency that collects the biometric data must forward the biometric data and arrest card to the Department of State Police. MCL 28.243(6).

E. Discretionary Collection of Biometric Data and Photographing

MCR 3.923(C) provides that, in addition to the collection of biometric data that is required by law, "[t]he [Family Division] may permit the collection of biometric data or photographing, or both, of a minor concerning whom a petition has been filed."[81] Any such biometric data and photographs "must be placed in the confidential files, capable of being located and destroyed on court order." *Id*.

21.11 Destruction of Biometric Data and Arrest Card

A. Petition Not Authorized, Release Without Charge, Finding of No Family Division Jurisdiction, or Finding of Not Guilty

If a petition is not authorized, the juvenile is released without being charged, or criminal contempt proceedings are not brought against the juvenile, the official taking or holding the juvenile's biometric data and arrest card must immediately destroy the biometric data and arrest card. MCL 28.243(7). If the juvenile's arrest card was forwarded to the Department of State Police ("department"), the law enforcement agency must notify the department in a manner prescribed by the department that a petition was not authorized or that a charge was not made against the juvenile. *Id.*

With the exception of certain offenses listed in MCL 28.243(14),[82] if a juvenile is adjudicated and found not to be within the Family Division's jurisdiction, or if the juvenile is found not guilty of an offense for which biometric data were collected, the biometric data and arrest card must be destroyed by the official holding those items. MCL 28.243(10). Additionally, "the clerk of the court entering the disposition shall notify the department of any finding of not guilty or

[80] For detailed information on the SORA, including both general and juvenile-specific information, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 9.

[81] See Section 7.6.

[82] See Section 21.11(D) for discussion of offenses listed in MCL 28.243(14).

nolle prosequi, if it appears that the biometric data of the accused were initially collected under [MCL 28.243], or of any finding that a juvenile alleged responsible for a juvenile offense[83] is not within the provisions of [MCL 712A.2(a)(1)]." MCL 28.243(10).

Similarly, MCR 3.936(D) provides:

> "The court, on motion filed pursuant to MCL 28.243(10), shall issue an order directing the Department of State Police, or other official holding the information, to destroy the biometric data and arrest card of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(14),[84] when a juvenile has had biometric data collected for a juvenile offense and no petition on the offense is submitted to the court, the court does not authorize the petition, or the court has neither placed the case on the consent calendar nor taken jurisdiction of the juvenile under MCL 712A.2(a)(1)."

"[The] defendant was [not] required to file an action for mandamus [against the Michigan State Police] rather than a motion in the district court seeking the destruction of his fingerprints and arrest card[]" because "courts of this state routinely recognize a defendant's ability to file a motion in a criminal case for the return or destruction of his or her biometric data and arrest card pursuant to MCL 28.243." *People v Guthrie*, 317 Mich App 381, 387, 387-388 n 6, 390 (2016) (additionally noting that "[t]his conclusion is consistent with the fact that the State Court Administrative Office (SCAO) has approved court forms[85] that specifically pertain to these motions").

B. Adjudication and Dismissal By Plea

"[T]he mere fact that the proceedings against [a juvenile] were later dismissed does not entitle [him or] her to destruction of [his or] her fingerprints and arrest cards." *In re Klocek*, 291 Mich App 9, 16 (2010). In *Klocek*, 291 Mich App at 10-11, the respondent juvenile admitted the allegation against her and the court entered an order of adjudication and indicated that she was adjudicated by plea under a *Cobbs*[86] agreement. Before disposition, the court either dismissed the petition or "warned and dismissed" the respondent under MCL

[83] See Section 21.9 for the applicable definition of "juvenile offense."

[84] See Section 21.11(D) for discussion of the offenses listed in MCL 28.243.

[85] See SCAO Form MC 235, *Motion for Destruction of Fingerprints and Arrest Card*; SCAO Form MC 392, *Order Regarding Destruction of Fingerprints and Arrest Card*; SCAO Form MC 263, *Motion/Order of Nolle Prosequi*.

[86] *People v Cobbs*, 443 Mich 276, 283 (1993).

712A.18(1)(a) (the lower court's record was unclear as to what occurred). *Klocek,* 291 Mich App at 10. The Court of Appeals rejected the respondent's claim that she was entitled to destruction of her fingerprints and arrest card under the portion of [MCL 28.243(10)[87]] requiring the court clerk to notify the Department of State Police of any "dismissal[.]" *Klocek*, 291 Mich App at 11-13. Rather, the Court explained:

> "By the plain language of [MCL 28.243(10)], there are two classes of persons who are entitled to destruction of their fingerprints[88] and arrest card: (1) a juvenile who 'is adjudicated and found not to be within the provisions of [MCL 712A.2(a)(1)]' (i.e., those found not to be within the jurisdiction of the family division of circuit court); and (2) an accused who 'is found not guilty of an offense for which he or she was fingerprinted.'"

In *Klocek,* 291 Mich App at 16, the respondent admitted the allegation against her at an adjudication hearing, and the court entered an order of adjudication and indicated the respondent was adjudicated by a *Cobbs* plea. "Thus, [the] respondent was neither a juvenile found not to be within the family court's jurisdiction nor an accused found not guilty." *Klocek*, 291 Mich App at 15-16.

C. Charge(s) Dismissed Before Trial

MCL 28.243(8) provides:

> "If an individual is arrested for any crime and the charge or charges are dismissed before trial, both of the following apply:
>
> (a) The arrest record shall be removed from the internet criminal history access tool (ICHAT).
>
> (b) If the prosecutor of the case agrees at any time after the case is dismissed, or if the prosecutor of the case or the judge of the court in which the case was filed does not object within 60 days from the

[87] At the time *Klocek* was decided, the provision discussed was MCL 28.243(8). It was renumbered by 2018 PA 67, effective 6/12/18.

[88] Effective December 14, 2012, 2012 PA 374 amended MCL 28.243(8) and several related provisions governing the collection of fingerprints and other criminal history and juvenile history record information by law enforcement agencies to refer to "biometric data" rather than "fingerprints[.]" "Biometric data" includes fingerprint and palm print images, "[d]igital images recorded during the arrest or booking process," and "descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

> date an order of dismissal was entered for cases in which the order of dismissal was entered after [June 12, 2018], both of the following apply:
>
> > (*i*) The arrest record, all biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate.
> >
> > (*ii*) Any entry concerning the change shall be removed from the LEIN."

"The department shall comply with the requirements listed in subsection (8) upon receipt of an appropriate order issued by the district court or the circuit court." MCL 28.243(9).

D. Charges For Which Destruction of Biometric Data and Arrest Card Is Not Permitted

MCL 28.243(14) provides:

> "The provisions of [MCL 28.243(10)] that require the destruction of the biometric data and the arrest card do not apply to a person who was arraigned for any of the following:
>
> > (a) The commission or attempted commission of a crime with or against a child under 16 years of age.
> >
> > (b) Rape.
> >
> > (c) Criminal sexual conduct in any degree.
> >
> > (d) Sodomy.
> >
> > (e) Gross indecency.
> >
> > (f) Indecent liberties.
> >
> > (g) Child abusive commercial activities.
> >
> > (h) A person who has a prior conviction, other than a misdemeanor traffic offense, unless a judge of a court of record, except the probate court, by express order on the record, orders the destruction or return of the biometric data and arrest card.
> >
> > (i) A person arrested who is a juvenile charged with an offense that would constitute the commission or attempted commission of any of the crimes in [MCL 28.243(12] if committed by an adult."

"[A]n arraignment in either district court or circuit court is sufficient for [MCL 28.243(14)[89]] to apply[;]" therefore, under [MCL 28.243(14)(c)[90]], a defendant who was arraigned in district court for second-degree criminal sexual conduct was not entitled to destruction of his biometric data and arrest card under [MCL 28.243(10)[91]] following entry of an order of nolle prosequi. *People v Guthrie*, 317 Mich App 381, 393-394 (2016) (concluding that the Legislature's "deletion of the phrase 'in circuit court or the family division of circuit court' [by a 2012 amendment to MCL 28.243(14)] reflects the Legislature's intent to change the statute's scope[]"). Additionally, "given the clear and unambiguous language of the statute," a trial court lacks "discretion to order the destruction or return of [a] defendant's biometric data and arrest card in the interest of justice." *Guthrie*, 317 Mich App at 394.

In *People v Cooper (After Remand)*, 220 Mich App 368, 369-370 (1996), the Court of Appeals rejected the defendant's Equal Protection challenge with respect to former MCL 28.243(9)(a), which, similarly to current MCL 28.243(14), provided that individuals who were charged with certain offenses, including criminal sexual conduct, were not entitled to the return of their fingerprints[92] and arrest cards following acquittal.[93] The *Cooper* Court, noting the particular difficulty in detecting, investigating, and prosecuting criminal sexual conduct offenses, held that a rational basis existed for prohibiting the return of fingerprints and arrest cards to persons acquitted of such charges while permitting return of those documents to persons acquitted of other serious crimes. *Cooper*, 220 Mich App at 371-375. See also *People v Pigula*, 202 Mich App 87, 91 (1993) (former MCL 28.243[9] did not violate the defendant's right of privacy because "there is no right of privacy with regard to arrest records where the arrest was made properly[]") (internal citations omitted).

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[89] At the time *Guthrie* was decided, the provision discussed was MCL 28.243(12). It was renumbered by 2018 PA 67, effective 6/12/18.

[90] At the time *Guthrie* was decided, the provision discussed was MCL 28.243(12)(c). It was renumbered by 2018 PA 67, effective 6/12/18.

[91] At the time *Guthrie* was decided, the provision discussed was MCL 28.243(8). It was renumbered by 2018 PA 67, effective 6/12/18.

[92] Effective December 14, 2012, 2012 PA 374 amended MCL 28.243(12) and several related provisions governing the collection of fingerprints and other criminal history and juvenile history record information by law enforcement agencies to refer to "biometric data" rather than "fingerprints[.]" "Biometric data" includes fingerprint and palm print images, "[d]igital images recorded during the arrest or booking process," and "descriptive data associated with identifying marks, scars, amputations, and tattoos." MCL 28.241a(b).

[93] Under the version of MCL 28.243 in effect at the time that *Cooper*, 220 Mich App 368, was decided, MCL 28.243(5) provided that an acquitted defendant was entitled to the "return" of his or her fingerprints and arrest card; however, MCL 28.243(9)(a) provided that return of the fingerprints and arrest card was not required if "[t]he person arrested was charged with the commission or attempted commission . . . of a crime with or against a child under 16 years of age or the crime of criminal sexual conduct in any degree, rape, sodomy, gross indecency, indecent liberties, or child abusive commercial activities."

21.12 Required Reporting to the Department of State Police

A. Report Upon Disposition, Conviction, Acquittal, or Dismissal

MCL 712A.18(16) provides:

> "Upon final disposition, conviction, acquittal, or dismissal of an offense within the [Family Division's] jurisdiction under [MCL 712A.2(a)(1)], using forms approved by the state court administrator, the clerk of the court entering the final disposition, conviction, acquittal, or dismissal shall immediately advise the department of state police of that final disposition, conviction, acquittal, or dismissal as required by [MCL 28.243]. The report to the department of state police must include information as to the finding of the judge or jury and a summary of the disposition or sentence imposed."

B. Report Upon Finding of No Jurisdiction, Finding of Not Guilty, or Nolle Prosequi

MCL 28.243(10) provides that "the clerk of the court entering [a] disposition shall notify the [Department of State Police] of any finding of not guilty or nolle prosequi, if it appears that the biometric data of the accused were initially collected under [MCL 28.243], or of any finding that a juvenile alleged responsible for a juvenile offense[94] is not within the provisions of [MCL 712A.2(a)(1)]."[95]

C. Adjudication of Responsibility or Conviction

MCL 28.243(11) provides:

> "Upon final disposition of the charge against the accused, the clerk of the court entering the disposition shall immediately advise the [Department of State Police ("department")] of the final disposition of the arrest for which the person's biometric data were collected if a juvenile was adjudicated to have committed a juvenile offense[96] or if the accused was

[94] See Section 21.9 for the applicable definition of "juvenile offense."

[95] See Section 21.11(B) for further discussion of this reporting requirement.

[96] See Section 21.9 for the applicable definition of "juvenile offense."

convicted of an offense for which the biometric data of the accused were collected under [MCL 28.243] or . . . MCL 769.16a.[97] With regard to any adjudication or conviction, the clerk shall transmit to the department information as to any adjudication or finding of guilty or guilty but mentally ill; any plea of guilty, nolo contendere, or guilty but mentally ill; the offense of which the accused was convicted; and a summary of any deposition or sentence imposed. The summary of the sentence must include any probationary term; any minimum, maximum, or alternative term of imprisonment; the total of all fines, costs, and restitution ordered; and any modification of sentence. If the sentence is imposed under any of the following sections, the report shall so indicate:

> (a) . . . MCL 333.7411 [(discharge and dismissal for certain first-time drug offenders)].
>
> (b) . . . MCL 600.1076[(4)] [(discharge and dismissal for drug treatment court participants)].
>
> (c) . . . MCL 762.11 to [MCL] 762.15 [(assignment to youthful trainee status)].
>
> (d) . . . MCL 769.4a [(deferral and probation for certain first-time domestic assault offenses)].
>
> (e) . . . MCL 750.350a[(4)] [(deferral and probation for certain first-time parental detention or concealment offenses)].
>
> (f) . . . MCL 750.430[(9)(a)] [(deferral and probation under MCL 750.430(9) has not already been utilized by defendant for certain first-time offenses involving the practice of profession by health care professional while under the influence of alcohol or controlled substance)].
>
> (g) . . . MCL 600.1209[(7)] [(adjudication/sentencing following successful completion of probation or court supervision of veterans treatment court participants).]"[98]

[97] See Section 21.10(C).

[98] See also MCL 600.1099k(3)(b), requiring a juvenile mental health court to send to the Department of State Police a record of adjudication of responsibility and disposition for a juvenile mental health court participant who was terminated from the program under MCL 600.1099k(1), or who has successfully completed the program but is not subject to discharge and dismissal under MCL 600.1099k(2). See Section 1.8 for discussion of juvenile mental health courts.

D. Final Disposition

1. Delinquency and Certain Designated Cases

a. Notice of Disposition

MCR 3.936(C) summarizes the above reporting requirements as applicable to delinquency and designated cases where the court imposes a juvenile disposition:

> "**(C) Notice of Disposition.** The [Family Division] shall notify the Department of State Police in writing:
>
> (1) of any juvenile who had biometric data collected for a juvenile offense and who was found not to be within the jurisdiction of the court under MCL 712A.2(a)(1); or
>
> (2) that the court took jurisdiction of a juvenile under MCL 712A.2(a)(1), who had biometric data collected for a juvenile offense, specifying the offense, the method of adjudication, and the disposition ordered." See MCR 3.943(E)(4); MCR 3.955(E) (making MCR 3.936 applicable to designated cases where the court imposes a juvenile disposition).

b. Violation of Probation in Delinquency Cases

In delinquency cases, if the Family Division finds that a juvenile has violated probation by committing a criminal offense, this finding "must *not* be reported to the State Police or the Secretary of State as an adjudication or disposition." MCR 3.944(E)(3) (emphasis supplied). Additionally, "that finding must be recorded as a violation of probation only and not a finding that the juvenile committed the underlying offense." *Id.*

2. Criminal Cases

In criminal cases, MCL 769.16a(1) requires the clerk of the court entering a final disposition on a charge of any of the following offenses[99] to "immediately" send a summary of the final

disposition, on SCAO-approved forms, to the Department of State Police:

- a felony;
- a misdemeanor for which the maximum penalty exceeds 92 days' imprisonment;
- a local ordinance for which the maximum possible penalty is 93 days' imprisonment and that substantially corresponds to a violation of state law that is a misdemeanor for which the maximum possible penalty is 93 days' imprisonment;
- a misdemeanor in a case in which the appropriate court was notified that fingerprints[100] were forwarded to the Department of State Police; or
- criminal contempt of court for failure to comply with a personal protection order as provided in MCL 600.2950, MCL 600.2950a, or MCL 600.2950i.

MCL 769.16a(1) further provides:

> "The report to the department of state police shall include the finding of the judge or jury, including a finding of guilty, guilty but mentally ill, not guilty, or not guilty by reason of insanity, or the person's plea of guilty, nolo contendere, or guilty but mentally ill; if the person was convicted, the offense of which the person was convicted; and a summary of any sentence imposed. The summary of the sentence shall include any probationary term; any minimum, maximum, or alternative term of imprisonment; the total of all fines, costs, and restitution ordered; and any modification of sentence. The report shall include the sentence if imposed under any of the following:

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[99] MCL 769.16a(1) states that it is subject to the exceptions listed in MCL 769.16a(3), which prohibits a court clerk from reporting a conviction of a misdemeanor offense under the Michigan Vehicle Code unless otherwise allowed under MCL 769.16a(4) or MCL 769.16a(6), or unless (1) the offense is punishable by more than 92 days' imprisonment; (2) the offense would be punishable by more than 92 days' imprisonment as a second conviction; or (3) "a judge of the court orders the clerk to report the conviction."

[100] Effective December 14, 2012, 2012 PA 374 amended MCL 28.243 and related provisions governing the collection of fingerprints and other criminal history and juvenile history record information by law enforcement agencies to refer to "biometric data" rather than "fingerprints[.]"

> (a) . . . MCL 333.7411 [(discharge and dismissal for certain first-time drug offenders)].
>
> (b) . . . MCL 600.1076[(4)] [(discharge and dismissal for drug treatment court participants)].
>
> (c) . . . MCL 750.350a [(parental detention or concealment offenses)].
>
> (d) . . . MCL 750.430 [(practice of profession by health care professional while under the influence of alcohol or controlled substance)].
>
> (e) [MCL 762.11 to MCL 762.15] [(assignment to youthful trainee status)].
>
> (f)[MCL 769.4a] [(deferral and probation for certain first-time domestic assault offenses)]."[101]

MCL 769.16a(8) provides:

> "For any conviction that was reported as provided in [MCL 769.16a], the clerk of the court entering a subsequent final disposition in the case shall immediately report to the department of state police and the department of corrections if the judgment of conviction is vacated and either the accusatory instrument is dismissed or upon retrial or by court finding, whether appellate or otherwise, the defendant is determined to be not guilty. The final disposition shall be reported on forms approved by the state court administrator. The department of state police and department of corrections shall immediately enter the disposition into each database they maintain concerning criminal convictions and shall remove all information indicating that the person was convicted of the offense from each of those databases that is available to the public."

[101]See also MCL 600.1099k(3)(b), requiring a juvenile mental health court to send to the Department of State Police a record of adjudication of responsibility and disposition for a juvenile mental health court participant who was terminated from the program under MCL 600.1099k(1), or who has successfully completed the program but is not subject to discharge and dismissal under MCL 600.1099k(2). See Section 1.8 for discussion of juvenile mental health courts.

21.13 Required Reporting to the Secretary of State

A. Required Abstracts

"The [Family Division] shall prepare and forward to the Secretary of State an abstract of its findings at such times and for such offenses as are required by law." MCR 3.943(E)(6).

"[E]ach clerk of a court of record"[102] is required to keep a "full record" of every case in which an individual is charged with or cited for violating the Michigan Vehicle Code or a local ordinance substantially corresponding to a provision of the Michigan Vehicle Code. MCL 257.732(1). For certain traffic-related offenses, the clerk of the court must send an abstract of the court record to the Secretary of State.[103] *Id*. MCL 257.732(3) sets out the following requirements concerning the form and contents of the abstract:

> "The abstract or report required under [MCL 257.732] must be made upon a form furnished by the secretary of state. An abstract must be certified by signature, stamp, or facsimile signature of the individual required to prepare the abstract as correct. An abstract or report must include all of the following:
>
> (a) The name, address, and date of birth of the individual charged or cited.
>
> (b) The number of the individual's operator's or chauffeur's license, if any.
>
> (c) The date and nature of the violation.
>
> (d) The type of vehicle driven at the time of the violation and, if the vehicle is a commercial motor vehicle, that vehicle's group designation.
>
> (e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.
>
> (f) Whether bail was forfeited.
>
> (g) Any license restriction, suspension, or denial ordered by the court as provided by law.

[102] The county clerk is the clerk of the court for the Family Division and keeps its records and indexes of actions. MCL 600.1007; MCR 8.119. See Section 21.1(C).

[103] MCL 257.732(16) excludes certain violations from the abstracting requirements, such as violations involving parking or standing and non-moving violations that do not result in the suspension, revocation, or denial of a license. See the statute for a complete list of exclusions.

(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.

(i) Other information considered necessary to the secretary of state."[104]

B. Time Requirements Applicable to Required Abstracts

1. Violations of Michigan Vehicle Code

MCL 257.732(1)(a) requires the clerk to forward an abstract of the record "[n]ot more than 5 days after a conviction, forfeiture of bail, or entry of a civil infraction determination or default judgment upon a charge of or citation for violating or attempting to violate [the Michigan Vehicle Code] or a local ordinance substantially corresponding to [the Michigan Vehicle Code] regulating the operation of vehicles on highways." A "[c]onviction" includes a finding of guilt in a juvenile adjudication or a "juvenile disposition for a violation that if committed by an adult would be a crime[.]" MCL 257.8a(a).

MCL 712A.2b(d) also requires the Family Division to forward an abstract as required under MCL 257.732 "[w]ithin 14 days after entry of a court order of disposition[.]"[105]

2. Charges Involving Operation of a Motor Vehicle While Intoxicated, While Visibly Impaired, With Unlawful Bodily Alcohol Content, or With Any Amount of Certain Controlled Substances in the Body

a. Charges Resulting in Dismissal or Acquittal

Under MCL 257.732(1)(b), the clerk must *immediately* forward an abstract of the record for each case resulting in dismissal or acquittal if the juvenile was charged with a violation of:

- MCL 257.625(1) (operating a vehicle while intoxicated);

[104] See also MCL 324.80131, which sets out similar abstract requirements for violations of the provisions governing the use of watercraft.

[105] The 14-day time frame set out in MCL 712A.2b(d) apparently corresponds to a former version of MCL 257.732(1)(a), which required the clerk to forward the abstract required under that subsection within 14 days rather than the currently applicable 5-day period.

- MCL 257.625(3) (operating a vehicle while visibly impaired);
- MCL 257.625(4) (causing death of another person while operating a vehicle in violation of MCL 257.625(1), MCL 257.625(3), or MCL 257.625(8));
- MCL 257.625(5) (causing serious impairment of a body function of another person while operating a vehicle in violation of MCL 257.625(1), MCL 257.625(3), or MCL 257.625(8));
- MCL 257.625(6) (person under 21 operating a vehicle with any bodily alcohol content);
- MCL 257.625(7) (operating a vehicle in violation of MCL 257.625(1), MCL 257.625(3), MCL 257.625(4), MCL 257.625(5), or MCL 257.625(8) while a person less than 16 years old is occupying the vehicle);
- MCL 257.625(8) (operating a vehicle while any amount of certain controlled substances are in the operator's body);
- MCL 257.625m (operating a commercial vehicle with a bodily alcohol content above a specified level); or
- a local ordinance corresponding to MCL 257.625(1), MCL 257.625(3), MCL 257.625(6) or MCL 257.625(8), or MCL 257.625m.

b. Charges Involving Off-Road Recreation Vehicles or Snowmobiles

MCL 257.732(1)(c) provides that an abstract must be *immediately* prepared and forwarded to the Secretary of State for each case charging a violation of:

- MCL 324.81134 (operating an off-road recreation vehicle (ORV) while under the influence of alcoholic liquor and/or a controlled substance, with any amount of certain controlled substances in the body, while visibly impaired, or with an unlawful bodily alcohol content, and related offenses);
- MCL 324.82127(1) or MCL 324.82127(3) (operating a snowmobile while under the influence of alcoholic liquor and/or a controlled substance, with a blood alcohol content above a specified level, with any amount of certain controlled

substances in the body, or while visibly impaired); or

- a local ordinance substantially corresponding to any of these statutory provisions.

3. Offenses Requiring Abstracts Upon Conviction

MCL 257.732(4) requires the clerk to forward an abstract of the court record upon a individual's conviction[106] of any of the following offenses:

- unlawfully driving away an automobile (UDAA), MCL 750.413;
- unlawfully taking or using an automobile without intent to steal, MCL 750.414;
- failure to obey a police or conservation officer's direction to stop ("fleeing and eluding"), MCL 750.479a;
- felonious driving, former MCL 752.191[107];
- manslaughter resulting from the operation of a vehicle[108];
- negligent homicide resulting from the operation of a vehicle[109];
- murder resulting from the operation of a vehicle, MCL 750.316 (first-degree murder) and MCL 750.317 (second-degree murder);
- selling or furnishing alcoholic liquor to a minor, MCL 436.1701(1), or a violation of a local ordinance substantially corresponding to MCL 436.1701(1);[110]

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[106] Additionally, an abstract must be forwarded upon a *finding or admission of responsibility* of a violation of MCL 436.1701(1) (selling or furnishing alcoholic liquor to a minor) or MCL 436.1703 (minor in possession ("MIP") offenses) or a substantially corresponding local ordinance. MCL 257.732(4); MCL 257.732(4)(d).

[107] Effective February 1, 2002, 2001 PA 134 repealed MCL 752.191.

[108] See MCL 750.321.

[109] See former MCL 750.324. Effective October 31, 2010, 2008 PA 463 repealed MCL 750.324 (negligent homicide with a motor vehicle) and added MCL 257.601d (establishing misdemeanor offenses for committing a moving violation that causes the death of another person or serious impairment of a body function to another person).

[110] Additionally, an abstract must be forwarded upon a *finding or admission of responsibility* of a violation of MCL 436.1701(1) or a substantially corresponding local ordinance. MCL 257.732(4).

- minor purchasing or attempting to purchase, consuming or attempting to consume, or possessing or attempting to possess alcoholic liquor ("MIP"), and related offenses, MCL 436.1703, or a violation of a local ordinance substantially corresponding to MCL 436.1703;[111]

- knowingly making a false report of a violation or attempted violation of certain statutes governing explosives and placing foreign objects or poisons in foods, and communicating or causing the communication of the false report to any other person, knowing the report to be false, or threatening to violate any of those statutes and communicating or causing the communication of the threat to any other person, MCL 750.411a(2);

- a violation of federal motor carrier safety regulations as adopted by MCL 480.11a;

- failure to stop a school bus before crossing a railroad track, MCL 257.1857;

- an attempt to violate, a conspiracy to violate, or a violation of MCL 333.7401 to MCL 333.7461 (controlled substance offenses), or a violation of a local ordinance that prohibits conduct prohibited under those statutory provisions, unless the convicted individual is sentenced to life imprisonment or a minimum term of imprisonment that exceeds one year for the offense;

- an attempt to commit any of the above offenses;

- a violation of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq.*;

- failure to maintain security for payment of insurance benefits as required under certain sections of the Insurance Code, MCL 500.3101, MCL 500.3102(1), and MCL 500.3103; or

- a disqualifying offense listed in 49 CFR 383.51 (governing commercial driver's license standards).

[111] Additionally, an abstract must be forwarded upon a *finding or admission of responsibility* of a violation of MCL 436.1703 (including a state civil infraction for a first-time MIP violation under MCL 436.1703(1)(a)), or a substantially corresponding local ordinance. MCL 257.732(4). For additional guidance concerning MIP cases, see SCAO Memorandum, *Minor in Possession Legislation and Review of Civil Infraction Agreements between Circuit Court-Family Division and the District Court*, November 8, 2017.

A "[c]onviction" includes a finding of guilt in a juvenile adjudication or a "juvenile disposition for a violation that if committed by an adult would be a crime[.]" MCL 257.8a(a).

4. Conviction of Felony in Which Motor Vehicle Was Used

With the exception of felonies specified in MCL 257.732(4)[112] or MCL 257.319,[113] when "an individual is charged with a felony in which a motor vehicle was used," the prosecuting attorney must include in the complaint and information a statement indicating that the individual's driver's license will be suspended by the Secretary of State upon a conviction if the judge finds that the conviction is for a felony in which a motor vehicle was used.[114]MCL 257.732(7). Similarly, MCL 257.732(8) provides that when "a juvenile is accused of an act, the nature of which constitutes a felony in which a motor vehicle was used," the prosecuting attorney or Family Division must include the following statement on the petition filed in the court:

> "You are accused of an act the nature of which constitutes a felony in which a motor vehicle was used. If the accusation is found to be true and the judge or referee finds that the nature of the act constitutes a felony in which a motor vehicle was used, as defined in . . . MCL 257.319, your driver's license shall be suspended by the secretary of state."

See also MCR 3.931(B)(7) (requiring a delinquency petition to contain the notice required by MCL 257.732, if applicable).

MCL 257.732(9) provides that "[i]f the court determines as part of the sentence or disposition that the felony for which the individual was convicted or adjudicated and with respect to which notice was given under [MCL 257.732](7) or [MCL 257.732](8) is a felony in which a motor vehicle was used, the clerk of the court shall forward an abstract of the court record of that conviction to the secretary of state."

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[112] See Section 21.13(B) for a list of offenses specified in MCL 257.732(4).

[113] MCL 257.319 provides for the mandatory suspension of a person's driver's license upon conviction of certain offenses.

[114] See Section (D) for additional discussion of this notification requirement.

5. Violation of Juvenile Probation

In delinquency cases, if the Family Division finds that a juvenile has violated probation by committing a criminal offense, this finding "must *not* be reported to the State Police or the Secretary of State as an adjudication or disposition." MCR 3.944(E)(3) (emphasis supplied). Additionally, "that finding must be recorded as a violation of probation only and not a finding that the juvenile committed the underlying offense." *Id.*

6. Abstract and Nonpublic Record of Deferral and Probation on Charge of Minor in Possession of Alcohol ("MIP") or Related Charge

MCL 436.1703(1) provides that a minor may not "purchase or attempt to purchase alcoholic liquor, consume or attempt to consume alcoholic liquor, possess or attempt to possess alcoholic liquor, or have any bodily alcohol content, except as provided in [MCL 436.1703]." An MIP violation occurring after one *prior judgment* as defined in MCL 436.1703(17)(d) is a misdemeanor offense. MCL 436.1703(1)(b). MCL 436.1703(3) allows the deferral of proceedings and the imposition of probation, without a judgment of guilt or adjudication of responsibility, for individuals who consent to the deferral and offer a plea of guilty (criminal proceedings), or a plea of admission (delinquency proceedings), to a misdemeanor MIP violation under MCL 436.1703(1)(b). MCL 436.1703(3) further provides:

> "The court shall maintain a nonpublic record of the matter while proceedings are deferred and the individual is on probation and if there is a discharge and dismissal under [MCL 436.1703(3)]. The secretary of state shall retain a nonpublic record of a plea and of the discharge and dismissal under [MCL 436.1703(3)]. These records shall be furnished to any of the following:
>
> > (a) To a court, prosecutor, or police agency on request for the purpose of determining if an individual has already utilized [MCL 436.1703(3)].
> >
> > (b) To the department of corrections, a prosecutor, or a law enforcement agency, on the department's, a prosecutor's, or a law enforcement agency's request, subject to all of the following conditions:

> (*i*) At the time of the request, the individual is an employee of the department of corrections, the prosecutor, or the law enforcement agency, or an applicant for employment with the department of corrections, the prosecutor, or the law enforcement agency.
>
> (*ii*) The record is used by the department of corrections, the prosecutor, or the law enforcement agency only to determine whether an employee has violated his or her conditions of employment or whether an applicant meets criteria for employment."

MCL 257.732(5) likewise provides that "[t]he clerk of the court shall . . . forward an abstract of the court record to the secretary of state if an individual has pled guilty to, or offered a plea of admission in a juvenile proceeding for, a violation of . . . MCL 436.1703, or a local ordinance substantially corresponding to [MCL 436.1703], and has had further proceedings deferred under that section. If the individual is sentenced to a term of probation and terms and conditions of probation are fulfilled and the court discharges the individual and dismisses the proceedings, the court shall also report the dismissal to the secretary of state."[115]

Part C: Setting Aside Juvenile Adjudications and Convictions

21.14 Setting Aside a Juvenile Adjudication

MCR 3.925(F)(1) states that "[t]he setting aside of juvenile adjudications is governed by MCL 712A.18e and MCL 712A.18t." MCL 712A.18e addresses applications to set aside a juvenile adjudication, while MCL 712A.18t addresses automatic set aside of a juvenile adjudication.

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[115] See also MCL 257.732(4)(d), which provides that an abstract must be forwarded upon a conviction or finding or admission of responsibility of a violation of MCL 436.1703 (including a state civil infraction for a first-time MIP violation under MCL 436.1703(1)(a)), or a substantially corresponding local ordinance. For additional guidance concerning MIP cases, see SCAO Memorandum, *Minor in Possession Legislation and Review of Civil Infraction Agreements between Circuit Court-Family Division and the District Court*, November 8, 2017.

MCL 712A.18e(1) provides:

> "Except as otherwise provided in [MCL 712A.18e(2)] and [MCL 712A.18t],[116] a person who has been adjudicated of not more than 1 juvenile offense that would be a felony if committed by an adult and not more than 3 juvenile offenses, of which not more than 1 may be a juvenile offense that would be a felony if committed by an adult and who has no felony convictions may file an application with the adjudicating court or adjudicating courts for the entry of an order setting aside the adjudications. A person may have only 1 adjudication for an offense that would be a felony if committed by an adult and not more than 2 adjudications for an offense that would be a misdemeanor if committed by an adult or if there is no adjudication for a felony if committed by an adult, not more than 3 adjudications for an offense that would be a misdemeanor if committed by an adult set aside under this section. Multiple adjudications arising out of a series of acts that were in a continuous time sequence of 12 hours or less and that displayed a single intent and goal constitute 1 offense provided that none of the adjudications constitute any of the following:
>
> > "(a) An assaultive crime as that term is defined in [MCL 712A.18e](7).
> >
> > (b) An offense involving the use or possession of a weapon.
> >
> > (c) An offense with a maximum penalty of 10 or more years[']imprisonment."

MCL 712A.18t(1) provides:

> "Except as otherwise provided in [MCL 712A.18t], beginning [July 3, 2023[117]], an adjudication is set aside under [MCL 712A.18t] without filing an application under [MCL 712A.18e] 2 years after the termination of court supervision or when the person becomes 18 years of age, whichever is later."

[116] See Section 21.14(A) for discussion of MCL 712A.18e(2).

[117] Pursuant to Executive Directive, the new effective date for automatic juvenile clean slate under MCL 712A.18t is December 30, 2023.

A. Offenses That May Not Be Set Aside

MCL 712A.18e(2) and MCL 712A.18t(2) provide that the following adjudications and convictions may not be set aside under MCL 712A.18e or MCL 712A.18t:

- an adjudication of an offense which if committed by an adult would be a felony for which the maximum punishment is life imprisonment; or
- a conviction in a designated proceeding in the Family Division.[118]

In addition, MCL 712A.18t(2) provides that the following adjudications and convictions may not be automatically set aside under MCL 712A.18t:

- an adjudication for an offense described in MCL 712A.2(a)(1)(A)-(I);
- a conviction or adjudication for a violation of MCL 750.81a;
- a conviction or adjudication for a violation of MCL 750.82;
- a conviction or adjudication for a violation of MCL 750.90;
- a conviction or adjudication for a violation of MCL 750.136b;
- a conviction or adjudication for a violation of MCL 750.321;
- a conviction or adjudication for a violation of MCL 750.322;
- a conviction or adjudication for a violation of MCL 750.397;
- a conviction or adjudication for a violation of MCL 750.411h
- a conviction or adjudication for a violation of MCL 750.411i;

[118] However, MCL 712A.18e(2)(b) "does not prevent a person convicted [in a designated proceeding] from having that conviction set aside as otherwise provided by law." See Section 21.15 for discussion of setting aside criminal convictions.

- a conviction or adjudication for a violation of MCL 750.520d;
- a conviction or adjudication for a violation of MCL 750.520g; or
- a conviction or adjudication for a violation of MCL 750.543k.

B. Procedure for Application

An application to set aside a juvenile adjudication under MCL 712A.18e "shall not be filed until the expiration of 1 year after the termination of jurisdiction." MCL 712A.18e(3).

MCL 712A.18e(4)(a)-(g) provides that the application is invalid unless it is signed under oath by the person whose adjudication is to be set aside and unless it contains:

- the applicant's full name and current address;
- a certified record of the adjudication that is to be set aside;
- a statement that the applicant has not been adjudicated of a juvenile offense other than the juvenile offenses sought to be set aside;
- a statement that the applicant has not been convicted of any felony offense;
- a statement as to whether the applicant has previously filed an application to set aside "this or any other adjudication and, if so, the disposition" of the prior application;
- a statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country; and
- a consent to the use of the nonpublic record created under MCL 712A.18e(13) to be held by the Department of State Police.[119]

"Upon application, the adjudicating court or adjudicating courts shall locate any court records or documents necessary to conduct a hearing under [MCL 712A.18e]." MCL 712A.18e(5).

[119] See Section 21.14(H) for discussion of the nonpublic record provided for in MCL 712A.18e(13).

C. Submission of Application to Department of State Police

MCL 712A.18e(6) requires the applicant to submit a copy of the application and two complete sets of fingerprints to the Department of State Police. MCL 712A.18e(5) further provides:

> "The department of state police shall compare [the submitted] fingerprints with the records of the department, including the nonpublic record created under [MCL 712A.18e(13)],[120] and shall forward a complete set of fingerprints to the Federal Bureau of Investigation for a comparison with the records available to that agency. The department of state police shall report to the court in which the application is filed the information contained in the department's records with respect to any pending charges against the applicant, any record of adjudication or conviction of the applicant, and the setting aside of any adjudication or conviction of the applicant and shall report to the court any similar information obtained from the Federal Bureau of Investigation. The court shall not act upon the application until the department of state police reports the information required by this subsection to the court."

D. Contesting Application or Order to Set Aside

"A copy of the application must be served upon the attorney general and, if applicable, upon the office of the prosecuting attorney who prosecuted the offense." MCL 712A.18e(7). The attorney general and the prosecuting attorney must have the opportunity to contest an application filed under MCL 712A.18e. MCL 712A.18e(7). "If the attorney general or prosecuting attorney wishes to contest an application, the attorney general or prosecuting attorney must do so not later than 35 days after service." MCL 712A.18e(7).

"The attorney general and the prosecuting attorney who prosecuted the offense shall not contest the setting aside of an adjudication without an application under [MCL 712A.18t]." MCL 712A.18t(3).

[120] See Section 21.14(H) for discussion of the nonpublic record provided for in MCL 712A.18e(13).

E. Victim Notification for Assaultive Crimes and Serious Misdemeanors[121]

MCL 712A.18e(7) provides, in part:

> "If the adjudication was for an offense that if committed by an adult would be an assaultive crime or serious misdemeanor, and if the name of the victim is known to the prosecuting attorney, the prosecuting attorney shall give the victim of that offense written notice of the application and forward a copy of the application to the victim under . . .MCL 780.796a.[122] The notice must be sent by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under [MCL 712A.18e] concerning that adjudication and to make a written or oral statement."

1. "Assaultive Crimes"

For purposes of the victim notification required by MCL 712A.18e(7), "'[a]ssaultive crime' means that term as defined in . . . MCL 770.9a." MCL 712A.18e(7)(a). The "assaultive crimes" set out in MCL 770.9a(3)[123] are:

- assault or assault and battery against a Department of Health and Human Services employee causing serious impairment of body function, MCL 750.81c(3);
- felonious assault, MCL 750.82;
- assault with intent to commit murder, MCL 750.83;
- assault with intent to do great bodily harm less than murder or assault by strangulation or suffocation, MCL 750.84;
- assault with intent to maim, MCL 750.86;

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[121] See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 5, for a thorough discussion of a victim's rights regarding notification. MCL 712A.18t does not require victim notification.

[122] MCL 780.796a, a provision of the Crime Victim's Rights Act, substantially corresponds to MCL 712A.18e(7).

[123] However, under MCL 712A.18e(2)(a), "[a]n adjudication for an offense that if committed by an adult would be a felony for which the maximum punishment is life imprisonment" may not be set aside; accordingly, not all of the "assaultive crimes" set out in MCL 770.9a are eligible to be set aside. Additionally, a juvenile accused of or charged with "a specified juvenile violation" must not be diverted from formal court procedures. MCL 722.823(3); see also MCL 722.822(e).

- assault with intent to commit a felony not otherwise punished, MCL 750.87;
- assault with intent to rob and steal while unarmed, MCL 750.88;
- assault with intent to rob and steal while armed, MCL 750.89;
- intentional assaultive conduct against pregnant individual resulting in miscarriage or stillbirth or death to embryo or fetus, MCL 750.90a;
- intentional assaultive conduct against pregnant individual resulting in miscarriage or stillbirth by that individual or death or great bodily harm to the embryo or fetus, MCL 750.90b(a)-(b);
- attempt to murder, MCL 750.91;
- a violation of MCL 750.200 to MCL 750.212a (governing explosives, bombs, and harmful devices);
- first-degree murder, MCL 750.316;
- second-degree murder, MCL 750.317;
- manslaughter, MCL 750.321;
- kidnapping, MCL 750.349;
- prisoner taking another as hostage, MCL 750.349a;
- kidnapping a child under age 14, MCL 750.350;
- mayhem, MCL 750.397;
- stalking, if the victim was less than 18 years of age at any time during the offender's course of conduct and the offender is 5 or more years older than the victim, MCL 750.411h(2)(b), or if the court placed the offender on probation as provided in MCL 750.411h(3);
- aggravated stalking, MCL 750.411i;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;

- fourth-degree criminal sexual conduct, MCL 750.520e;
- assault with intent to commit criminal sexual conduct, MCL 750.520g;
- armed robbery, MCL 750.529;
- carjacking, MCL 750.529a;
- unarmed robbery, MCL 750.530; and
- a violation of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq*.

2. Serious Misdemeanors

For purposes of the victim notification required by MCL 712A.18e(7), "'[s]erious misdemeanor' means that term as defined in section 61 of the William Van Regenmorter crime victim's rights act [(CVRA)], 1985 PA 87, MCL 780.811." MCL 712A.18e(7)(b). The "serious misdemeanors" set out in MCL 780.811(1)(a) are:

- assault and battery, including domestic violence, MCL 750.81;
- assault resulting in infliction of serious or aggravated injury, including aggravated domestic violence, MCL 750.81a;
- threatening a DHHS employee with physical harm, MCL 750.81c(1);
- breaking and entering or illegal entry, MCL 750.115;
- fourth-degree child abuse, MCL 750.136b(7);
- contributing to the neglect or delinquency of a minor, MCL 750.145;
- using the internet or a computer to make a prohibited communication, MCL 750.145d;
- embezzlement from a vulnerable adult of an amount of less than $200, MCL 750.174a(2) or MCL 750.174a(3)(b);
- embezzlement from a vulnerable adult of an amount of $200 to $1,000, MCL 750.174a(3)(a);

- intentionally aiming a firearm without malice, MCL 750.233;
- discharge of a firearm intentionally, but without malice, aimed at a person, MCL 750.234;
- discharge of a firearm intentionally, but without malice, aimed at a person, resulting in injury, MCL 750.235;
- indecent exposure, MCL 750.335a;
- stalking, MCL 750.411h;
- committing a moving violation in a work zone or school bus zone, causing injury, MCL 257.601b(2);
- moving violation causing death, MCL 257.601d(1);
- moving violation causing serious impairment of a body function, MCL 257.601d(2);
- leaving the scene of a personal-injury accident, MCL 257.617a;
- violating MCL 257.625 (offenses involving the operation of a vehicle while intoxicated, while visibly impaired, with an unlawful bodily alcohol content, or with any amount of certain controlled substances in the body[124]), if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual;
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;
- operating a motorboat while under the influence of or visibly impaired by alcoholic liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or MCL 324.80176(3),[125] if the violation involves an accident resulting in damage to

[124] Effective March 31, 2013, 2012 PA 543 amended several subsections of MCL 257.625, governing various offenses involving the operation of a motor vehicle while under the influence of or visibly impaired by alcoholic liquor and/or a controlled substance or with an unlawful bodily alcohol content, to additionally prohibit the operation of a motor vehicle while under the influence of or visibly impaired by any *other intoxicating substance*. However, MCL 780.811(1)(a)(*xix*) still refers to "[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[.]"

another individual's property or physical injury or death to any individual;

- a violation of a local ordinance substantially corresponding to a violation listed above; and
- a violation charged as a crime[126] or serious misdemeanor listed above but subsequently reduced to or pleaded to as a misdemeanor.

F. Court Action on the Application

MCL 712A.18e(8) provides that "[u]pon the hearing of the application, the court may require the filing of affidavits and the taking of proofs as it considers proper."

1. Setting Aside an Adjudication

For all offenses other than unlawfully driving away an automobile (UDAA) or certain prostitution-related offenses committed by victims of human trafficking, which *must* be set aside if the applicant otherwise meets all of the requirements of MCL 712A.18e,[127] the setting aside of an adjudication is conditional and a privilege, not a right. MCL 712A.18e(9); MCL 712A.18e(10).

The Family Division may enter an order setting aside an applicant's juvenile adjudication(s)[128] if it "determines that the circumstances and behavior of the applicant from the date of the applicant's adjudication to the filing of the application warrant setting aside the . . . adjudication[(s)] . . . and that setting aside the adjudication[(s)] . . . is consistent with the public welfare[.]"

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[125] Effective March 31, 2015, 2014 PA 402 amended MCL 324.80176(1) and MCL 324.80176(3) to, among other things, replace the term *vessel* with *motorboat*; replace the term *intoxicating liquor* with *alcoholic liquor*; and add MCL 324.80176(1)(c) to prohibit a person from operating a motorboat with the presence of any amount of certain controlled substances in the body. However, MCL 780.811(1)(a)(*xxi*) still refers to "[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[.]"

[126] "'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); see MCL 780.811(1)(a)(*xxiii*).

[127] See Section 21.4(F)(2) for discussion of the mandatory setting aside of an adjudication of a UDAA offense. See Section 21.4(F)(3) for discussion of the mandatory setting aside of an adjudication of a prostitution-related offense committed by a victim of human trafficking.

[128] The court may set aside "1 adjudication for a juvenile offense that would be a felony if committed by an adult and not more than 2 adjudications for a juvenile offense that would be a misdemeanor if committed by an adult or if there is no adjudication for a felony if committed by an adult, not more than 3 adjudications for an offense that would be a misdemeanor if committed by an adult[.]" MCL 712A.18e(9).

MCL 712A.18e(9). Upon submission by the applicant of a certificate of completion from the Michigan Youth ChalleNGe Academy,[129] the Family Division must "determine that the applicant's circumstances and behavior warrant setting aside the adjudication[(s)]," and "[i]f the court also determines that setting aside the adjudication[(s)] . . . is consistent with the public welfare, the court may enter an order setting aside the adjudication as provided in [MCL 712A.18e(9)]." *Id*.

The nature of an offense, standing alone, is insufficient to warrant denial of an application; rather, the court must balance the circumstances and behavior of the offender and the public welfare. *People v Rosen*, 201 Mich App 621, 622-624 (1993) (applying former MCL 780.621(9) (since deleted; language similar to former MCL 780.621(9) can now be found at MCL 780.621d(13)).

2. Mandatory Setting Aside of UDAA Adjudication

An adjudication for an offense that, if committed by an adult, would constitute unlawfully driving away an automobile (UDAA) or attempted UDAA, MCL 750.413, *must* be set aside if an application is filed and the applicant otherwise meets the requirements of MCL 712A.18e. MCL 712A.18e(10)(a).

3. Mandatory Setting Aside of Adjudications for Prostitution-Related Offenses Committed by Human Trafficking Victims

If an application is filed and the applicant otherwise meets the requirements of MCL 712A.18e, an adjudication for an offense that, if committed by an adult, would constitute a violation or attempted violation of MCL 750.448 (accosting/soliciting/inviting another person to commit prostitution or do a lewd/immoral act), MCL 750.449 (admitting another person for purposes of prostitution), MCL 750.450 (aiding/abetting another person in violating MCL 750.448, MCL 750.449, or MCL 750.449a[130]), or a substantially corresponding local ordinance, *must* be set aside if the applicant "committed the offense as a direct result of his or her being a victim[131] of a human trafficking violation." MCL 712A.18e(10)(b).

[129] See http://miycp.org/.

[130] MCL 750.449a prohibits engaging or offering to engage the services of another person for the purpose of prostitution, lewdness, or assignation.

G. Effect of Order

If the court grants the application and enters an order setting aside a juvenile adjudication under MCL 712A.18e, or upon the automatic set aside of an adjudication under MCL 712A.18t, the applicant or person is considered not to have been previously adjudicated, except as provided in MCL 712A.18e(13) or MCL 712A.18t(6)[132] and as follows:

- The applicant or person is not entitled to the remission of any fine, costs, or other money paid as a consequence of an adjudication that is set aside.[133]
- Setting aside a conviction under MCL 712A.18e or MCL 712A.18t does not affect the right of the applicant to rely upon the adjudication to bar subsequent proceedings for the same offense.
- Setting aside a conviction under MCL 712A.18e or MCL 712A.18t does not affect the right of a victim of an offense to prosecute or defend a civil action for damages.
- Setting aside a conviction under MCL 712A.18e or MCL 712A.18t does not create a right to commence an action for damages for detention under the disposition that the applicant served before the adjudication is set aside. MCL 712A.18e(11)(a)-(d); MCL 712A.18t(4)(a)-(d).

In addition, upon the setting aside of an adjudication under MCL 712A.18t, the person is considered to have been previously adjudicated for "[r]esearch on the utilization and effectiveness of the set-aside process." MCL 712A.18t(4)(e).

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[131] The Juvenile Code does not define *victim* for purposes of MCL 712A.18e(10)(b). However, see MCL 712A.18e(7)(c) (defining *victim*, for purposes of MCL 712A.18e(7), as "that term as defined in [MCL 780.781 of the Crime Victim's Rights Act]"); MCL 780.621(4)(j) (defining *victim*, for purposes of setting aside an adult conviction under MCL 780.621, as "that term as defined in [MCL 780.752, MCL 780.781, and MCL 780.811 of the Crime Victim's Rights Act]").

See also MCL 750.451(6), establishing a rebuttable presumption that a person under 18 years of age who is prosecuted for an enumerated prostitution-related offense (or a substantially similar local ordinance violation) was coerced into child sexually abusive activity or commercial sexual activity by another person engaged in human trafficking.

[132] MCL 712A.18e(13) and MCL 712A.18t(6) require the Department of State Police to retain a nonpublic record regarding an adjudication that is set aside under MCL 712A.18e or automatically set aside under MCL 712A.18t. See Section 21.14(H).

[133] However, see *Nelson v Colorado*, 581 US ___, ___ (2017), holding that "[w]hen a criminal conviction is invalidated by a reviewing court and no retrial will occur, . . . the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction"; the retention of such conviction-related assessments following the reversal of a conviction, where the defendant will not be retried, "offends the Fourteenth Amendment's guarantee of due process." It is unclear whether the reasoning of *Nelson* extends to convictions that are set aside, rather than vacated or reversed on appeal.

When setting aside a juvenile adjudication, the court must not remove or expunge the adjudication from the juvenile's driving record. MCL 712A.18e(17); MCL 712A.18t(10).

H. Access to Records of Adjudications That Have Been Set Aside

MCL 712A.18e(12)-(15) and MCL 712A.18t(5)-8) set out requirements regarding the maintenance of and access to nonpublic records of the state police.

If the Family Division grants an application and enters an order setting aside a juvenile adjudication, it must send a copy of the order to the arresting agency and the Department of State Police. MCL 712A.18e(12). If an adjudication is automatically set aside under MCL 712A.18t, the court must notify the arresting agency and the Department of State Police about the order. MCL 712A.18t(5).

MCL 712A.18e(13) and MCL 712A.18t(6) contain substantially similar provisions addressing the nonpublic record or an order setting aside an adjudication:

> "The department of state police shall retain a nonpublic record of the order setting aside an adjudication [or adjudications] . . . and of the record of the arrest, fingerprints, adjudication, and disposition of the applicant in the case to which the order applies. Except as provided in [MCL 712A.18e(14) or MCL 712A.18t(7)],[134] this nonpublic record must be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes:
>
> > (a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.
> >
> > (b) Consideration by a law enforcement agency if a person whose adjudication has been set aside applies for employment with the law enforcement agency.

[134] MCL 712A.18e(14) permits a person whose adjudication is set aside to obtain a copy of the nonpublic record by paying a fee in the same manner as provided in § 4 of the Michigan Freedom of Information Act (FOIA), MCL 15.234. See also MCL 712A.18t(7).

(c) To show that a person who has filed an application to set aside an adjudication has previously had an adjudication set aside under this section. [This subsection only applies to applications to set aside under MCL 712A.18e.]

(d) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.[135]

(e) Consideration by the governor, if a person whose adjudication has been set aside applies for a pardon for another offense." MCL 712A.18e(13)(a)-(e); MCL 712A.18t(6)(a)-(d).

The nonpublic record maintained by the Department of State Police is exempt from disclosure under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. MCL 712A.18e(15); MCL 712A.18t(8).[136]

"Except as provided in [MCL 712A.18e(13) or MCL 712A.18t(6) (governing the nonpublic record retained by the Department of State Police)], a person, other than the applicant [or, in the case of an automatic set-aside, a person, other than the person whose adjudication is set aside under MCL 712A.18t or a victim[137]], who knows or should have known that an adjudication was set aside under [MCL 712A.18e or MCL 712A.18t], who divulges, uses, or publishes information concerning an adjudication set aside under [MCL 712A.18e or MCL 712A.18t] is guilty of a misdemeanor." MCL 712A.18e(13); MCL 712A.18t(9).

21.15 Setting Aside a Criminal Conviction

A. Generally

A conviction following automatic waiver, traditional waiver, or designated proceedings may be set aside as provided in MCL 780.621. MCR 3.925(F)(2) ("The court may only set aside a conviction as provided by MCL 780.621, *et seq*.").

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[135] See *People v Smith*, 437 Mich 293, 302-304 (1991), discussed in Section 21.8(C).

[136] However, MCL 712A.18e(14) and MCL 712A.18t(7) permit a person whose adjudication is set aside to obtain a copy of the nonpublic record by paying a fee in the same manner as provided in § 4 of the FOIA, MCL 15.234.

[137] For purposes of MCL 712A.18t(9), a *victim* is "any individual who suffered direct or threatened physical, financial, or emotional harm as the result of the offense that was committed by the person whose adjudication is set aside under [MCL 712A.18t]." MCL 712A.18t(9).

Further discussion of this topic is beyond the scope of this benchbook. For more information on the setting aside of criminal convictions, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3.

B. Access to Records of Criminal Convictions That Have Been Set Aside

MCL 780.623(1) requires the court, upon the entry of an order setting aside a conviction, to send a copy of the order to the arresting agency and to the Department of State Police. MCL 780.623(2) requires the Department of State Police to retain a nonpublic record of the order or other notification regarding a conviction automatically set aside under MCL 780.621g, and of the arrest record, fingerprints, conviction, and sentence of the person whose conviction has been set aside. The nonpublic record may be made available only to certain requesters and only for certain purposes. See MCL 780.623(2). Further discussion of this topic is beyond the scope of this benchbook. For more information on the setting aside of criminal convictions, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 3.

Part D: SORA Registration, DNA Profiling, and Communicable Disease Testing Requirements

21.16 The Sex Offenders Registration Act (SORA)

Juveniles who are adjudicated responsible for or convicted of certain offenses in delinquency, designated, automatic waiver, or traditional waiver proceedings are required to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*.[138] MCL 712A.18(17). MCL 712A.18(17) provides that if the Family Division has entered an order of disposition or a judgment of conviction for an offense that is listed in MCL 28.722,[139] the court, the Department of Health and Human Services, or the county juvenile agency[140] must register the juvenile or accept the

[138]MCL 28.722(a)(*iii*) provides, in relevant part, that a juvenile is "convicted" under the Sex Offenders Registration Act (SORA) if the court has entered an order of disposition under MCL 712A.18 that is open to the general public under MCL 712A.28. MCL 712A.28(3) provides, in relevant part, "[b]eginning January 1, 2021, except as otherwise provided, records of a case brought before the court are not open to the general public and are open only to persons having a legitimate interest." Accordingly, because orders of disposition are generally not open to the public, unless otherwise provided, an individual cannot be "convicted" under SORA for sealed dispositional orders. MCL 28.722(a)(*iii*) has not been amended in response to MCL 712A.28(3).

juvenile's registration as provided in the SORA.[141] For detailed discussion of these registration requirements, see Chapter 9 of the Michigan Judicial Institute's *Sexual Assault Benchbook*.

21.17 DNA Profiling Requirements

This section briefly discusses the requirements of Michigan's DNA Identification Profiling System Act, MCL 28.171 *et seq*.[142] This Act is part of the national Combined DNA Index System (CODIS), which links together existing state DNA databases. Michigan's Act requires the collection of blood, saliva, or tissue samples from an individual arrested for committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult, and from other selected criminal and juvenile offenders; additionally, the Act requires the retention, disposal, and expunction of the resultant DNA identification profiles under certain circumstances.[143] See MCL 28.173—MCL 28.176.[144]

The Act applies to various categories of offenders and offenses as set out in several statutes. See MCL 712A.18k (juveniles); MCL 750.520m (penal code); MCL 791.233d (prisoners serving sentence in state correctional facilities and probationers placed in special alternative incarceration programs); MCL 803.225a (juveniles committed to the Department of Health and Human Services (DHHS) or a county juvenile agency[145] under MCL 712A.18); and MCL 803.307a (public wards[146]).[147]

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[139] "'Listed offense' means a tier I, tier II, or tier III offense." MCL 28.722(i). A tier I offense is defined in MCL 28.722(r), a tier II offense is defined in MCL 28.722(t), and a tier III offense is defined in MCL 28.722(v). See the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 9, for the current listed offenses.

[140] See Section 16.17(B) and Section (C) for discussion of county juvenile agencies.

[141] Effective July 1, 2011, 2011 PA 17 and 2011 PA 18 made significant amendments to the SORA in order to comply with the requirements of the federal Sex Offender Registration and Notification Act (SORNA). For a summary of SORNA's requirements and content, see http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf. Discussion of specific registration requirements under the SORA is beyond the scope of this benchbook. For detailed information on the SORA, including both general and juvenile-specific information, see the Michigan Judicial Institute's *Sexual Assault Benchbook*, Chapter 9.

[142] A detailed discussion of all of the requirements of the DNA Identification Profiling System Act, MCL 28.171 *et seq*., is beyond the scope of this benchbook. For thorough coverage of this topic, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

[143] *DNA identification profile* or *profile* "means the results of the DNA identification profiling of a sample, including a paper, electronic, or digital record." MCL 28.172(c); see also MCL 712A.18k(9)(a) (juveniles); MCL 750.520m(9)(a) (penal code). A *sample* is "a portion of an individual's blood, saliva, or tissue collected from the individual." MCL 28.172(g); see also MCL 712A.18k(9)(d); MCL 750.520m(9)(d). *DNA identification profiling* "means 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." MCL 28.172(d); see also MCL 712A.18k(9)(a); MCL 750.520m(9)(a).

All offenders meeting the requirements detailed below must provide blood, saliva, or tissue samples for DNA testing,[148] unless at the time the person is required to provide the sample the investigating law enforcement agency or state police already has a sample from the person that meets the requirements of the DNA Identification Profiling System Act, MCL 28.171 *et seq*. See MCL 712A.18k(2) (juveniles), MCL 750.520m(2) (penal code), MCL 791.233d(1) (prisoners serving sentence in state correctional facilities and probationers placed in special alternative incarceration programs), MCL 803.225a(2) (juveniles committed to DHHS), and MCL 803.307a(2) (public wards).

A. Adult Offenders and Juveniles Tried as Adults

1. Categories of Offenses Requiring DNA Samples

The following offenders must provide a DNA sample:

- An individual who is arrested for committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult.[149] MCL 28.176(1)(a); MCL 712A.18k(1)(a); MCL 750.520m(1)(a);[150]

- An individual, including a juvenile, who is convicted of,[151] or found responsible for, a felony or attempted felony.[152] MCL 28.176(1)(b); MCL 712A.18k(1)(b); MCL 750.520m(1)(b);

- An individual, including a juvenile, who is convicted of,[153] or found responsible for, any of the following misdemeanors, or any local ordinance substantially corresponding to any of the following misdemeanors:

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[144] The United States Supreme Court has upheld the constitutionality of a state statute authorizing the collection and analysis of an arrestee's DNA according to CODIS procedures "[a]s part of a routine booking procedure for serious offenses[.]" *Maryland v King*, 569 US 435, 465 (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id*. at 465-466. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11, for discussion of Fourth Amendment search and seizure issues.

[145] See Section 16.17(B) and Section (C) for discussion of county juvenile agencies.

[146] See Section 21.5 for discussion of public wards.

[147] The requirements for the collection and retention of DNA samples and identification profiles are in addition to the testing and counseling requirements for communicable diseases, such as venereal disease, hepatitis, HIV, and AIDS. For more information on those requirements, see Section 21.18.

[148] See SCAO Form MC 283, *Order for DNA Sample*.

[149] A *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); MCL 712A.18k(9)(b); MCL 750.520m(9)(c).

- disorderly person (window peeping), MCL 750.167(1)(c),
- disorderly person (indecent or obscene conduct), MCL 750.167(1)(f),
- disorderly person (loitering in house of prostitution), MCL 750.167(1)(i),
- indecent exposure, MCL 750.335a(1),
- prostitution (first and second violations), MCL 750.451(1) or MCL 750.451(2), or
- leasing a house for prostitution, MCL 750.454.[154]

MCL 28.176(1)(b)(*i*)-(*iv*); MCL 712A.18k(1)(b)(*i*)-(*iii*); MCL 750.520m(1)(b)(*i*)-(*iv*).

2. Responsible Agency and Timeframe of Sample Collection

MCL 750.520m(4) provides:

> "An investigating law enforcement agency,[155] prosecuting agency, or court that has in its possession a DNA identification sample obtained from a person under [MCL 750.520m(1)] shall forward the DNA identification sample to the department of state police after the person from whom the sample was taken has been charged with committing or attempting to commit a felony offense or an offense that would be a felony if

[150] The United States Supreme Court has upheld the constitutionality of a state statute authorizing the collection and analysis of an arrestee's DNA according to CODIS procedures "[a]s part of a routine booking procedure for serious offenses[.]" *Maryland v King*, 569 US 435, 465 (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id*. at 465-466. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11, for discussion of Fourth Amendment search and seizure issues.

[151] A *conviction* is "a plea of guilty, guilty but mentally ill, or nolo contendere if accepted by the court, or a jury verdict or court finding that a defendant is guilty or guilty but mentally ill for a criminal law violation, or a juvenile adjudication or disposition for a criminal law violation that if committed by an adult would be a crime." MCL 28.172(a).

[152] A *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); MCL 712A.18k(9)(b); MCL 750.520m(9)(c).

[153] A *conviction* is "a plea of guilty, guilty but mentally ill, or nolo contendere if accepted by the court, or a jury verdict or court finding that a defendant is guilty or guilty but mentally ill for a criminal law violation, or a juvenile adjudication or disposition for a criminal law violation that if committed by an adult would be a crime." MCL 28.172(a).

committed by an adult[156] unless the department of state police already has a DNA identification profile of the person."

MCL 750.520m(3) provides:

"The county sheriff or the investigating law enforcement agency[157] shall collect and transmit the samples[158] in the manner required under the DNA identification profiling system act, . . . MCL 28.171 to [MCL] 28.176."

MCL 28.176(4) provides, in part:

"The county sheriff or the investigating law enforcement agency as ordered by the court shall provide for collecting the samples required to be provided under [MCL 28.176(1)] in a medically approved manner by qualified persons using supplies provided by the [Department of State Police ("department")] and shall forward those samples and any samples described in [MCL 28.176(1)] that were already in the agency's possession to the department after the individual from whom the sample was taken has been arraigned in the district court. However, the individual's DNA sample must not be forwarded to the department if the individual is not charged with committing or attempting to commit a felony

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[154] Effective July 1, 2015, 2014 PA 458 removed MCL 750.454, leasing a house for purposes of prostitution, from the list of misdemeanor offenses that an individual convicted of, or found responsible for, must provide a DNA sample under the Juvenile Code. See MCL 712A.18k(1)(b); former MCL 712A.18k(1)(b)(*v*). However, MCL 750.454 still appears in MCL 750.520m(1)(b)(*iv*), which applies to juveniles who are "found responsible" for that offense.

[155] *Investigating law enforcement agency* "means the law enforcement agency responsible for the investigation of the offense for which the individual is arrested or convicted[] . . . [and] includes the county sheriff but does not include a probation officer employed by the department of corrections." MCL 750.520m(9)(b); see also MCL 28.172(f). However, see MCL 712A.18k(9)(c) (juveniles), which defines *investigating law enforcement agency* as "the law enforcement agency responsible for the investigation of the offense for which the individual is arrested, convicted, or found responsible[,] . . . not includ[ing] a probation officer employed by the department of corrections."

[156] See also MCL 712A.18k(3) (juveniles), providing that the required DNA samples must be collected and transmitted by the investigating law enforcement agency "when a petition is filed or the court issues a summons."

[157] *Investigating law enforcement agency* "means the law enforcement agency responsible for the investigation of the offense for which the individual is arrested or convicted[] . . . [and] includes the county sheriff but does not include a probation officer employed by the department of corrections." MCL 750.520m(9)(b); see also MCL 28.172(f). However, see MCL 712A.18k(9)(c) (juveniles), which defines *investigating law enforcement agency* as "the law enforcement agency responsible for the investigation of the offense for which the individual is arrested, convicted, or found responsible[,] . . . not includ[ing] a probation officer employed by the department of corrections."

> offense or an offense that would be a felony if committed by an adult. If the individual's DNA sample is forwarded to the department despite the individual not having been charged as described in this subsection, the law enforcement agency shall notify the department to destroy that sample. The collecting and forwarding of samples must be done in the manner required under [the DNA Identification Profiling System Act, MCL 28.171—MCL 28.176]. A sample must be collected by the county sheriff or the investigating law enforcement agency after arrest but before sentencing or disposition as ordered by the court and promptly transmitted to the department . . . after the individual is charged with committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult. This subsection does not preclude a law enforcement agency or state agency from obtaining a sample at or after sentencing or disposition."

B. Juveniles

1. Categories of Offenses Requiring DNA Samples

Under the Juvenile Code, the following juvenile offenders must provide a DNA sample:

- A juvenile who is arrested for committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult.[159] MCL 712A.18k(1)(a); see also MCL 28.176(1)(a); MCL 750.520m(1)(a);[160]

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[158] However, under the Juvenile Code, only the *investigating law enforcement agency* may collect and transmit a DNA sample. MCL 712A.18k(3); see also MCL 712A.18k(9)(c) (defining *investigating law enforcement agency* as "the law enforcement agency responsible for the investigation of the offense for which the individual is arrested, convicted, or found responsible[,] . . . not includ[ing] a probation officer employed by the department of corrections[]").

[159] A *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); MCL 712A.18k(9)(b); MCL 750.520m(9)(c).

[160] The United States Supreme Court has upheld the constitutionality of a state statute authorizing the collection and analysis of an arrestee's DNA according to CODIS procedures "[a]s part of a routine booking procedure for serious offenses[.]" *Maryland v King*, 569 US 435, 465 (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id*. at 465-466. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11, for discussion of Fourth Amendment search and seizure issues.

- A juvenile who is convicted of,[161] or found responsible for, a felony or attempted felony.[162] MCL 712A.18k(1)(b); see also MCL 28.176(1)(b); MCL 750.520m(1)(b);

- A juvenile who is convicted of,[163] or found responsible for, any of the following misdemeanors, or any local ordinance substantially corresponding to any of the following misdemeanors:

  - disorderly person (window peeping), MCL 750.167(1)(c),

  - disorderly person (indecent or obscene conduct), MCL 750.167(1)(f),

  - disorderly person (loitering in house of prostitution), MCL 750.167(1)(i),

  - indecent exposure, MCL 750.335a(1), or

  - prostitution (first and second violations), MCL 750.451(1) or MCL 750.451(2). MCL 712A.18k(1)(b)(*i*)-(*iii*); see also MCL 28.176(1)(b); MCL 750.520m(1)(b)(*i*)-(*iv*).[164]

Additionally, a juvenile who has been convicted of or found responsible for any of the offenses listed in Section 21.17(A)or Section 21.17(B) and who is under the supervision of the DHHS or a county juvenile agency,[165] or who is a public ward under a youth agency's[166] jurisdiction, must not be placed in a

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[161] For purposes of the DNA Identification Profiling System Act, MCL 28.171—MCL 28.176, a *conviction* is "a plea of guilty, guilty but mentally ill, or nolo contendere if accepted by the court, or a jury verdict or court finding that a defendant is guilty or guilty but mentally ill for a criminal law violation, or a juvenile adjudication or disposition for a criminal law violation that if committed by an adult would be a crime." MCL 28.172(a).

[162] A *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); MCL 712A.18k(9)(b); MCL 750.520m(9)(c).

[163] For purposes of the DNA Identification Profiling System Act, MCL 28.171—MCL 28.176, a *conviction* is "a plea of guilty, guilty but mentally ill, or nolo contendere if accepted by the court, or a jury verdict or court finding that a defendant is guilty or guilty but mentally ill for a criminal law violation, or a juvenile adjudication or disposition for a criminal law violation that if committed by an adult would be a crime." MCL 28.172(a).

[164] Effective July 1, 2015, 2014 PA 458 removed MCL 750.454, leasing a house for purposes of prostitution, from the list of misdemeanor offenses that an individual convicted of, or found responsible for, must provide a DNA sample under the Juvenile Code. See MCL 712A.18k(1)(b); former MCL 712A.18k(1)(b)(*v*). However, MCL 750.454 still appears in MCL 750.520m(1)(b)(*iv*), which applies to juveniles who are "found responsible" for that offense.

[165] See Section 16.17(B) and Section (C) for discussion of county juvenile agencies.

[166] See Section 21.5 for definitions of "public ward" and "youth agency."

community placement of any kind or released from wardship until he or she has provided samples for chemical testing. MCL 803.225a(1); MCL 803.307a(1).

2. Responsible Agency and Timeframe of Sample Collection

Only the investigating law enforcement agency[167] may collect a DNA sample from a juvenile convicted of or found responsible for an offense in the Family Division.[168] MCL 712A.18k(3). The required samples must be collected and transmitted to the Department of State Police "in the manner prescribed under the DNA identification profiling system act, . . . MCL 28.171 to MCL 28.176, when a petition is filed or the court issues a summons." MCL 712A.18k(3).

MCL 28.176(4) provides, in part:

> "The . . . investigating law enforcement agency as ordered by the court shall provide for collecting the samples required to be provided under [MCL 28.176(1)] in a medically approved manner by qualified persons using supplies provided by the [Department of State Police ("department")] and shall forward those samples and any samples described in [MCL 28.176(1)] that were already in the agency's possession to the department after the individual from whom the sample was taken has been arraigned in the district court. However, the individual's DNA sample must not be forwarded to the department if the individual is not charged with committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult. If the individual's DNA sample is forwarded to the department despite the individual not having been charged as described in

[167] For purposes of the DNA collection provisions of the Juvenile Code, MCL 712A.18k(9)(c) defines *investigating law enforcement agency* as "the law enforcement agency responsible for the investigation of the offense for which the individual is arrested, convicted, or found responsible[,] . . . not includ[ing] a probation officer employed by the department of corrections." See, however, MCL 28.172(f) (DNA Identification Profiling System Act) and MCL 750.520m(9)(b) (Penal Code), providing that *investigating law enforcement agency* "means the law enforcement agency responsible for the investigation of the offense for which the individual is arrested or convicted[] . . . [and] *includes the county sheriff* but does not include a probation officer employed by the department of corrections[]" (emphasis supplied).

[168] However, if a juvenile who has been convicted of or found responsible for any of the offenses listed in Section 21.17(A) or Section 21.17(B) is under the supervision of the DHHS or a county juvenile agency, or is a public ward under a youth agency's jurisdiction, the DHHS or agency is responsible for collecting a DNA sample before the juvenile is placed in a community placement of any kind or released from wardship. MCL 803.225a(1); MCL 803.225a(3)-(4); MCL 803.307a(1); MCL 803.307a(3)-(4).

> this subsection, the law enforcement agency shall notify the department to destroy that sample. The collecting and forwarding of samples must be done in the manner required under [the DNA Identification Profiling System Act, MCL 28.171—MCL 28.176]. A sample must be collected by the county sheriff or the investigating law enforcement agency after arrest but before sentencing or disposition as ordered by the court and promptly transmitted to the department . . . after the individual is charged with committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult. This subsection does not preclude a law enforcement agency or state agency from obtaining a sample at or after sentencing or disposition."

C. Prisoners and Probationers

1. Prisoners and Probationers Who Must Submit a Sample

Any prisoner serving a sentence in a state correctional facility or any probationer who is in the special alternative incarceration program under MCL 798.11 *et seq*. must provide a DNA sample. MCL 791.233d(1).[169]

2. Responsible Agency and Timeframe of Sample Collection

The Department of Corrections (DOC) is responsible for collecting a blood, saliva, or tissue sample within the timeframe described in MCL 791.233d(1)(a)-(b). MCL 791.233d(3).

MCL 791.233d(1)(a)-(b) provides:

> "(a) For a prisoner serving a sentence or a probationer in a special alternative incarceration program on June 1, 2011, the samples shall be obtained not later than January 1, 2012. However, if the prisoner or probationer is released on parole, placed in a community placement facility of any kind, including a community corrections center or a community residential home, or discharged

[169] Unlike the testing requirements for convicts, juveniles, and public wards, the testing requirements for prisoners are not predicated upon the type of convicted offense.

> upon completion of his or her maximum sentence before January 1, 2012, the samples shall be obtained before the date of release, placement, or discharge.
>
> (b) For a prisoner or a probationer in a special alternative incarceration program whose sentence begins after June 1, 2011, the samples shall be obtained not later than 90 days after the date on which the prisoner or probationer is committed to the jurisdiction of the [DOC]."

The sample must be collected in a medically approved manner by qualified persons using supplies provided by the Department of State Police and promptly forwarded, along with any samples already in the agency's possession, to the Department of State Police. MCL 28.176(4); MCL 791.233d(3). No court order or hearing is required to collect a sample, and it may be collected regardless of the person's consent. MCL 791.233d(4).

D. Notification Requirements

MCL 28.176(4) provides, in part:

> "At the time a DNA sample is taken from an individual under [MCL 28.176], the individual must be notified in writing of all of the following:
>
> (a) That, except as otherwise provided by law, the individual's DNA sample or DNA identification profile,[170] or both, must be destroyed or expunged, as appropriate, if the charge for which the sample was obtained has been dismissed or resulted in acquittal, or no charge was filed within the limitations period.
>
> (b) That the individual's DNA sample or DNA identification profile, or both, will not be destroyed or expunged, as appropriate, if the [Department of State Police] determines that the individual from whom the sample is taken is otherwise obligated to submit a sample or if it is evidence relating to

[170] *DNA identification profile* or *profile* "means the results of the DNA identification profiling of a sample, including a paper, electronic, or digital record." MCL 28.172(c); see also MCL 712A.18k(9)(a) (juveniles); MCL 750.520m(9)(a) (penal code). A *sample* is "a portion of an individual's blood, saliva, or tissue collected from the individual." MCL 28.172(g); see also MCL 712A.18k(9)(d); MCL 750.520m(9)(d). *DNA identification profiling* "means 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." MCL 28.172(d); see also MCL 712A.18k(9)(a); MCL 750.520m(9)(a).

> another individual that would otherwise be retained under [MCL 28.176].
>
> (c) That the burden is on the arresting law enforcement agency and the prosecution to request the destruction or expunction of a DNA sample or DNA identification profile as required under [MCL 28.176], not on the individual."[171]

E. Retention and Disposal of DNA Identification Profile[172]

1. Permanent Retention

MCL 28.176(1) provides:

> "Except as otherwise provided in [MCL 28.176], the [Department of State Police ("department")] shall permanently retain a DNA identification profile of an individual obtained from a sample in the manner prescribed the department under [the DNA Identification Profiling System Act, MCL 28.171—MCL 28.176,] if any of the following apply:
>
> (a) The individual is arrested for committing or attempting to commit a felony offense or an offense that would be a felony offense if committed by an adult.
>
> (b) The individual is convicted of or found responsible for a felony or attempted felony, or any of the following misdemeanors, or local ordinances that are substantially corresponding to the following misdemeanors:
>
> (*i*) A violation of [MCL 750.167(1)(c), MCL 750.167(1)(f), or MCL 750.167(1)(i),] . . . disorderly person by window peeping, engaging in indecent

[171] See Section 21.17(E) for discussion of the destruction or expunction of a DNA sample or profile.

[172] *DNA identification profile* or *profile* "means the results of the DNA identification profiling of a sample, including a paper, electronic, or digital record." MCL 28.172(c); see also MCL 712A.18k(9)(a) (juveniles); MCL 750.520m(9)(a) (penal code). A *sample* is "a portion of an individual's blood, saliva, or tissue collected from the individual." MCL 28.172(g); see also MCL 712A.18k(9)(d); MCL 750.520m(9)(d). *DNA identification profiling* "means 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." MCL 28.172(d); see also MCL 712A.18k(9)(a); MCL 750.520m(9)(a).

> or obscene conduct in public, or loitering in a house of ill fame or prostitution.
>
> (*ii*) A violation of [MCL 750.335a(1),] . . . indecent exposure.
>
> (*iii*) A violation punishable under [MCL 750.451(1) or MCL 750.451(2),] . . . first and second prostitution violations.
>
> (*iv*) A violation of . . . MCL 750.454, leasing a house for purposes of prostitution."[173]

2. Temporary Retention

All DNA identification profiles that are not required to be permanently retained under MCL 28.176(1) may not be permanently retained "but must be retained only as long as [they are] needed for a criminal investigation or criminal prosecution." MCL 28.176(10).

3. Disposal

a. Mandatory Disposal Upon Dismissal of Charge(s)

MCL 764.26a provides:

> "(1) If an individual is arrested for any crime and the charge or charges are dismissed before trial, both of the following apply:
>
> (a) The arrest record shall be removed from the internet criminal history access tool (ICHAT).
>
> (b) If the prosecutor of the case agrees at any time after the case is dismissed, or if the prosecutor of the case or the judge of the court in which the case was filed does not object within 60 days from the date an order of dismissal was entered for cases in which the order of dismissal

[173] Effective July 1, 2015, 2014 PA 458 removed MCL 750.454, leasing a house for purposes of prostitution, from the list of misdemeanor offenses that an individual convicted of, or found responsible for, must provide a DNA sample under the Juvenile Code. See MCL 712A.18k(1)(b); former MCL 712A.18k(1)(b)(*v*). However, MCL 750.454 still appears in MCL 750.520m(1)(b)(*iv*), which applies to juveniles who are "found responsible" for that offense.

> is entered after [June 12, 2018], all of the following apply:
>
> > (*i*) The arrest record, all biometric data, and fingerprints shall be expunged or destroyed, or both, as appropriate.
> >
> > (*ii*) Any entry concerning the charge shall be removed from LEIN.
> >
> > (*iii*) Unless a DNA sample or profile, or both, is allowed or required to be retained by the department of state police under . . . MCL 28.176, the DNA sample or profile, or both, obtained from the individual shall be expunged or destroyed.
>
> (2) The department of state police shall comply with the requirements listed in subsection (1) upon receipt of an appropriate order of the district court or the circuit court."

Additionally, "MCL 28.176(1) provides that law enforcement shall permanently retain a DNA identification profile of an individual obtained from a sample if the individual is arrested for committing or attempting to commit a felony offense." *People v Cole*, ___ Mich App ___, ___ (2024) (cleaned up). "However, MCL 28.176(4)(a) provides that the individual's DNA sample or DNA identification profile, or both, must be destroyed or expunged, as appropriate, if the charge for which the sample was obtained has been dismissed or resulted in acquittal, or no charge was filed within the limitations period." *Cole*, ___ Mich App at ___ (quotation marks omitted). "Likewise, MCL 28.176(10)(b) provides that the state police forensic laboratory shall dispose of a DNA sample or profile or both when the charge for which the sample was obtained has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable limitations period." *Cole*, ___ Mich App at ___ (quotation marks omitted). In this case, "[d]efendant was charged with second-degree home invasion, and domestic violence. *Id*. at ___ (citations omitted). "In connection with the felony home invasion charge, police collected a DNA profile and sample from defendant." *Id*. at ___. "The prosecution thereafter charged defendant

with aggravated assault and illegal entry, to which defendant pleaded no contest in exchange for the dismissal of the felony charge of second-degree home invasion and the misdemeanor charge of domestic violence." *Id*. at ___ (citations omitted). "Defendant contend[ed] that MCL 28.176(4) and [MCL 28.176(10)(b)] require the destruction of the DNA profile and sample obtained from him in connection with the felony home invasion charge because that charge was dismissed." *Cole*, ___ Mich App at ___. "The trial court determined, however, that even though the felony charge against defendant that gave rise to the police collecting defendant's DNA profile and sample had been dismissed, the dismissal did not warrant destruction of his DNA profile and sample because defendant pleaded guilty to lesser offenses in lieu of the felony." *Id*. at ___. Here, the Court noted that MCL 28.176(4)(a) "plainly states that DNA must be destroyed when *the charge* for which the sample was obtained has been dismissed." *Cole*, ___ Mich App at ___ (quotation marks and citation omitted). "MCL 28.176(4)(a) and MCL 28.176(10)(b) specify that the dismissal refers to the charge for which the sample was obtained, not the action or claim." *Cole*, ___ Mich App at ___. "[MCL 28.176] does not in any way qualify the term 'the charge for which the sample was obtained' or the term 'dismissed.'" *Cole*, ___ Mich App at ___. Conversely, MCL 28.176 "requires the DNA profile and sample to be destroyed when the charge for which the sample was obtained has been dismissed." *Cole*, ___ Mich App at ___. Accordingly, "the dismissal in this case falls squarely within the plain and ordinary meaning of the statutory language of MCL 28.176(4)(a) and MCL 28.176(10)(b), [and] the destruction of defendant's DNA profile and sample is mandated." *Cole*, ___ Mich App at ___.**]**

b. Mandatory Disposal Upon Reversal of Conviction

MCL 28.176(9) provides:

> "If a sample was collected under [MCL 28.176(1)] from an individual who does not have more than 1 conviction, and that conviction was reversed by an appellate court, the sentencing court shall order the disposal of the sample collected and DNA identification profile record for that

conviction in the manner provided in [MCL 28.176(12)-(13)]."[174]

c. Mandatory Disposal When Individual Is Not Charged With a Felony

MCL 28.176(4) provides, in part:

> "[An] individual's DNA sample must not be forwarded to the [Department of State Police] if the individual is not charged with committing or attempting to commit a felony offense or an offense that would be a felony if committed by an adult. If the individual's DNA sample is forwarded to the [D]epartment despite the individual not having been charged as described in this subsection, the law enforcement agency shall notify the [D]epartment to destroy that sample."

d. Mandatory Disposal Upon Request

MCL 28.176(10) generally requires the Department of State Police to dispose of a DNA sample or a DNA identification profile, or both, if either:

- the Department receives a written request for disposal from the investigating police agency or prosecutor indicating that the sample or profile is no longer necessary for a criminal investigation or criminal prosecution, or

- the Department receives a written request for disposal and a certified copy of a final court order establishing that the charge for which the sample was obtained has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable limitations period. MCL 28.176(10)(a)-(b).

However, the disposal requirements set out in MCL 28.176(10) do not apply in the following circumstances:

[174] See Section 21.17(D)(3)(f) for discussion of MCL 28.176(12)-(13).

- Disposal is not required if the Department determines that the individual from whom the sample is taken has otherwise become obligated to submit a sample. MCL 28.176(11)(a).

- "[T]he [D]epartment is not required to dispose of physical evidence or data obtained from a sample if evidence relating to an individual other than the individual from whom the sample was taken would be destroyed and the evidence or data relating to the other individual would otherwise be retained under [MCL 28.176]." MCL 28.176(15); see also MCL 28.176(11)(b).

e. Disposal Requirements

"Not more than 60 days after the [D]epartment receives notice under [MCL 28.176(10)]," the state police forensic laboratory must dispose of the DNA sample and the DNA identification profile record in accordance with MCL 333.13811 (governing medical waste). MCL 28.176(12)(a). Additionally, the disposal of the sample and profile record must be done in the presence of a witness. MCL 28.176(12)(b).

After disposal of the sample and DNA identification profile record, the laboratory must make and keep a record of the disposal, signed by the person who witnessed the disposal. MCL 28.176(13). The Department must "send written notice to the requesting law enforcement agency, court, or prosecutor when the individual's DNA sample or DNA identification profile has been destroyed[.]" MCL 28.176(16).

F. Disclosure and Use Limitations

1. Use of DNA Profiles by Department of State Police

MCL 28.175a(1) provides:

"The [Department of State Police] shall only use the DNA profiles of DNA samples[175] authorized to be provided under [the DNA Identification Profiling System Act, MCL 28.171—MCL 28.176,] for 1 or more of the following purposes:

(a) Law enforcement identification purposes.[176]

(b) To assist in the recovery or identification of human remains or missing persons.

(c) Academic, research, statistical analysis, or protocol development purposes only if personal identifiers are removed."

DNA samples collected under the DNA Identification Profiling System Act "shall not be analyzed for identification of any medical or genetic disorder." MCL 28.175a(2).

2. Disclosure of DNA Identification Profiles

A DNA identification profile must be disclosed only as follows:

- to a criminal justice agency for law enforcement identification purposes;
- in a judicial proceeding as authorized or required by a court;
- to a defendant in a criminal case if the DNA identification profile is used in conjunction with a charge against the defendant; or
- for an academic, research, statistical analysis, or protocol developmental purpose, but only if personal identifications are removed.MCL 28.176(2)(a)-(d).

See also MCL 791.233d(6)(a)-(d) (prisoners serving sentence in state correctional facilities and probationers placed in special alternative incarceration programs); MCL 803.225a(5)(a)-(d)

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[175] *DNA identification profile* or *profile* "means the results of the DNA identification profiling of a sample, including a paper, electronic, or digital record." MCL 28.172(c); see also MCL 712A.18k(9)(a) (juveniles); MCL 750.520m(9)(a) (penal code). A *sample* is "a portion of an individual's blood, saliva, or tissue collected from the individual." MCL 28.172(g); see also MCL 712A.18k(9)(d); MCL 750.520m(9)(d). *DNA identification profiling* "means 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." MCL 28.172(d); see also MCL 712A.18k(9)(a); MCL 750.520m(9)(a).

[176] The collection and analysis of an arrestee's DNA according to CODIS procedures "[a]s part of a routine booking procedure for serious offenses[]" did not violate the Fourth Amendment where the DNA sample was used to identify the arrestee as the perpetrator of an earlier unsolved rape. *Maryland v King*, 569 US 435, 465 (2013). "When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Id*. at 465-466. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11, for discussion of Fourth Amendment search and seizure issues.

(juveniles committed to DHHS); MCL 803.307a(5)(a)-(d) (public wards).

3. Unauthorized Use and Criminal Penalties

MCL 28.175 provides:

> "(1) An individual shall not disseminate, receive, or otherwise use or attempt to use information in the DNA identification profile record knowing that the dissemination, receipt, or use of that information is for a purpose not authorized by law.
>
> (2) An individual shall not willfully remove, destroy, tamper with, or attempt to tamper with a DNA sample, record, or other DNA information obtained or retained under [the DNA Identification Profiling System Act ("the Act"), MCL 28.171—MCL 28.176,] without lawful authority.
>
> (3) An individual shall not, without proper authority, obtain a DNA identification profile from the DNA identification profiling system.
>
> (4) An individual shall not, without proper authority, test a DNA sample obtained under [the Act].
>
> (5) An individual shall not willfully fail to destroy a DNA sample or profile that has been required or ordered to be destroyed under [the Act].
>
> (6) Nothing in [MCL 28.175] shall be considered to prohibit the collection of a DNA sample in the course of a criminal investigation by a law enforcement agency.
>
> (7) An individual who violates [MCL 28.175] 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."

21.18 Required Communicable Disease Testing[177]

A. Mandatory Testing or Examination of Juveniles Bound Over for Trial in the Criminal Division

MCL 333.5129(3) provides that if the district court determines there is reason to believe a violation of an enumerated offense involved sexual penetration or exposure to the body fluid of the defendant, the district court must order[178] the defendant to be examined or tested for sexually transmitted infection, hepatitis B infection, and hepatitis C infection and for the presence of HIV or an HIV antibody if he or she is bound over to a court of general criminal jurisdiction for any of the enumerated offenses listed below. Additionally, the *circuit* court must "order the examination or testing if the defendant is brought before it by way of indictment for any of the [enumerated offenses]." *Id*. This testing is required for any of the following 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 male persons, MCL 750.338;
- gross indecency between female persons, MCL 750.338a;
- gross indecency between male and female persons, MCL 750.338b;
- aiding and abetting certain prostitution offenses, MCL 750.450;
- keeping, maintaining, or operating a house of prostitution, MCL 750.452;
- pandering, MCL 750.455;
- first-degree criminal sexual conduct, MCL 750.520b;
- second-degree criminal sexual conduct, MCL 750.520c;
- third-degree criminal sexual conduct, MCL 750.520d;
- fourth-degree criminal sexual conduct, MCL 750.520e; or
- assault with intent to commit criminal sexual conduct, MCL 750.520g.

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[177] A thorough discussion of communicable disease testing requirements is beyond the scope of this benchbook.

[178] See SCAO Form MC 234, *Order for Counseling and Testing for Disease/Infection*.

With some exceptions, "the examinations and tests must be confidentially administered by a licensed physician, the [Department of Health and Human Services[179]], or a local health department."[180] MCL 333.5129(3). Additionally, the court must "order the defendant to receive counseling regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum, information regarding treatment, transmission, and protective measures." *Id*.

B. Expedited Examination or Testing for Criminal Sexual Conduct Offenses

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

> "If a defendant is bound over to or brought before the circuit court for violating . . . MCL 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [or MCL] 750.520g, the court shall, upon the victim's request, order the examination or testing [required by MCL 333.5129(3)] to be done not later than 48 hours after the date that the information or indictment is presented and the defendant is in custody or has been served with the information or indictment. The court shall include in its order for expedited examination or testing at the victim's request under this subsection a provision that requires follow-up examination or testing that is considered medically appropriate based on the results of the initial examination or testing."

With some exceptions, "the examinations and tests must be confidentially administered by a licensed physician, the [Department of Health and Human Services[181]], or a local health department."[182] MCL 333.5129(3). Additionally, the court must "order the defendant to receive counseling regarding sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum,

[179] See MCL 333.1104(5).

[180] See Section 21.18(E) for discussion of confidentiality of test results.

[181] See MCL 333.1104(5).

[182] See Section 21.18(E) for discussion of confidentiality of test results.

information regarding treatment, transmission, and protective measures." *Id*.

C. Mandatory Testing or Examination Following Juvenile Adjudication or Conviction

MCL 333.5129(4) provides that the court having jurisdiction of a criminal prosecution or juvenile hearing must order the defendant or juvenile to be examined or tested for sexually transmitted infection, hepatitis B infection, and hepatitis C infection and for the presence of HIV or an HIV antibody if he or she is convicted of or adjudicated responsible for any of the offenses set out in Section 21.18(A) or any of the following additional offenses:

- soliciting and accosting to commit prostitution, MCL 750.448;
- receiving or admitting a person to a place or vehicle for purpose of prostitution, lewdness, or assignation, MCL 750.449;
- engaging or offering to engage services for purposes of prostitution, lewdness, or assignation, MCL 750.449a;
- intravenous use of a controlled substance, MCL 333.7404; or
- a local ordinance prohibiting prostitution, solicitation, gross indecency, or the intravenous use of a controlled substance.

The court must also order the defendant or juvenile to receive counseling regarding "sexually transmitted infection, hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome, including, at a minimum, information regarding treatment, transmission, and protective measures." MCL 333.5129(4).

D. Disclosure of Results to Victim

MCL 333.5129(5) provides:

> "If the victim or individual with whom the defendant or [juvenile] . . . engaged in sexual penetration or sexual contact or who was exposed to a body fluid during the course of the crime consents, the court or [Family Division] shall provide the person or agency conducting the examinations or administering the tests . . . with the name, address, and telephone number of the victim or

> individual with whom the defendant or [juvenile] engaged in sexual penetration or sexual contact or who was exposed to a body fluid of the defendant during the course of the crime. If the victim or individual with whom the defendant or [juvenile] engaged in sexual penetration during the course of the crime 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 this subsection. After the defendant or [juvenile] is examined or tested as to the presence of sexually transmitted infection, of hepatitis B infection, of hepatitis C infection, or of HIV or an antibody to HIV, or if the defendant or [juvenile] receives appropriate follow-up testing for the presence of HIV, the person or agency conducting the examinations or administering the tests shall immediately provide the examination or test results to the victim or individual with whom the defendant or [juvenile] . . . engaged in sexual penetration or sexual contact or who was exposed to a body fluid during the course of the crime and shall refer the victim or other individual for appropriate counseling."

E. Confidentiality of Test Results

MCL 333.5129(6) provides:

> "The examination or test results and any other medical information obtained from the defendant or [juvenile] . . . , by the person or agency conducting the examinations or administering the tests . . . must be transmitted to the court or [Family Division] and, after the defendant or [juvenile] is sentenced or an order of disposition is entered, made part of the court record. The examination or test results and any other medical information described in this subsection are confidential and may be disclosed only to 1 or more of the following:
>
> (a) The defendant or [juvenile].
>
> (b) The local health department.
>
> (c) The [Department of Health and Human Services].
>
> (d) The victim or other individual required to be informed of the results under this subsection or [MCL 333.5129(5)] 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.
>
> (e) Upon written authorization of the defendant or [juvenile] . . . , or the [juvenile's] parent, guardian, or person in loco parentis.
>
> (f) As otherwise provided by law."

MCL 333.5131(1) provides:

> "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 the serious communicable diseases or infections of HIV infection and [AIDS] are confidential. A person shall release reports, records, data, and information described in this subsection only pursuant to [MCL 333.5131]."

MCL 333.5129(7) allows for transmission of the examination or test results to the Department of Corrections if the defendant is placed in its custody, and to the relative or public or private agency, institution, or facility with whom a juvenile is placed by the Family Division.

MCL 333.5131 governs the confidentiality and disclosure of test results concerning HIV infection or AIDS. A person or agency that receives test results or other medical information pertaining to HIV infection or AIDS under MCL 333.5129(6)-(7) is subject to the provisions of MCL 333.5131 and may disclose information only according to those provisions. MCL 333.5129(7).

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