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STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
REDFORD, P.J. AND RIORDAN AND FEENEY, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 166766

-vs-

JAMES ELLIS, JR.,

Defendant-Appellant.

Court of Appeals No. 363845
Berrien County CC No. 2021-016148-FH

APPENDIX OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

J. D. BROOKS
PRESIDENT
PROSECUTING ATTORNEYS
ASSOCIATION OF MICHIGAN

KAREN McDONALD
PROSECUTING ATTORNEY
OAKLAND COUNTY

MARILYN DAY
CHIEF, APPELLATE DIVISION

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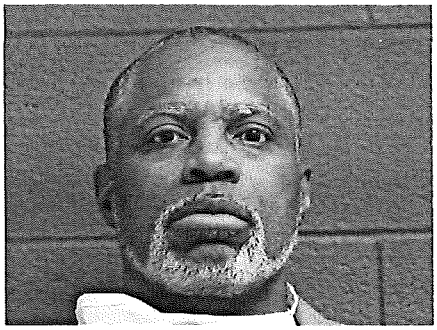
BIOGRAPHICAL INFORMATION



MDOC Number:
692319

SID Number:
1238755P

Name:
JAMES ELLIS JR.

Racial Identification:
Black

Gender:
Male

Hair:
Black

Eyes:
Brown

Height:
5' 8"

Weight:
210 lbs.

Date of Birth:
XXXXXXX(61)

JAMES ELLIS JR.

Image Date:
2/18/2022

MDOC STATUS

Current Status:
Parolee

Assigned Location:
Indiana

Security Level:

Supervision Begin Date:
04/15/2024

Supervision Discharge Date:
04/15/2025

Date Paroled:
04/15/2024

ALIASES

CALVIN WILLIAMS

CALVIN WILLIAMS COOLEY

JAMES COOLEY

JAMES WILLIAMS

MARKS, SCARS & TATTOOS

Tattoo- Back - pyramid,star

Tattoo- Back Neck - "Belinda"

Tattoo- Center Left Arm - Playboy bunny; Hat

Tattoo- Center Left Chest - "Tracey"

Tattoo- Center Right Chest - "James"

PRISON SENTENCES

ACTIVE

Sentence 1

Offense:
Robbery Unarmed - Attempt

Minimum Sentence:
1 year 0 months 0 days

MCL#:
750.530

Maximum Sentence:
5 years 0 months

Court File#:
21016148-FH

Date of Offense:
11/04/2021

County:
Berrien

Date of Sentence:
01/24/2022

Conviction Type:
Plea

INACTIVE

None

PROBATION SENTENCES

ACTIVE

None

INACTIVE

None

SUPERVISION CONDITIONS

01 - Contact agent no later than first business day after release

02 - Must not change residence

2.0 - Not use/possess alcohol/intoxicants or in place served

2.1 - Complete Sub Abuse or Re-Entry Program as referred by agent

2.2 - Substance abuse assessment

03 - Must not leave state

3.5 - Treatment disclosure to parole agent

04 - Not engage in any behavior that constitutes a violation

4.2 - Written Consent to Search Parolee's person and/or property

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4.16 - Obey all court orders

05 - Comply with alcohol and drug testing ordered by field agent

06 - Do not associate with anyone who is housed within a MDOC fac

07 - Must not own or possess a firearm

7.1 - Pay cost of treatment

7.3 - Pay restitution as directed

7.4 - Pay a Crime Victim's Assessment

7.5 - State Costs

08 - Must not own, possess or use any object as a weapon

09 - Make earnest efforts to find and maintain employment

10 - Must comply w/special conditions, written and verbal orders

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUANDRAIKO HAYES,

Defendant-Appellant.

UNPUBLISHED
January 15, 2019

No. 339563
Wayne Circuit Court
LC No. 17-001771-01-FC

Before: LETICA, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Quandraiko Hayes appeals as of right his bench trial convictions of assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, intentional discharge of a firearm in or at a dwelling causing serious impairment, MCL 750.234b(4), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] The trial court sentenced Hayes as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 25 to 40 years each for the AWIGBH and intentional discharge of a firearm convictions and a consecutive two-year term of imprisonment for the felony-firearm conviction, with credit for 127 days served. We affirm.

This case arises from the nonfatal shooting of the victim in the early morning hours of February 7, 2017. The prosecution presented testimony from the victim and his girlfriend. Both witnesses testified that they had been staying with Hayes at his home, but Hayes told them to leave and then retrieved a shotgun. Hayes fired the gun, hitting the victim in the arm. The victim, who the trial court found was reluctant to testify at trial, claimed that the shooting was an accident. The victim's girlfriend denied seeing the shot fired and said she was intoxicated at the

[1] The trial court granted defendant's motion for a directed verdict on an additional count of assault with intent to commit murder, MCL 750.83, and found defendant not guilty of carrying a weapon with unlawful intent, MCL 750.226, felonious assault, MCL 750.82, and two additional felony-firearm charges.

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time. Hayes testified on his own behalf and claimed that the shooting was accidental. The trial court discredited the testimony indicating that the shooting was accidental and found the testimony offered by the victim's girlfriend unreliable because she was intoxicated. It found beyond a reasonable doubt that Hayes intentionally fired the shotgun at the victim and convicted Hayes of AWIGBH, intentional discharge of a firearm in or at a dwelling causing serious impairment, and felony-firearm. Pursuant to MCL 769.12(1)(a), the trial court sentenced Hayes to mandatory 25-year minimum sentences for the AWIGBH and intentional discharge of a firearm convictions, to be served consecutive to a two-year sentence for the felony-firearm conviction. This appeal followed.

I. HAYES'S BRIEF ON APPEAL

Hayes raises three issues on appeal in a brief filed by appointed appellate counsel.

A. SUFFICIENCY OF THE EVIDENCE

First, Hayes argues that there was insufficient evidence to support his convictions. We disagree.

"A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law." *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014). "We review de novo a challenge to the sufficiency of the evidence in a bench trial, viewing the evidence in the light most favorable to the prosecution and determining whether the trial court could have found the essential elements proved beyond a reasonable doubt." *People v Ventura*, 316 Mich App 671, 678; 894 NW2d 108 (2016). As stated by this Court in *People v Murphy*, 321 Mich App 355, 358-359; 910 NW2d 374 (2017):

> When reviewing a challenge to the sufficiency of the evidence, [a]ll conflicts in the evidence must be resolved in favor of the prosecution, and circumstantial evidence and all reasonable inferences drawn therefrom can constitute satisfactory proof of the crime. It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. [Quotation marks and citations omitted; alteration in original.]

"The elements of AWIGBH are (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014) (quotation marks and citation omitted). "The intent to do great bodily harm less than murder is an intent to do serious injury of an aggravated nature." *Id.* (quotation marks and citation omitted).

> Because of the difficulty in proving an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant had the requisite intent. Intent to cause serious harm can be inferred from the defendant's actions, including the use of a dangerous weapon or the making of threats. Although actual injury to the victim is not an element of the crime, injuries suffered by the victim may also be indicative of a defendant's intent. [*Id.* at 629 (citations omitted).]

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Hayes argues that there was insufficient evidence to support his conviction of AWIGBH because there was no evidence that he intended to cause great bodily harm. Although Hayes and the victim both testified that the shooting was an accident, the trial court disbelieved that testimony. We defer to the trial court's credibility determinations. See *People v Barbee*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 337515); slip op at 6. The evidence at trial was sufficient to enable the trial court to find that the elements of AWIGBH were proven beyond a reasonable doubt. First, the evidence allowed the trial court to find that Hayes attempted with force or violence to do corporal harm to the victim by firing a shotgun at him. See *Stevens*, 306 Mich App at 628. Second, Hayes's intent to do serious injury of an aggravated nature can be inferred from Hayes's requests that the victim and his girlfriend leave, followed by his conduct of obtaining a shotgun and then discharging the gun while it was pointed toward the victim. See *id.* at 628-629. The victim's girlfriend testified that Hayes told them to "get out" while pointing the shotgun at her, which can reasonably be interpreted as a threat. See *id.* at 629. Further, Hayes's intent can be inferred from his use of a dangerous weapon and the victim's injury. See *id.* Hayes's actions after the shooting further support an inference that the shooting was not an accident. Hayes prevented the victim's girlfriend from calling 911, put the shotgun behind a couch in another room, and left the location. The trial court reasonably could have found that these actions were inconsistent with Hayes's claim that the shotgun discharged accidently.

On appeal, Hayes also claims that he acted in self-defense. Hayes did not assert self-defense as a theory at trial. Moreover, a self-defense theory was not supported by the evidence. "A finding that a defendant acted in justifiable self-defense necessarily requires a finding that the defendant acted intentionally, but that the circumstances justified his actions." *People v Guajardo*, 300 Mich App 26, 43; 832 NW2d 409 (2013) (quotation marks and citation omitted). At trial, Hayes testified that he obtained the shotgun in order to scare the victim into leaving because the victim had a look of rage on his face and had previously assaulted Hayes and destroyed Hayes's property. Hayes maintained, however, that he did not intend to shoot the victim. Given Hayes's testimony that he did not act intentionally, his testimony did not support a self-defense theory.

Further, under MCL 780.972(1):

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if . . .
>
> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual.

In this case, there was ample evidence to discount Hayes's claim of self-defense. Initially, Hayes testified that he obtained the shotgun in order to scare the victim. Thus, Hayes

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was engaged in the commission of a crime, felonious assault,[2] and could not justifiably claim self-defense. In addition, although Hayes claimed that the victim moved toward him and, at some point, threatened to take the gun from him, the victim was not armed with a weapon and there is no indication that the victim used deadly force against Hayes. See *Stevens*, 306 Mich App at 630. Hayes's mere expression of fear did not allow a trier of fact to conclude that Hayes's actions were necessary to prevent imminent death or great bodily harm. Thus, there was sufficient evidence to exclude beyond a reasonable doubt any claim of self-defense. See *id.* at 630-631.

Hayes further argues that there was insufficient evidence to sustain his convictions for intentional discharge of a firearm and felony-firearm. However, these additional challenges to the sufficiency of the evidence are outside the scope of the statement of the question presented for review and are, therefore, not properly before this Court. MCR 7.212(C)(5); *People v Mysliwiec*, 315 Mich App 414, 420; 890 NW2d 691 (2016). Even if these arguments had been properly presented, they too lack merit.

MCL 750.234b provides, in relevant part:

> (2) An individual who intentionally discharges a firearm in a facility that he or she knows or has reason to believe is a dwelling or a potentially occupied structure, in reckless disregard for the safety of any individual and whether or not the dwelling or structure is actually occupied at the time the firearm is discharged, is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.
>
> * * *
>
> (4) If an individual violates subsection (1) or (2) and causes the serious impairment of a body function of another individual, the individual is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

" 'Serious impairment of a body function' means that term as defined in section 58c of the Michigan vehicle code, 1949 PA 300, MCL 257.58c." MCL 750.234b(10)(d). That definition includes loss of use of a hand or finger and loss or substantial impairment of a bodily function. MCL 257.58c(b) and (d). Accordingly, in this case, the elements of the crime of discharge of a firearm in an occupied structure under MCL 750.234b(4) are (1) the intentional discharge of a firearm, (2) in a facility (3) that the defendant knows or has reason to believe is a dwelling or potentially occupied structure, (4) in reckless disregard for the safety of any individual, (5)

[2] "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Urban*, 321 Mich App 198, 217; 908 NW2d 564 (2017) (quotation marks and citation omitted).

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whether or not the dwelling or structure is actually occupied, and (6) the defendant caused the serious impairment of a body function of another individual.

Hayes only disputes the first element, claiming that there was no evidence that he intentionally discharged the shotgun. For the reasons discussed earlier, the trial court could have reasonably inferred from the evidence that Hayes intentionally discharged the firearm, and the court was free to disbelieve the testimony claiming that the shooting was accidental. The court could have additionally found beyond a reasonable doubt that the intentional discharge occurred in a facility that Hayes knew was occupied because he, the victim, and the victim's girlfriend were staying there. The victim was struck in the left forearm and testified that he required multiple surgeries as a result of the gunshot wound and still lacked feeling in two of his fingers. Thus, the trial court could have also concluded beyond a reasonable doubt that Hayes acted in reckless disregard for the victim's safety and caused serious impairment of a body function. Accordingly, there was sufficient evidence to support Hayes's conviction of intentional discharge of a firearm in a dwelling causing serious impairment.

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Hayes only argues that he was not guilty of any underlying felony. For the reasons discussed above, however, there was sufficient evidence that Hayes committed AWIGBH. Moreover, while Hayes argues that self-defense is a valid defense to a charge of felony-firearm, for the reasons stated above, a self-defense theory was not supported by the evidence.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Hayes argues that his trial counsel was ineffective for failing to call an expert witness and failing to argue self-defense. We disagree.

"Generally, whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citation omitted). "This Court reviews findings of fact for clear error and questions of law de novo." *Id.* But because Hayes did not raise his claims of ineffective assistance of counsel before the trial court in a motion for a new trial or evidentiary hearing,[3] our "review is limited to mistakes apparent from the record." *Id.* As explained in *Heft*, 299 Mich App at 80-81:

> A criminal defendant has the fundamental right to effective assistance of counsel. However, it is the defendant's burden to prove that counsel did not provide effective assistance. To prove that defense counsel was not effective, the

[3] We recognize that Hayes filed a motion in this Court seeking remand for the purpose of conducting an evidentiary hearing to supplement the existing record, but this Court denied Hayes's motion. *People v Hayes*, unpublished order of the Court of Appeals, entered April 17, 2018 (Docket No. 339563).

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> defendant must show that (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant. The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different. [Citations omitted.]

Hayes first argues that trial counsel was ineffective for failing to obtain a firearms expert. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 432; 884 NW2d 297 (2015) (quotation marks and citation omitted).

> An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy. A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy. In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. [*People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted).]

Hayes argues that an expert "could have aided the defense theory" that the shotgun accidentally discharged. Hayes, however, fails to offer any proof that an expert witness would have testified in a manner favorable to the defense. Accordingly, Hayes has not established the factual predicate for this claim. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Therefore, this claim cannot succeed.

Hayes also claims that trial counsel was ineffective for failing to argue a self-defense theory. "Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses. A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted). As discussed earlier, a self-defense theory was not supported by Hayes's testimony or the evidence presented at trial. Accordingly, trial counsel was not ineffective for failing to pursue a theory of self-defense.

C. DUE PROCESS

Lastly, Hayes contends that he is entitled to resentencing because the trial court improperly enhanced his sentences pursuant to MCL 769.12(1)(a), resulting in disproportionate sentences. We disagree.

"In order to preserve an issue for appellate review, it must be raised before and considered by the trial court." *People v Solloway*, 316 Mich App 174, 197; 891 NW2d 255 (2016). Hayes did not argue below that the imposition of mandatory 25-year minimum sentences pursuant to MCL 769.12(1)(a) violated due process, but raised it for the first time in his motion to remand, which this Court denied. Therefore, this issue is unpreserved. Unpreserved issues are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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The trial court imposed mandatory 25-year minimum sentences pursuant to MCL 769.12(1)(a), which provides:

> (1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> (a) If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment for not less than 25 years. Not more than 1 conviction arising out of the same transaction shall be considered a prior felony conviction for the purposes of this subsection only.

Hayes does not dispute that his current AWIGBH and discharge-in-a-building convictions are serious crimes under MCL 769.12(6)(c). Nor does he dispute that at least one of his prior felony convictions is for a listed prior felony, MCL 769.12(6)(a)(*iii*). Instead, Hayes argues that the trial court's use of a conviction for an offense committed when he was a juvenile[4] to impose 25-year minimum sentences under MCL 769.12(1)(a) violates due process, resulting in cruel and unusual punishment[5] and disproportionate sentences.

"In deciding if punishment is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the punishment to the penalty imposed for other crimes in this state, as well as the penalty imposed for the same crime in other states." *People v Bowling*, 299 Mich App 552, 557-558; 830 NW2d 800 (2013) (quotation marks and citation omitted). "[A] proportionate sentence is not cruel or unusual." *Id.* at 558. A legislatively mandated sentence is presumptively proportionate. *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002), citing *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991). "In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate

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[4] One of his prior felony convictions was obtained in 1989, when Hayes, who was born in 1973, was 15 years old. The prosecution charged Hayes under the automatic waiver statute then in effect and the court convicted Hayes of a lesser offense. MCL 600.606; *People v Veling*, 443 Mich 23; 504 NW2d 456 (1993); *People v Parrish*, 216 Mich App 178; 549 NW2d 32 (1996).

[5] Hayes initially refers to the Eighth Amendment to the United States Constitution, but then also refers to the Michigan Constitution, Const 1963, art 1, § 16. "[T]he Michigan provision prohibits 'cruel *or* unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel *and* unusual.' " *People v Bowling*, 299 Mich App 552, 557 n 3; 830 NW2d 800 (2013) (some quotation marks and citation omitted). "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id.* (quotation marks and citation omitted).

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sentence disproportionate." *Bowling*, 299 Mich App at 558 (quotation marks and citation omitted).

In this case, Hayes's 25-year minimum sentences were legislatively mandated. MCL 769.12(1)(a). Therefore, his sentences are presumptively proportionate and not cruel or unusual. See *Bowling*, 299 Mich App at 558; *Davis*, 250 Mich App at 369. Hayes does not present any unusual circumstances that would render these presumptively proportionate sentences disproportionate, see *Bowling*, 299 Mich App at 558, apart from arguing that relying on a conviction for an offense committed when he was a juvenile is improper and violates due process. But MCL 769.12(1)(a) does not prohibit the use of crimes committed when a defendant was a juvenile. Hayes recognizes our Court has already held that a juvenile convicted as an adult, but sentenced as a juvenile, was properly sentenced as a third-offense habitual offender because the statutory language "focuses only on whether a defendant has been convicted[.]" *People v Jones*, 297 Mich App 80, 86; 823 NW2d 312 (2012). Hayes's contention that *Jones* is distinguishable based on the nature of the mandatory sentence involved fails. The statute at issue here is likewise focused on the fact of a prior conviction, not the defendant's age at the time of the prior conviction.

Hayes, however, argues that juveniles must be treated differently than adult offenders, citing *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (holding that mandatory life sentences without parole for juvenile offenders are prohibited under the Eighth Amendment), and *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005) (holding that execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments). Hayes's reliance on these cases is misplaced because he was not a juvenile when he committed the instant offenses. Rather, he was a 43-year-old adult. Thus, the cited cases regarding the sentencing of juvenile offenders are inapplicable.

Moreover, this Court has held that the 25-year mandatory minimum sentence prescribed by MCL 750.520b(2)(b)[6] does not constitute cruel or unusual punishment as applied to a juvenile offender. See *People v Payne*, 304 Mich App 667, 675; 850 NW2d 601 (2014). This Court concluded that while a minimum sentence of 25 years is substantial, it is not comparable to sentences of death and life without parole. *Id.* A 25-year sentence also "allow[s] for review of an individual defendant's progress toward rehabilitation and provides a meaningful opportunity for release on parole." *Id.* If a juvenile may be permissibly sentenced to a mandatory 25-year minimum sentence, then the imposition of a 25-year mandatory minimum sentence against an adult offender based, in part, on the offender's commission of a crime when he was a juvenile also does not constitute cruel or unusual punishment.

II. HAYES'S STANDARD 4 BRIEF

[6] MCL 750.520b(2)(b) requires a mandatory 25-year minimum sentence for first-degree criminal sexual conduct committed by an individual 17 years of age or older against an individual less than 13 years of age.

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Hayes raises two additional issues in a brief filed pursuant to Administrative Order No. 2004-6, Standard 4, 471 Mich c, cii (2004).

A. INEFFECTIVE ASSISTANCE

Hayes first raises a claim of ineffective assistance of counsel. Because Hayes did not raise his claim in the trial court, we review it for mistakes apparent from the record. *Heft*, 299 Mich App at 80.

Hayes simply states: "Counsel failed to impeach prior inconsistent statement. Prosecution use of perjured statement. Counsel was ineffective and the conviction should be reversed." He makes no attempt to provide legal analysis of this issue or identify the inconsistent or perjured statements to which he refers. As this Court has often explained:

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. [*People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Because Hayes has failed to establish the factual predicate for this claim of ineffective assistance of counsel, *Jackson*, 313 Mich App at 432, or adequately brief this issue, *Waclawski*, 286 Mich App at 679, he is not entitled to appellate relief.

B. SENTENCING

Hayes also alleges that the enhancement of his sentences pursuant to MCL 769.12(1)(a) violated the prohibition against ex post facto laws. Because Hayes did not raise this argument below, it is unpreserved. See *Solloway*, 316 Mich App at 197. We review unpreserved issues for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763-764.

US Const, art I, § 10 states, in relevant part, "No State shall . . . pass any . . . ex post facto Law . . . ."[7] In *People v Patton*, ___ Mich App ___, ___; ___ NW2d___ (2018) (Docket No. 341105); slip op at 7, this Court recently stated:

> There are four categories of ex post facto laws: (1) any law that punishes an act that was innocent when the act was committed, (2) any law that makes an act a more serious criminal offense than when committed, (3) increases the punishment for a crime committed before the law was passed, or (4) any law that allows the prosecution to convict a defendant on less evidence than was required when the act was committed All ex post facto laws share two elements: (1) they

[7] Hayes does not rely on the Michigan Constitution.

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> attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant. The crucial question in determining whether a law violates the Ex Post Facto Clause is whether the law changes the legal consequences of acts completed before its effective date. [Quotation marks and citations omitted.]

The precise nature of Hayes's argument is difficult to discern, but we nevertheless conclude that MCL 769.12(1)(a), the statute under which Hayes's sentences were enhanced, does not violate the Ex Post Facto Clause. Subsection (1)(a) of MCL 769.12 was added by 2012 PA 319, which became effective on October 1, 2012. There is no indication that the statute was given retroactive effect.

We further reject any argument that the use of Hayes's prior felony convictions to enhance his sentences under MCL 769.12(1)(a) violates the Ex Post Facto Clause even though the prior convictions were obtained before MCL 769.12 was amended in 2012. This Court has concluded that the Ex Post Facto Clause is not violated by the use of convictions obtained before the adoption of a habitual-offender law. See *People v Callon*, 256 Mich App 312, 320-321; 662 NW2d 501 (2003). This is because "it is the second or subsequent offense that is punished, not the first." *People v Palm*, 245 Mich 396, 403; 223 NW 67 (1929) (quotation marks and citation omitted). Accordingly, the use of Hayes's prior felony convictions obtained before the adoption of MCL 769.12(1)(a) to support the imposition of mandatory 25-year minimum sentences for subsequent offenses committed after MCL 769.12 was amended to add Subsection (1)(a) does not violate the Ex Post Facto Clause.

Hayes also argues that only one of his prior felony convictions occurred before the commission of the instant offense. According to the felony information, however, Hayes's prior felony convictions were from 1989, 1991, 1993. Hayes's presentence investigation report (PSIR) confirms the accuracy of these dates. At sentencing, Hayes's trial counsel stated that the PSIR was accurate, and counsel acknowledged that Hayes had four prior felonies and three prior misdemeanors. The offense in this case occurred in 2017. Thus, the record does not support Hayes's contention.

Hayes also complains that he was not aware of the mandatory-minimum law when he committed the prior felonies. However, ignorance of the law is not a defense to a criminal prosecution. *People v Beydoun*, 283 Mich App 314, 334-335; 770 NW2d 54 (2009).

Hayes further argues that there was a gap of 10 years or more between his prior convictions and the instant offenses and, therefore, his prior felonies were not listed on his record when the prosecution filed its notice. In support of this argument, Hayes cites MCL 777.50, which prohibits the use of a conviction more than 10 years old to score prior record variables 1 through 5. However, MCL 769.12(1)(a) has no similar 10-year-gap rule.

Affirmed.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

Senate Fiscal Agency
P.O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

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House Bill 5679 (Substitute H-5 as passed by the House)
Sponsor: Representative James A. Lower
House Committee: Judiciary
Senate Committee: Committee of the Whole

Date Completed: 12-9-20

CONTENT

The bill would amend the Sex Offender Registration Act to do the following:

- **Modify, from "immediately" (within three business days) to seven days, the time period by which a probation or parole agent must register an individual if the individual's probation or parole is transferred to the State.**
- **Modify, from "immediately" to within three days, the time period for which individuals required to the registered under the Act must register or report status changes in person with a local law enforcement agency.**
- **Modify the information required to be obtained or otherwise provided for registration purposes and that must be contained in the law enforcement database.**
- **Specify that a requirement to report all electronic mail addresses would apply only to an individual required to be registered under the Act after July 1, 2011.**
- **Delete a provision prohibiting an electronic mail address and instant message addresses assigned to an individual required to be registered under the Act from being made available on the public internet website.**
- **Prohibit an individual's tier classification from being made available on the public internet website.**
- **Require the Michigan State Police (MSP) to remove an individual from the law enforcement database and public internet website if the individual presented a court order that the conviction or adjudication requiring the individual to be registered under the Act had been set aside or expunged.**
- **Modify the definition of "convicted.**

The bill also would repeal Sections 33 to 36 of the Act, which pertain to student safety zones.

Definition of "Convicted"

Under the Act, the term "convicted" includes having a judgment of convictions or a probation order entered in any court having jurisdiction over criminal offense, including a tribal court or military court, and including a conviction subsequently set aside under Public Act (PA) 213 of 1965, which provides for setting aside convictions in certain criminal cases. Under the bill, "convicted" *would not* include a conviction that was subsequently set aside under PA 213 or otherwise expunged.

"Convicted" also includes either of the following:

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-- Being assigned to youthful trainee status under the Holmes Youthful Trainee Act (HYTA), before October 1, 2004; however, this provision does not apply if a petition was granted under Section 8c at any time allowing the individual to discontinue registration under the Act, including a reduced registration period that extends to or past July 1, 2011, regardless of the tier designation that would apply on and after that date.
-- Being assigned to youthful trainee status under HYTA before October 1, 2004, if the individual is convicted of any other felony on or after July 1, 2011.

Instead, under the bill, "convicted" would include being assigned to youthful trainee status under HYTA before October 1, 2004. An individual who was assigned to and successfully completed a term of supervision under HYTA would not be convicted for purposes of the Act. The exception described above still would apply.

Registration

Under the Act, except as otherwise provided, for an individual convicted of a listed offense on or before October 1, 1995, if the individual's probation or parole is transferred to the State after October 1, 1995, the probation or parole agent must register the individual immediately after the transfer. "Immediately" means within three business days.

The bill, instead, would require the probation or parole agent to register the individual within seven days after the transfer. The bill also would delete the definition of "immediately".

The Act requires all of the following to register with the local law enforcement agency, sheriff's department, or the MSP immediately after becoming domiciled or residing, working, or being a student temporarily in the State:

-- An individual convicted in another state or country on or after October 1, 1995, of a listed offense as defined before September 1, 1999.
-- An individual convicted in another state or country of an offense added on September 1, 1999, to the definition of listed offenses.
-- An individual convicted in another state or country of a listed offense before October 1, 1995, and an individual convicted in another state or country of an offense added on September 1, 1999, to the definition of listed offenses, who is convicted of any other felony on or after July 1, 2011.
-- An individual required to be registered as a sex offender in another state or country regardless of when the conviction was entered.

The bill would require the above individuals to register within three business days, instead of immediately, after becoming domiciled or residing, working, or being a student temporarily in the State.

Reporting Status to Registering Authority

Section 4a of the Act requires an individual required to be registered under the Act who is not a Michigan resident to report his or her status in person to the registering authority having jurisdiction over a campus of an institution of higher education if either of the following occurs:

-- The individual is or enrolls as a student with that institution of higher education or the individual discontinues that enrollment.
-- As part of his or her course of studies at an institution of higher education in this state, the individual is present at any other location in this state, another state, a territory or

possession of the United States, or the individual discontinues his or her studies at that location.

An individual required to be registered under the Act who is a Michigan resident must report his or her status in person to the registering authority having jurisdiction where his or her new residence or domicile is located if any of the events described above occur.

The report required above must be made as follows:

-- For an individual registered under the Act before October 1, 2002, who is required to make his or her first report, by January 15, 2003.
-- Immediately after he or she enrolls or discontinues his or her enrollment as a student on that campus including study in Michigan or another state, a territory or possession of the United States, or another country.

The bill would require the report to be made within three days, instead of immediately, after he or she enrolled or discontinued enrollment as a student.

Reporting Status Changes

An individual required to be registered under the Act who is a Michigan resident must report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately after any of the following occur:

-- The individual changes or vacates his or her residence or domicile.
-- The individual changes his or her place of employment, or employment is discontinued.
-- The individual enrolls as a student with an institution of higher education, or enrollment is discontinued.
-- The individual changes his or her name.
-- The individual intends to temporarily reside at any place other than his or her residence for more than seven days.
-- The individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings.
-- The individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.
-- Any change required to be reported under Section 4a.

Instead, under the bill, an individual required to be registered under the Act who is a Michigan resident would report in person, or in a manner prescribed by the MSP, and notify the registering authority having jurisdiction where his or her residence or domicile was located within three days after any of the following occurred:

-- The individual changed or vacated his or her residence or domicile.
-- The individual changed his or her place of employment, or employment was discontinued.
-- The individual enrolled as a student with an institution of higher education, or enrollment was discontinued.
-- The individual changed his or her name.
-- Any change required to be reported under Section 4a.

An individual required to be registered under the Act who was a Michigan resident would have to report in the manner prescribed by the MSP to the registering authority having jurisdiction where his or her residence or domicile was located within three days after either of the following occurred:

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-- The individual intended to reside temporarily at any place other than his or her residence for more than seven days.
-- Except as otherwise provided, any change in vehicle information, electronic mail addresses, internet identifiers, or telephone numbers registered to or used by the individual.

The requirement to report any change in electronic mail addresses and internet identifiers would apply only to an individual required to be registered under the Act after July 1, 2011. "Internet identifier" would mean all designations used for self-identification purposes or routing in internet communications or posting.

Under the Act, an individual required to be registered under the Act, who is not a Michigan resident but has his or her place of employment in Michigan must report in person and notify the registering authority having jurisdiction where his or her place of employment is located of the MSP post of the individual's place of employment immediately after the individual changed his or her place of employment or employment is discontinued. The bill would require the reporting within three days, instead of immediately.

Under the Act, immediately after either of the following occurs, the Michigan Department of Corrections (MDOC) must notify the local law enforcement agency or sheriff's department having jurisdiction over the area to which the individual is transferred or the MSP post of the transferred residence or domicile of an individual required to be registered under the Act:

-- The individual is transferred to a community residential program.
-- The individual is transferred into a level one correctional facility of any kind, including a correctional camp or work camp.

The bill would require notification to be made within seven days, instead of immediately.

The Act requires an individual required to be registered under the Act who is a Michigan resident to report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately before he or she changes his or her domicile or residence to another state. The bill would require the notification to be made within three days, instead of immediately.

Under the bill, if an individual required to be registered under the Act presented an order to the MSP or the appropriate registering authority that the conviction or adjudication for which the individual was required to be registered under the Act had been set aside under PA 213 or had been otherwise expunged, his or her registration under the Act would have to be discontinued. If this provision applied, the MSP would have to remove the individual from both the law enforcement database and the public internet website.

Notice to Registered Individuals

Section 5a of the Act specifies that upon the release of an individual registered under the Act who is in a State correctional facility, the MDOC must provide written notice to that individual explaining his or her duties under Section 5a and the Act and the procedure for registration, notification, and verification and payment of the registration fee. The individual must sign and date the notice. The MDOC must maintain a copy of the signed and dated notice in the individual's file. The MDOC must forward the original notice to the MSP immediately, regardless of whether the individual signs it. Under the bill, the MDOC would have to forward the original notice to the MSP within seven days, instead of immediately.

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The Act requires an individual required to be registered under the Act who is not incarcerated to report in person to the registering authority where he or she is domiciled or resides for verification of domicile or residence.

When an individual reports for domicile or residence verification, an officer or authorized employee of the registering authority must verify the individual's residence or domicile and any information required to be reported under Section 4a. The officer or authorized employee also must determine whether the individual's photograph required under the Act matches the appearance of the individual sufficiently to properly identify him or her from that photograph. If not, the officer or authorized employee must require the individual to immediately obtain a current photograph. The bill would require the individual to obtain a current photograph within seven days, instead of immediately.

Driver License or State ID Requirement

Section 5a of the Act requires an individual required to be registered under the Act to maintain either a valid operator's or chauffeur's license issued under the Michigan Vehicle Code or an official State personal identification card issued under PA 222 of 1972 with the individual's current address. Under the bill, this requirement would not apply to an individual required to be registered under the Act who was homeless. As used in this provision, "homeless" would mean someone who lacks a fixed or temporary residence.

Under the Act, an individual registered under the Act who is incarcerated must report to the Secretary of State immediately after he or she is released to have his or her digitalized photograph taken. The bill would require the individual to report to the Secretary of State within seven days, instead of immediately, after he or she was released.

Registration Information

The Act requires all registration information obtained under the Act to be forwarded to the MSP in the format the Department prescribes. The Act also requires the MSP to maintain a computerized law enforcement database of registrations and notices required under the Act. The information required to be obtained or otherwise provided for registration purposes and that the law enforcement database must contain includes the following, in addition to other prescribed information:

-- All telephone numbers registered to the individual or routinely used by the individual.
-- All electronic mail address and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers the individual used when using any electronic mail address or instant messaging system.
-- The license plate number, registration number, and any description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual and the location at which the vehicle, aircraft, or vessel is habitually stored or kept.

"Aircraft" means that term as defined in Section 2 of the Aeronautics Code: any contrivance used or designed for navigation of or flight in the air. "Vessel" means that term as defined in Section 44501 of the Natural Resources and Environmental Protection Act: every description of watercraft, other than a seaplane, used or capable of being used as a means of transportation on water irrespective of the method of operation or propulsion.

Instead, the bill would require the following information to be obtained or otherwise provided for registration purposes:

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-- All telephone numbers registered to the individual or used by the individual, including residential, work, and mobile telephone numbers.
-- The license plate number and any description of any vehicle owned or operated by the individual.
-- Except as otherwise provided, all electronic mail addresses used by the individual.

The requirement to obtain or otherwise provide for registration purposes electronic mail address information would apply only to an individual required to be registered under the Act after July 1, 2011.

The bill also would delete the definitions of "aircraft" and "vessel".

Public Internet Website

The Act requires the MSP to maintain a public internet website separate from the law enforcement database. Except as otherwise provided, the website must include certain information for each individual registered under the Act, including the license plate or registration number and any description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual. Instead, the bill would require the public internet website to contain for each individual registered under the Act the license plate number and any description of any vehicle owned or operated by the individual.

The Act also requires the public internet website to contain for each individual registered under the Act the individual's tier classification. The bill would delete this requirement.

The Act prohibits the following information from being made available on the public internet website:

-- The identity of any victim of the offense.
-- The individual's Social Security number.
-- Any arrests not resulting in conviction.
-- Any travel or immigration document numbers.
-- Any electronic mail address and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers the individual used when using any electronic mail address or instant messaging system.

The bill would delete from the list of information prohibited from being made available on the public internet website any electronic mail address and instant message addresses assigned to the individual or routinely used by the individual and all login names or other identifiers the individual used when using any electronic mail address or instant messaging system. The bill would include on the list the individual's tier classification.

Under the Act, if an individual provides the MSP with documentation showing that he or she is required to register under the Act for a violation that has been set aside under PA 213 or that has been otherwise expunged, the Department must note on the public internet website that the violation has been set aside or expunged. The bill would delete this provision.

Penalties

Under the Act, an individual who fails to comply with Section 5a, other than payment of the required registration fee, is guilty of a misdemeanor punishable by up to two years' imprisonment or a maximum fine of $2,000, or both. The bill would refer to an individual who *willfully* failed to comply with Section 5a, other than payment of the required fee.

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School Safety Zones

Section 33 of the Act prescribes the definitions for "listed offense", "loiter", "minor", "school", "school property", and "student safety zone".

Section 34 prohibits an individual required to be registered under the Act from working or loitering within a student safety zone, prescribes penalties for a violation, and specifies exceptions to the prohibition.

Section 35 prohibits an individual required to be registered under the Act from residing within a student safety zone, prescribes penalties for a violation, and specifies exceptions to the prohibition.

Section 36 specifies exemptions from the prohibitions prescribed in Sections 34 and 35 for individuals convicted of certain offenses as juveniles or who were discharged from youthful trainee status.

The bill would delete these sections.

MCL 28.722 et al.

BACKGROUND

The Michigan Sex Offender Registry (SOR) was created under the Sex Offender Registration Act in 1994. Since its creation, the Legislature has been amended the Act several times, including in 2006 (prohibiting certain individuals required to be registered under the Act from living, working, or loitering within a "school safety zone" (within 1,000 feet of school property), subject to exceptions),[1] and in 2011 (aligning the Act with the Federal Sex Offender Registration and Notification Act by categorizing offenses subject to the Act's registration and reporting requirements in a tier classification system).[2]

In 2015, a US Federal District Judge ruled that, among other things, the prohibitions on living, working, and loitering within a school safety zone were unconstitutionally vague in violation of the Due Process Clause and that the requirements to report all telephone numbers, electronic mail addresses, and instant message addresses routinely used by an individual required to be registered under the Act were unconstitutionally vague in violation of the Due Process Clause and First Amendment of the US Constitution. *Does v. Snyder*, opinion of the US District Court for the Eastern District of Michigan, Case No. 12-11194 (*Does I*). The plaintiffs (the individuals required to be registered under the Act) and defendants (the Snyder Administration) appealed the case to the Sixth Circuit Court of Appeals, which held that the Act imposes punishment and that the retroactive application of the 2006 and 2011 amendments was unconstitutional. *Does #1-5 v. Snyder*, 834 F3d 696 (US Court of Appeals for the Sixth Circuit) (2016). The Sixth Circuit remanded the case and the District Court entered a final judgment declaring the retroactive application of the Act's 2006 and 2011 amendments violated the Ex Post Facto Clause of the US Constitution and enjoined the Defendants from enforcing the 2006 and 2011 amendments against the plaintiffs. The Snyder Administration appealed to the US Supreme Court, but the Court refused to hear the case.

Shortly after the Sixth Circuit's decision in *Does I*, six plaintiffs filed a class action complaint challenging the constitutionality of the Act. Specifically, the plaintiffs challenged the retroactive application of the 2006 and 2011 amendments; that electronic mail and instant

[1] PA 121 and 127 of 2005.
[2] PA 17 of 2011.

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message address reporting requirements violated the First Amendment; that the prohibitions on living, working, and loitering within a school safety zone and the requirements to report all telephone numbers, electronic mail addresses, and instant message addresses were unconstitutionally vague; and that the imposition of a strict liability scheme for violations of the Act violated the Due Process Clause. A Federal District Judge certified a primary class that included all individuals required to be registered under the Act and two ex post facto subclasses.

In May 2019, the district court entered a stipulated order granting declaratory relief for the plaintiffs, holding that the 2006 and 2011 amendments were unconstitutional as applied to the ex post facto subclasses. The district court also deferred ruling on the issues of injunctive relief and the severability of the 2006 and 2011 amendment for 90 days to allow the Legislature to revise the Act to comply the *Does I* decision and address the Act's constitutional deficiencies.

In February 2020, the district court declared the Act null and void as applied to members of the ex post facto subclasses (any individual required to be registered under the Act who offense required registration prior to April 12, 2011) and prohibited the Defendants from enforcing any of the Act's provisions against members of the ex post facto subclasses. *Doe v. Snyder*, opinion of the US District Court for the Eastern District of Michigan, Case No. 16-13137 (*Does II*). The court prohibited the enforcement of the prohibitions on living, working, and loitering within a student safety zone; the requirements to report telephone numbers, electronic mail addresses, and instant message addresses routinely used by the individual required to be registered under the Act; and the requirement to report license plate and registration numbers of any motor vehicle, aircraft, or vessel regularly operated by the individual required to be registered under the Act. The district court also delayed the effective date of its decision until 60 days after entry of the final judgment to allow the Legislature to enact a new statute and to ensure that individuals required to be registered under the Act, prosecutors' offices, and law enforcement would receive notice of the order before relief took effect.

In April 2020, the district court issued an interim order delaying entry of final judgment in *Does II* because of the COVID-19 pandemic. The order prohibits the Defendants from enforcing regulation, verification, school zone, and fee violations that occurred after February 14, 2020, until the end of the COVID-19 pandemic. The court also ordered the parties to report every 30 days on their progress in completing the tasks set out in the court's February opinion.

Legislative Analyst: Stephen Jackson

FISCAL IMPACT

The bill could have a minimal fiscal impact on the Department of State Police, which administers the SOR, as the Department reports that one of the provisions in its vendor contract for the SOR program requires the vendor to reprogram the system at no cost to the State if there is are legislatively mandated changes.

The bill's provisions allowing a registrant to report to a registering authority by means other than in person if prescribed by the Department, could require additional costs for MSP in the tens of thousands of dollars for postage (return receipt) and roughly $200,000 to $300,000 for SOR employees needed for processing costs, if the US Mail were chosen as a permissible reporting method.

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The SOR unit at MSP has a gross annual budget of approximately $1.0 million, 100% of which comes from the SOR Fund. The Fund is supported by fees collected from a $50 annual fee paid by registered sex offenders required to periodically report to a local registering authority (i.e., a local police department, sheriff's department, or MSP post) under the Sex Offenders Registration Act. It allocates $20 from each fee to the court, local law enforcement agency, sheriff's department, or MSP post that registers an offender. The remaining $30 is credited to the SOR Fund. In practice, the $20 retained by an MSP post also is credited to the SOR Fund. Approximately $890,000 to $900,00 is collected annually for deposit into the Fund; these amounts may be used by the Department for training concerning, and the maintenance and automation of, the SOR database, public internet website, or notification and offender registration duties.

Any additional costs necessitated by provisions in the bill would likely not be able to be covered by existing fee revenues and would therefore need to be supported by General Fund/General Purpose dollars.

Fiscal Analyst: Bruce Baker

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.

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John Does A-H, et al. v. Gretchen Whitmer, et al.
USDC-ED No: 2:22-cv-10209
Honorable Mark Goldsmith
Magistrate Judge Curtis Ivy, Jr.

Ex D = Affidavit of Sharon Jegla, February 7, 2023

Brief of Amicus Curiae of the Michigan State Police
in Support the People and the Macomb County Prosecutor,
People v Kardasz (Mi S Ct No. 165008)

EXHIBIT K

Jegla Affidavit

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AFFIDAVIT OF SHARON JEGLA

I, Sharon Jegla, ("Affiant"), being first duly sworn, deposes and states as follows:

1. I am employed by the Michigan State Police as a Department Analyst in the Sex Offender Registration Unit. I have held this position since January 20, 2013.

2. This Affidavit is based upon Affiant's personal knowledge.

3. Affiant, if sworn as a witness, can testify competently as to the facts stated herein.

4. As of January 25, 2023, the following data is available in the Michigan Sex Offender Registry regarding the registrants and the underlying crimes that led to their registration obligations:

Field	Results
Public and private registrants	43,995
Public and private registrants with a subsequent registrable offense	5,268
Gross indecency with a victim under 13	76
Gross indecency with a victim between 13-17	131
Criminal Sexual Conduct 1st Degree with a victim under 13	4,903
Criminal Sexual Conduct 1st Degree with a victim between 13-17	990
Criminal Sexual Conduct 1st Degree with an adult victim	761
Criminal Sexual Conduct 2nd Degree with a victim under 13	8,960
Criminal Sexual Conduct 2nd Degree with a victim between 13-17	2,388
Criminal Sexual Conduct 2nd Degree with an adult victim	737
Criminal Sexual Conduct 3rd Degree with a victim under 13	801
Criminal Sexual Conduct 3rd Degree with a victim between 13-17	6,039
Criminal Sexual Conduct 3rd Degree with an adult victim	853
Criminal Sexual Conduct 4th Degree with a victim under 13	1,222
Criminal Sexual Conduct 4th Degree with a victim between 13-17	4,088
Criminal Sexual Conduct 4th Degree with an adult victim	1,658
Criminal Sexual Conduct Assault with Intent to Commit Penetration with a victim under 13	407
Criminal Sexual Conduct Assault with Intent to Commit Penetration with a victim between 13-17	719
Criminal Sexual Conduct Assault with Intent to Commit Penetration with an adult victim	453
Criminal Sexual Conduct 2nd Degree Assault with a victim under 13	424

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Criminal Sexual Conduct 2nd Degree Assault with a victim between 13-17	390
Criminal Sexual Conduct 2nd Degree Assault with an adult victim	195
Accosting a child (victims under 18)	1,600
Child pornography or using a computer to commit a crime	2,822
Sodomy (victims under 18)	23
Aggravated indecent exposure (victims under 18)	284
Surveilling or capturing image of unclothed person (victims under 18)	185
Prostitution/Human Trafficking (victims under 18)	93
Crimes of CSC 1st Degree, 2nd Degree, 3rd Degree, 4th Degree, CSC Assault with intent to commit penetration, or CSC 2nd Degree Assault, where the age of the victim is unknown	9,030

5. The majority of the crimes listed above where the age of the victim is known are committed against children or victims under the age of 18.

Age Range of Victims	Results
Victims under the age of 13	16,793
Victims between 13-17	14,745
Total victims under 18 (including those immediately above)	36,545
Adult victims	4,657

Affiant says nothing further.

Sharon Fyle

Date: 2-7-2023

Subscribed and sworn to before me this
7th day of February, 2023.

Jeremy Dorsey
Notary Public

My Commission Expires: 01/23/2027

Ex F = Declaration of Dr. Goodman-Williams

Brief of Amicus Curiae of the Michigan State Police in Support the People and the Macomb County Prosecutor
People v Kardasz (Mi S Ct No. 165008)

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Exhibit 141:

Dr. Rachael Goodman-Williams Declaration

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funded Domestic Violence Prevention Enhancement and Leadership Through Alliances (DELTA) FOCUS (2015 – 2018) and IMPACT (2018 – 2020) projects.

5. In my position at Wichita State University, I teach undergraduate courses on research methods (PSY 311), and graduate courses on program evaluation (PSY 941), cultural diversity (PSY 912), and community practicum (PSY 944). While pursuing my doctorate at Michigan State University, I taught undergraduate courses on prevention of and interventions related to sexual assault (PSY 317), gender-based violence across the lifespan (PSY 318), and human services fieldwork in the community (PSY 381).

6. I conduct quantitative and qualitative research on topics including serial sexual perpetration, victim/survivor experiences after sexual assault, victim/survivor reasons for non-reporting, and advocacy, criminal-legal, and medical responses to sexual assault.

7. I have served as a peer reviewer for scientific research journals, including but not limited to *Journal of Investigative Psychology and Offender Profiling*, *Journal of Interpersonal Violence*, *Trauma, Violence, & Abuse*, *Violence and Victims*, and *Violence Against Women.*

8. My research has been published in peer-reviewed journals, including but not limited to *Psychological Trauma: Theory, Research, Practice, and Policy*, *Psychology of Violence*, *Journal of Criminal Justice, Psychology of Women Quarterly*, and *Victims & Offenders.* I have presented my research at various academic conferences and scientific meetings, including those held by the American Association of Forensic Sciences and the American Psychological Association.

9. My curriculum vitae is attached. This document includes a true record of my academic and community work.

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- These concerns are well-founded; research has consistently found that for decades, sexual assault cases were routinely closed with minimal investigative work and most cases are not referred by police to prosecutors.
- Attrition throughout the criminal legal system means that few reported sexual assaults (approximately 6.5% - 14.0%) end in a conviction.
- Many of the cases that do end in a conviction reach that verdict through a plea bargain, meaning that the offender's criminal history record may not reflect the sex crime for which they were originally reported.
- Collectively, these patterns of underreporting and case attrition limit the conclusions that can be drawn about serial sexual offending from criminal history records alone.
- More specifically, estimates of serial sexual perpetration that rely solely on criminal history records are likely to substantially underestimate serial sexual offending.
- Incorporating DNA linkages as indicators of serial sexual perpetration can mitigate the limitations of criminal history records and provide a fuller picture of serial sexual offending.
- Research that incorporates DNA linkages as an indicator of serial sexual perpetration has found substantially higher rates of serial sexual perpetration than research that relies solely on criminal history records. More specifically, research that includes DNA linkages has found serial offending rates of 35% - 39%.
- Based on this research, I conclude that rates of serial sexual offending based solely on criminal history records substantially underestimate the frequency of

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decades, a plethora of research has demonstrated that sexual assault victims are frequently blamed and not believed when they report their assaults to police.[9,10] The treatment many sexual assault victims experience when reporting their assaults is recognized as so harmful that it has come to be known as "secondary victimization" or "the second rape". [11,12] In light of the treatment described above, it should not be surprising that the vast majority of sexual assault victims do not report their rapes to police. This issue will be discussed in depth below.

UNDERREPORTING OF SEXUAL ASSAULT AND CASE ATTRITION THROUGH THE CRIMINAL LEGAL SYSTEM

16. Sexual assault is reported less often than any other violent crime. The National Crime Victimization Survey (NCVS), for example, found that approximately 50% of violent victimizations were reported to police in 2011. Sexual assaults were the least frequently reported of all these violent crimes, with NCVS data showing that only approximately 25% of sexual assault victimizations were reported to the police.[13,14] Research surveys that situate their questions in the context of health, rather than crime, have found even lower rates of police reporting, ranging from 5% – 15%.[15,16,17] Collectively, these findings indicate that **the criminal**

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[9] Spohn, C., & Tellis, K. (2014). *Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System.* Boulder: Lynne Rienner Publishers.
[10] Shaw, J., Campbell, R., Cain, D., & Feeney, H. (2017). Beyond surveys and scales: How rape myths manifest in sexual assault police records. *Psychology of Violence, 7*(4), 602 – 614.
[11] Williams, J.E., (1984). Secondary victimization: Confronting public attitudes about rape. *Victimology, 9*(1), 66 – 81.
[12] Madigan, L., & Gamble, N. (1991). *The second rape: Society's continued betrayal of the victim.* New York: Macmillan.
[13] Truman, J.L., & Planty, M. (2012). *Criminal Victimization, 2011.* U.S. Department of Justice.
[14] Morgan, R.E., & Oudekerk, B.A. (2019). *Criminal victimization, 2018* (NCJ 253043). Bureau of Justice Statistics. https://www.bjs.gov/content/pub/pdf/cv18.pdf
[15] Wolitzky-Taylor, K.B., Resnick, J.L., Amstander, A.B., Kilpatrick, D.G., & Ruggiero, K.J. (2011). Is reporting of rape on the rise? A comparison of women with reported versus unreported experiences in the National Women's Study-Replication. *Journal of Interpersonal Violence, 26*(4). 807 – 832.
[16] Kilpatrick, D.G., Resnick, H.S., Ruggiero, K.J., Conoscenti, L.M., & McCauley, J. (2007). *Drug-facilitated, incapacitated, and forcible rape: A national study.* Charleston, SCS: National Criminal Justice Reference Service.
[17] Fisher, B.S., Daigle, L.E., Cullen, F.T., & Turner, M.G., (2003). Reporting sexual

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18. Case attrition occurs at every step of the criminal legal process, starting with insufficient investigation of reported sexual assaults. While law enforcement officers are expected to investigate all reports, the thoroughness of those investigations varies widely, and research has consistently found that many cases are closed with little to no meaningful investigative work.[27] Research analyzing police officer documentation of reported sexual assaults has found extensive evidence of rape myths, indicating that victims' reports were routinely compared to stereotypes of what "real rape" or "real victims" should look like and dismissed when they or their experiences did not measure up.[28]

19. Even when law enforcement officers are committed to carrying out a thorough investigation, there are unique barriers to achieving justice for sexual assault victims through the criminal legal system. Other crimes, such as murder, robbery, and aggravated assault, do not routinely face a "consent defense," in which the alleged perpetrator argues that the potentially criminal act occurred but was in fact not criminal because the complainant agreed to the act at that time.[29] Unless a victim is incapable of giving consent via an indisputable characteristic, such as age, the consent defense is routinely used by alleged offenders if they are questioned by police or taken to trial.[30] The appeal of this defense is understandable when one considers how difficult it is to disprove. Sexual acts typically take place in private, meaning the only two witnesses to the event are the complainant and the alleged perpetrator. In the context of an "innocent until proven guilty" legal system, how do you prove beyond a reasonable doubt that you did not agree

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[27] See note 6 above

[28] Shaw, J., Campbell, R., Cain, D., & Feeney, H. (2016). Beyond surveys and scales: How rape myths manifest in sexual assault police records. *Psychology of Violence, 7*(4), 602 – 614.

[29] This double standard is parodied in the 1975 short story *The Rape of Mr. Smith*, in which a mugging victim, Mr. Smith, is grilled by the defense attorney, who asks him questions such as "Did you struggle with the robber?" and "Have you ever GIVEN money away?" See "The Legal Bias Against Rape Victims (The Rape of Mr. Smith)" written by Connie K. Borkenhagen and published in the American Bar Association Journal.

[30] Archambault, J., & Faugno, D. (2001). Overcoming a consent defense to sexual assault. *Journal of Emergency Nursing, 27*(2), 204 – 208.

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referred by police to prosecutors, but even of those that are so referred, filing of charges is far from guaranteed. Research conducted in Los Angeles, California, found that the likelihood of charges being filed in cases where an arrest had been made ranged from 66% to 82%[37],[38]. Interestingly, the lowest charge rate (66.0%) was from the Los Angeles Sheriff's Department, which had the highest arrest rate (33.9%); conversely, the highest charge rate (82.2%) was from the Los Angeles Police Department, which also had the lowest arrest rate (12.2%). Taken together, these statistics indicate that all the jurisdictions studied have paths through which they weed out "weak" cases. For some, more cases are screened out at investigation and fewer referred to prosecutors and for others it is the reverse, but all jurisdictions studied have a process through which the vast majority of sexual assault reports are never brought to trial. In these same jurisdictions, between 53.4% and 78.1% of cases for which prosecutors brought charges ended in a conviction.

22. When considering the process as a whole, these statistics make clear how few reported rapes end in a conviction. In Spohn and Tellis' (2012) analysis, 7.7% of sexual assaults reported to the Los Angeles Police Department ended in conviction. For the Los Angeles Sheriff's Department the rate was slightly better, but still a dispiriting 14.0%. Morabito et al.'s (2019) study that sought to replicate and extend Spohn and Tellis' (2012) findings by purposively sampling six diverse jurisdictions across the country found that only 6.5% of reported sexual assaults ended in a conviction. In individual cases, Morabito's findings mean that **across six United States jurisdictions in which 2,887 reports of sexual assault were made, 189 of them resulted in a conviction and 2,698 did not.**

[37] See note 33 above
[38] See note 35 above

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committed by a unique, first-time perpetrator. This is certainly possible, but it would be unlikely for underreporting and case attrition not to distort our view of serial sexual perpetration. **Because most reported sexual assaults do not progress through the criminal legal system, a definition of serial sexual perpetration that requires multiple such progressions makes it less likely that we will identify serial sexual perpetration when it occurs.**

26. As an example, let's consider a sexual offender who committed two sexual assaults, both of which were reported to police. The lowest threshold of serial sexual offending used in research based on criminal history data is arrest, so for this thought experiment we will define serial sexual offending as having been arrested for two sexual assaults. Based on the data discussed in the previous section, we can estimate the probability of a reported sexual assault resulting in an arrest at approximately 20% (slightly higher than the 18.8% found in the six jurisdictions studied by Morabito).[39] This probability can be thought of through the lens of a five-sided dice, with a roll of "one" representing the outcome in which a reported sexual assault results in arrest and rolls of two, three, four, or five representing outcomes in which the reported assault that does not result in arrest. While the probability of rolling one "one" is 1/5, the probability of rolling two "ones" is 1/25. All possible combinations are represented below, with the single combination indicated by rolling a "one" twice shaded grey.

Die #2

Die #1	1	2	3	4	5
1	(1 , 1)	(1 , 2)	(1 , 3)	(1 , 4)	(1 , 5)
2	(2 , 1)	(2 , 2)	(2 , 3)	(2 , 4)	(1 , 5)
3	(3 , 1)	(3 , 2)	(3 , 3)	(3 , 4)	(1 , 5)
4	(4 , 1)	(4 , 2)	(4 , 3)	(4 , 4)	(1 , 5)
5	(5 , 1)	(5 , 2)	(5 , 3)	(4 , 4)	(1 , 5)

[39] See note 35 above

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ability to identify serial sexual offending. Three new outcomes are depicted in the table below: "Yes," to indicate the 20% probability that a reported sexual assault results in an arrest, "No," to indicate the 80% probability that a reported sexual assault does not result in arrest, and "Yes if" to indicate the agreed upon condition in which all reports of sexual assault result in an arrest if the alleged perpetrator has been arrested for a sexual assault previously. Again, the interior cells of the table show the combination of arrest outcomes.

Arrest for Assault 2 (with hypothetical conditional probabilities)

Arrest for Assault 1	Yes	Yes only if previously arrested	Yes only if previously arrested	Yes only if previously arrested	Yes only if previously arrested
Yes	Yes/Yes	Yes/Yes if	Yes/Yes if	Yes/Yes if	Yes/Yes if
No	No/Yes	No/No	No/No	No/No	No/No
No	No/Yes	No/No	No/No	No/No	No/No
No	No/Yes	No/No	No/No	No/No	No/No
No	No/Yes	No/No	No/No	No/No	No/No

29. Because an analysis relying on this hypothetical data would not identify the offender as a serial sexual offender unless there were two or more arrests for sexual assault, 80% of outcome combinations would lead to the incorrect conclusion that this offender was not a serial sexual offender. In terms of the ability of criminal history data to identify serial sexual offending, the outcome combinations that do not indicate serial sexual offending even though two assaults did occur can be thought of as the data source's "false negative" rate (i.e., the probability that the data source will not show serial sexual perpetration when, in reality, the offender did perpetrate multiple sexual assaults). The following table illustrates the ability of the data to correctly identify serial offending when it occurs based on the usual 20% arrest rate and

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legal system, it is especially true for sexual assault and domestic violence cases.[40,41] Of the 189 convictions that came out of the 2,887 sexual assaults reported across six United States jurisdictions discussed previously, 152 (81%) of those convictions were the result of a plea bargain.[42] Plea bargains are often particularly appealing to alleged sexual offenders when they are offered the opportunity to plead guilty to a lesser charge that is not sexual in nature, thereby avoiding registering as a sex offender. If offenders plead guilty to a non-sexual crime, serial perpetration data that relies on conviction as the offense threshold would not incorporate those crimes into rates of serial sexual perpetration.

31. A final consideration in this discussion is the possibility of a false positive for serial sexual offending, which would mean instances in which criminal history data lead to the conclusion that someone is a serial sexual offender when, in fact, they are not. The simplest reason that this has not been discussed in-depth is that research has consistently shown that rates of falsely reporting sexual assault to police are quite low—approximately 5%.[43,44] Furthermore, the practical purpose of the steps that have been discussed thus far—from the police officer's decision of whether to thoroughly investigate, to their decision of whether or not to arrest, to the prosecutor's decision of whether or not to charge, to a judge or jury's decision regarding whether or not to convict—is to ensure that alleged perpetrators are only brought to court and potentially held accountable for sexual assaults in which there is exceedingly strong evidence against them. It is certainly possible that individuals who have not, in fact, perpetrated the sexual assault they

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[40] See note 32 above

[41] Lovell, R., Flannery, D.J., & Luminais, M. Lessons learned: Serial sex offenders identified from backlogged sexual assault kits (SAKs). In A.T. Vazsonyi, D.J. Flannery, & M. DeLisi (Eds.), *The Cambridge handbook of violent behavior and aggression (2nd ed.)* (pp. 399 – 417). Cambridge University Press.

[42] See note 35 above

[43] Spohn, C., White, C., & Tellis, K. (2014). Unfounding sexual assault: Examining the decision to unfound and identifying false reports. *Law & Society Review, 48*(1), 161 - 192.

[44] De Zutter, A., Horselenberg, R., & van Koppen, P.J. (2017). The prevalence of false allegations of rape in the United States from 2006 – 2010. *Journal of Forensic Psychology, 2*(2), 119 – 123.

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34. There has been some research in the past four decades focused on measuring *undetected* serial sexual offending, that is to say, serial sexual offending for which the offender was never arrested, charged, or convicted. These studies have typically used anonymous self-report surveys, in which male samples are asked whether they have engaged in behaviors that meet legal definitions of sexual assault over the course of their lifetimes or across specific time periods.

35. Two such studies were carried out with samples of sex offenders who were incarcerated or in sex offender treatment. In the first, 83 convicted rapists and 54 convicted child molesters filled out an anonymous questionnaire about their history of sex offenses.[48] Approximately 81% of the incarcerated respondents whose detected offense was rape and 49% of the respondents in the rehabilitation program whose detected offense was rape disclosed undetected rapes, disclosing an average of 5.2 rapes and 4.2 rapes, respectively. Respondents who were incarcerated for child molestation disclosed, on average, having victimized an additional 6.0 children, and respondents who were in the treatment program for child molestation disclosed having molested an additional 3.4 undetected child victims. It should be noted that these means were calculated *after* the study authors had excluded 7% of the offenders (6 child molesters and 3 rapists) who had an unusually high number of undetected offenses (50 or more), so as not to artificially inflate the means. A similar study conducted approximately ten years later found that their sample of 37 men convicted of rape had been arrested a total of 52 times and charged with 66 sex offenses, with a mean number of 1.8 detected victims per offender. When undetected offenses were included (i.e., rapes self-reported by men in the sample that they had never been caught for), this total increased to 433 total rapes across the 37 men, with a mean of

[48] Growth, A.N., Longo, R.E., & McFadin, J.B. (1982). Undetected recidivism among rapists and child molesters. *Crime & Delinquincy, 28*(3), 450 – 458.

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population studies in tandem, it appears that among men who commit sexual assault, men who commit a single assault are in the minority. What's more, when considering the self-report sexual perpetration literature as a whole, it appears that when people who perpetrate sexual assault (whether incarcerated, in sex offender treatment, or in the community at large) are given the opportunity to disclose the full range of their sexual perpetration behaviors with no legal repercussions, most disclose a great many more sexual assault perpetrations than they have ever had to criminally take responsibility for.

DNA LINKAGES AS AN ALTERNATIVE TO CRIMINAL HISTORY RECORDS AS THE SOLE INDICATOR OF SEXUAL OFFENDING

37. An additional option for identifying and measuring serial sexual perpetration is establishing DNA matches across sexual offenses. This process requires an understanding of how DNA is collected in the aftermath of a sexual assault, and so I will briefly explain that process before reviewing how such DNA informs knowledge of serial sexual offending.

38. After a sexual assault, victims are routinely encouraged to seek out a medical forensic exam (MFE). The MFE as a whole includes examination of physical trauma, documentation of signs of penetration or force, interviewing the patient, and collecting evidence. Having an MFE conducted post-assault is routinely described as an emotionally difficult, even retraumatizing, experience for sexual assault victims,[52] which helps explains why only 21% - 38% of victims seek such care in the aftermath of an assault.[53,54,55] Physical and/or biological

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[52] Campbell, R., Wasco, S.M., Ahrens, C.E., Sefl, T., & Barnes, H.E. (2001). Preventing the "second rape": Rape survivors' experiences with community service providers. *Journal of Interpersonal Violence, 16,* 1239 – 1259.
[53] Amstadter, A.B., McCauley, J.L., Ruggiero, K.J., Resnick, H.S., & Kilpatrick, D.G> (2008). Service utilization and helpseeking in a national sample of female rape victims. *Psychiatric Services, 59*, 1450 – 1457.
[54] Ullman, S.E., & Lorenz, K. (2020). Correlates of African American sexual assault survivors' medical care seeking. *Women and Health, 60,* 502 – 516.
[55] Zinzow, H.M., Resnick, H.S., Barr, S.C., Danielson, C.K., & Kilpatrick, D.G> (2012). Receipt of post-rape medical care in a national sample of female victims. *American Journal of Preventative Medicine, 43,* 183 – 187.

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unknown DNA profiles obtained at crime scenes or obtained from crime scene evidence, including SAKs. CODIS linkages, known as "hits," to these indexing systems, are called "offender hits" and "forensic hits," respectively. When a large number of SAKs are tested at once, as was the case for many jurisdictions that tested thousands of previously untested SAKs in short succession, DNA profiles from those SAKs can also hit to each other; these linkages are called "case-to-case associations."

41. These different types of CODIS hits have the potential to communicate different information. When a new DNA profile is entered into CODIS and an "offender hit" occurs, that new DNA profile has hit to a known offender profile already in CODIS. If the SAK was associated with an assault in which the victim did not know the identity of the assailant, an offender hit may provide crucial insight into the identity of the offender. Additionally, because an offender's qualifying offense is entered into the offender index along with their DNA profile, SAK DNA hitting to the offender index can also indicate suspected serial sexual offending if the qualifying index offense was another sexual assault.[59] When a DNA profile is entered into CODIS and a "forensic hit" occurs, the new DNA profile has hit to an unknown DNA profile, and while the hit can therefore not directly resolve the identity of the offender if it is unknown, it can indicate suspected serial sexual offending if the forensic profile it hit to was from another sexual assault or potentially resolve the identity of the offender through connecting law enforcement agencies who may have unique information on the case to each other.

42. Like criminal history data, data from SAKs will still underestimate serial sexual offending, as the majority of sexual assault victims do not receive post-assault medical care or

[59] Because DNA profiles from SAKs are typically not from cases that have been adjudicated when they are entered into CODIS, it is important to recognize that an SAK is not proof in and of itself that a crime occurred. Therefore, these linkages are referred to as instances of *suspected* serial sexual offending.

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that could be uploaded into the CODIS database. 1,675 of those SAKs yielded a CODIS hit, and analysis of those CODIS hits produced record of 1,424 unique (i.e., unduplicated) offenders.

44. From this sample of unique offenders, we sought to determine the percentage who could be identified as suspected serial sexual offenders through CODIS hits. When the CODIS hit was to the offender database and the identity of the offender was therefore known, we were able to (through partnership with our law enforcement colleagues who de-identified the data before sending it to us) obtain their criminal history records to explore what other crimes they had committed. When incorporating criminal history records into our definition of suspected serial sexual offending, we included previous arrests, charges, or convictions in their adult (age 16+) Michigan criminal histories. This process provided two distinct yet overlapping samples: (1) unique perpetrators, n = 1,424 and (2) unique and identifiable perpetrators, n = 1,270. We used these samples to answer two research questions. The first question was: what proportion of unique perpetrators were associated with two or more sexual assaults through CODIS hits? The second question was: what proportion of unique and identifiable perpetrators (i.e., perpetrators whose criminal history records we could access) were associated with two or more sexual assaults through CODIS and/or their adult criminal history records from the state of Michigan? A depiction of this progression is presented in Figure 1.[62]

[62] Figure was created from data and depictions in Campbell, R., Feeney, H., Goodman-Williams, R., Sharma, D.B., & Pierce, S.J. (2019). Connecting the dots: Identifying suspected serial sexual offenders through forensic DNA evidence. *Psychology of Violence, 10*(3), 255 – 267.

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45. **We determined that 35.7% of all unique perpetrators were associated with serial sexual offending based on DNA linkages through CODIS.** Of the 508 serial sexual perpetrators identified, approximately 70% had two sexual assaults documented through CODIS DNA linkages, with the remaining 30% associated with three or more sexual assaults (15.5% three assaults, 6.1% four assaults, 7.9% five or more sexual assaults). The mean number of assaults associated with individuals in the unique perpetrator subsample was 2.64 (*SD* = 1.37) with a range of 2 to 12 sexual assaults identified per offender through CODIS data alone. Figure 2, on the next page, illustrates the undetected pattern of offending in one of these cases.

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46. To explore what proportion of offenders are identified as serial sexual perpetrators based on both CODIS DNA linkages and criminal history data, we refocused our attention to the sample of $n = 1{,}270$ unique and identifiable perpetrators (i.e., perpetrators whose adult, Michigan criminal history records we could access).[63] We received data that delineated each Michigan-based criminal offense according to 449 crime codes. To address our research question, we identified the unique and identifiable perpetrators whose criminal history records had any criminal incident record (arrest, charge, or conviction) for Michigan's Criminal Sexual Conduct codes. For each incident of sexual assault identified in the criminal history records, we compared the offense date to the forensic testing data to ensure that we were not double counting offenses; when the two dates were within 45 days of each other, we considered them to be the same incident. This may have resulted in an underestimate of sexual offending when offenses occurred close together, but it ensured that we did not overestimate sexual offending across the two data sources.

47. Of the $n = 1{,}424$ unique perpetrators we had identified, $n = 1{,}270$ of them were unique and identifiable perpetrators, meaning that they could be identified from hits the offender index of CODIS and their criminal history records could be obtained. Many of the $n = 508$ unique serial sexual perpetrators were identifiable as well, with $n = 365$ determined to be unique and identifiable serial sexual assault perpetrators based solely on CODIS data.

48. When criminal history data was incorporated into the analysis, we discovered that many of the offenders had *additional* sexual assault arrests, charges, or convictions. Incorporating these criminal history records into our designations of serial sexual offending

[63] Those data were compiled by community partners at Michigan State Police, who assigned a unique, anonymized research ID number to each individual, such that we never had access to perpetrators' names, state-issued ID numbers, or DNA profiles.

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Based on the limited vantage point held by recidivism studies that rely solely on criminal history records, they are likely to substantially overestimate desistance among sexual offenders.

CONCLUSION

51. In sum, the literature on underreporting of sexual assault and case attrition highlights numerous problems with relying on criminal history records as the sole indicators of serial sexual perpetration. The vast majority of sexual assaults are not reported, and of those that are reported the majority do not result in arrest, charge, or conviction. These realities mean that any sexual assaults that are not reported will not factor into estimates of serial sexual perpetration, nor will reports of sexual assault that do not lead to an arrest. Depending on the threshold used to define serial sexual perpetration in a particular recidivism study, reported rapes that lead to an arrest but not a conviction may not contribute to estimates of serial sexual perpetration, either. At least some of the under-identification of offenders at these later levels of case progression is due to the intentionally high threshold for conviction in which guilt must be proved beyond a reasonable doubt. It is incredibly difficult to prove a crime of consent beyond a reasonable doubt, however. Estimates of serial sexual perpetration gleaned from criminal history records are likely to be affected by this difficulty to the degree that they are not accurate indicators of serial sexual perpetration, only of the small portion of serial sexual perpetration identified by the criminal legal system. **Recidivism studies based solely on criminal history data are therefore not measuring sexual offenders' behaviors so much as they are measuring the behavior of the criminal legal system; they are not effectively measuring multiple instances of sexual offending so much as they are measuring multiple instances of being caught and held accountable by a system with a uniquely poor track record of doing so. Measures of serial sexual offending that include data less vulnerable to case attrition**

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ACADEMIC APPOINTMENTS

August 2020 - Present	Assistant Professor, Community Psychology, Wichita State University
August 2020 – Present	Core Faculty, Clinical-Community Psychology, Wichita State University

EDUCATION

August 2020	Doctor of Philosophy in Ecological-Community Psychology Specialization in Quantitative Methods and Evaluation Sciences Michigan State University, East Lansing, MI
May 2017	Master of Arts in Ecological-Community Psychology Michigan State University, East Lansing, MI
May 2009	Bachelor of Arts in Gender & Women's Studies, *Summa Cum Laude* Knox College, Galesburg, IL

GRANT FUNDING

2021 – 2023	Center for Institutional Courage *Title IX Practitioners' Experiences of and Perspectives on Mandatory Reporting for Sexual Violence: An Examination of Institutional Practices that Foster Betrayal and Courage* Award Number: Total Costs: $4,000 Role: Co-Investigator Primary Investigator: Kathryn Holland, Ph.D.

AWARDS, FELLOWSHIPS, & HONORS

2020	Graduate Student Teaching Award, College of Social Sciences, Michigan State University ($500)
2020	Research Enhancement Award, Michigan State University Graduate School ($500)
2019	Future Academic Scholars in Teaching Fellowship, Michigan State University ($2,000)
2019	Bob and Bets Caldwell Land Grant Values Award, Michigan State University ($4,000)

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7. Campbell, R., Feeney, H., **Goodman-Williams, R.,** Sharma, D.B., & Pierce, S.J. (2020). Connecting the dots: Identifying suspected serial sexual offenders through forensic DNA evidence. *Psychology of Violence, 10*(3), 255-267. DOI: 10.1037/vio0000243

6. **Goodman-Williams, R.**, Campbell, R.M., Sharma, D., Pierces, S.J., Feeney, H., & Fehler-Cabral, G. (2019). How to Right a Wrong: Developing Empirically Tested Approaches for Resolving Untested Rape Kits. *Journal of Trauma and Dissociation, 20*(3), 288-303. Doi: 10.1080/15299732.2019.1592645 **(Runner-up for the Richard P. Klutt Award for *Journal of Trauma & Dissociation* 2019 Best Article).**

5. Campbell, R., **Goodman-Williams, R.,** & Javorka, M. (2019). A trauma informed approach to sexual violence ethics and open science. *Journal of Interpersonal Violence, 34*(23-24), 4765-4793. Doi: 10.1177/0886260519871530

4. Campbell, R., Pierce, S.J., Ma, W., Feeney, H., **Goodman-Williams, R.**, & Sharma, D.B. (2019). Will history repeat itself? Growth mixture modeling of suspected serial sexual offending using forensic DNA evidence. *Journal of Criminal Justice, 61,* 1-12. Doi: 10.1016/j.jcrimjus.2019.01.004

3. Chiaramonte, D., Quarles, J., Strzyzykowski, T., **Goodman-Williams, R.,** Weber, R., Broessel, K., & Thompson, T. (*2019*). Lessons that cannot be lectured: Highlighting the experiences and benefits of undergraduates engaged in community psychology research. *Global Journal of Community Psychology Practice, 10*(2), 1-21.

2. Kubiak, S.P., Brenner, H.J., Bybee, D., Campbell, R., Cummings, Darcy, K.M., Fedock, G., & **Goodman-Williams, R.** (2017). Do sexually victimized female prisoners perceive justice in litigation processes and outcomes? *Psychology, Public Policy, and Law, 23*(1), 39-52. http://dx.doi.org/10.1037/law0000100

1. Kubiak, S.P., Brenner, H.J., Bybee, D., Campbell, R., Cummings, C.E., Darcy, K.M., Fedock, G., & **Goodman-Williams, R.** (2017). Sexual misconduct in prison: What factors affect whether incarcerated women will report abuses committed by prison staff? *Law and Human Behavior, 41*(4), 361-374. http://dx.doi.org/10.1037/lhb0000239

Under Review

4. **Goodman-Williams, R.,** Dworkin, E., & Hetfield, M (Invited resubmission). Why do sexual assault rates vary across studies? A meta-anslysis examining study-level factors.

3. **Goodman-Williams, R.,** Simmons, C., Chiaramonte, D., Ayeni, O.O., Guerrero, M., Sprecher, M., & Sullivan, C.M. (Invited resubmission). Domestic violence survivors' housing stability, safety, and well-being over time: Examining the role of Domestic Violence Housing First, social support, and material hardship.

2. Campbell, R., Gregory, K., **Goodman-Williams, R.,** Engleton, J., & Javorka, M. (Invited resubmission). Organizational readiness and response during COVID-19: Reflections from a sexual assault agency serving a predominantly African American Community.

1. Campbell, R., Gregory, K., Javorka, M., Engleton, J. & **Goodman-Williams, R.** Victim notification protocols for untested sexual assault kits (SAKs): Survivors' and advocates' perspective on law enforcement-led outreach methods.

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Alia-Ray, K., Shaw, J., & **Goodman-Williams, R.** (2019, June). Propelling a movement for equitable justice: Opportunities and challenges for community psychology in criminal justice. Roundtable presented at Society for Community Research and Action Biennial Conference, Chicago, IL.

Feeney, H., Campbell, R., Pierce, S.J., Sharma, D., & **Goodman-Williams, R.** (2018, November). *Serial sexual assaults: A longitudinal examination of offending patterns.* Panel presentation at the American Society for Criminology Annual Meeting, Atlanta, GA.

Goodman-Williams, R., & Chiaramonte, C., Strzyzykowski, T., & Quarles, J. (2018, October). Lessons that cannot be lectured: Highlighting the experiences and benefits of undergraduates engaged in community psychology research. Presented at the International Conference for Community Psychology, Santiago, Chile.

Helms, T., & **Goodman-Williams, R.,** (2017, November). The impact of organizational context on measurement design. In. T. Armstead *Intentional use of data-to-action processes to shape programs and shift evaluations: Examples from CDC DELTA FOCUS grantees.* Presented at the American Association for Evaluation Conference, Washington, D.C..

Goodman-Williams, R., Strzyzykowski, T., Spring, H., & Bombsta, H. (2017, October). Undergraduate research assistant needed: How to train and support undergraduate students doing sensitive research. Chaired Panel Presentation, Midwest Eco Conference, Lansing, MI.

Goodman-Williams, R. (2016, March). "Did you ever scream out at all—'this officer is going to rape me'?": Rape myths about sexual abuse in prison. In S. Kubiak *Sexual Abuse of Women in Prison: A Multi-Disciplinary Feminist Examination.* Presented at the Association for Women in Psychology Annual Conference, Pittsburgh, PA.

Goodman-Williams, R., Hussein, A., James, R., Long, B. (2015, October). That's so meta(analysis): Practical tips and lessons learned. Presented at the Midwest Eco Conference, Madison, WI.

Pendergast, T., Brown, A., Ullman, S., Chiaramonte, D., Sunnquist, M., Feeney, H., **Goodman-Williams, R.,** & Jason, L. (2015, October). Making a difference through advocacy: Challenges to our field. Roundtable presented at the Midwest Eco Conference, Chicago, IL.

SELECTED COMMUNITY PRESENTATIONS AND WEBINARS

Goodman-Williams, R. (2021, December). Non-report medical forensic exams and opportunities for research-community partnerships. Presentation given for the Montgomery County Sexual Assault Response Team.

Campbell, R., & **Goodman-Williams, R.** (2019, July). Trajectories of suspected serial sexual offending using criminal history and DNA data. Webinar given for the Sexual Assault Kit Initiative (SAKI) Project.

Campbell, R., & **Goodman-Williams, R.** (2018, November). Understanding case connectivity: How testing SAKs can link criminal cases. Webinar given for the Sexual Assault Kit Initiative (SAKI) Training Team.

Goodman-Williams, R., & ┼Helms, T. (2017, May). Evaluation conclusions that can be drawn with client satisfaction surveys. Presentation given for Abused Women's Assistance and Resources.

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Wichita State University
PSY 311: Research Methods in Psychology (Fall, 2022)

Michigan State University
PSY 318: Gender-Based Violence Across the Lifespan (Summer 2019)
PSY 381: Human Services Internships (Spring 2019)
PSY 317: Sexual Assault Context, Interventions, and Prevention (Summer 2018)

UNIVERSITY AND PROFESSIONAL SERVICE

University and Departmental Service

2021 – 2022	Program Coordinator, Community Psychology Doctoral Program, Wichita State University
2021 – 2022	Curriculum Committee, Psychology Department, Wichita State University
2021 – 2022	Research Roundup Committee, Psychology Department, Wichita State University
2021 – 2022	Hiring Committee, Community Psychology Program, Wichita State University
2021 – 2022	Hiring Committee, Clinical-Community Psychology Program, Wichita State University
2021 - 2022	Workload Committee, Psychology Department, Wichita State University
2020 – 2021	Colloquium Committee, Psychology Department, Wichita State University

Professional Service

2020 – 2022	Academic Alliance for Survivor Choice in Title IX Reporting Policies
2019 – 2020	Undergraduate Teaching Interest Group, Society for Community Research and Action
2018 – 2020	LGBT Interest Group, Society for Community Research and Action

Ad-hoc Reviewer

Canadian Society of Forensic Science Journal
Journal of American College Health
Journal of Interpersonal Violence
Trauma, Violence & Abuse
Violence Against Women
Violence and Victims

PROFESSIONAL AFFILIATIONS

American Psychological Association
Division 27 of the American Psychological Association, Society for Community Research and Action
Division 35 of the American Psychological Association, Psychology of Women
Division 44 of the American Psychological Association, Society for Sexual Orientation and Gender Diversity
Society for the Psychology Study of Social Issues
American Evaluation Association

Legislative Analysis

HOUSE FISCAL AGENCY
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SEX OFFENDER REGISTRATION REVISIONS

Senate Bill 188 with House committee amendments
Senate Bill 189 with House committee amendments
Senate Bill 206 as introduced
Sponsor: Sen. Phil Pavlov
House Committee: Judiciary
Senate Committee: Judiciary

First Analysis (3-22-11)

BRIEF SUMMARY: Together, Senate Bills 188 and 189 would revise the Sex Offenders Registration Act to conform to mandates under the federal Sex Offenders Registration and Notification Act, part of the Adam Walsh Act. Senate Bill 189 would also repeal two obsolete sections of the act. Senate Bill 206 would incorporate in the sentencing guidelines a change in the maximum sentence for failing to update registration information or report as scheduled.

FISCAL IMPACT: Senate Bills 188 and 189 would have an indeterminate fiscal impact on state and local governments, and Senate Bill 206 would have no fiscal impact on either as discussed later in the analysis. As noted later, in ***Fiscal Information***, if these bills do not become law, the state may lose up to 10% in Federal Byrne Grant funds.

THE APPARENT PROBLEM:

The federal Adam Walsh Child Protection and Safety Act (AWA) was enacted in 2006. One provision of the AWA created the Sex Offender Registration and Notification Act (SORNA), which mandates a national sex offender registry and establishes a set of minimum standards for sex offender registration and notification with which each state must comply. Failure to comply with SORNA will result in a state losing 10 percent of Byrne Justice Grant funding used to support law enforcement efforts. Numerous provisions of the federal act (SORNA) are different from those in the state Sex Offenders Registration Act; therefore, legislation is needed to revise the statute to conform to the requirements of SORNA. Though SORNA allows states some latitude, the legislation must conform substantially to SORNA in order to continue to receive the full grant amount.

THE CONTENT OF THE BILLS:

Currently, a person who is convicted or found responsible for certain listed offenses is required to register with law enforcement and is placed on the sex offenders registry for a minimum of 25 years; serious offenses require registration for life. Recent amendments allowed for certain juvenile offenders to petition to shorten the time they are required to register. The Michigan State Police (MSP) maintains one database for law enforcement purposes and another less comprehensive one that is accessible to the public. Individuals

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who fail to comply with the registration and reporting requirements of the act are subject to criminal penalties.

Senate Bills 188, 189, and 206

With the exception of one provision in Senate Bill 188, the legislation would take effect July 1, 2011. (That exception is a provision that would require the Michigan State Police to mail a notice to each individual registered under the current act who is not currently incarcerated in a prison explaining the individual's duties under the act as amended, and it would take effect immediately). Senate Bills 188 and 189 are tie-barred to each other and Senate Bill 206 is tie-barred to Senate Bill 189.

The bills are intended to apply to currently registered sex offenders, offenses for which the prosecution is pending or has not yet begun as of the legislation's effective date, and offenses committed after the effective date. However, as currently worded, the bills would be prospective in nature, applying only to offenses committed after the effective date or committed before that date but for which the prosecution is pending or has not yet begun.

Significant changes to the Sex Offenders Registration Act (SORA) by Senate Bills 188 and 189 include the following:

Offenses requiring registration

- Revise the definition of "convicted" to include offenders assigned to youthful trainee status before October 1, 2004, if they are convicted of any other felonies after July 1, 2011; exclude offenders assigned to youthful trainee status whose petition under current law to reduce the time required to register as a sex offender has been granted; and include offenders adjudicated as juveniles only if they were at least 14 years of age at the time of the offense and the order of disposition was for a Tier III offense.
- Redefine "listed offense" to instead mean a Tier I, Tier II, or Tier III offense, with Tier I being the least serious, and define those terms. (See ***Background Information***)
- Require a registration period of 15 years for a Tier I offense, 25 years for a Tier II offense, and life for a Tier III offense.
- Require Tier I offenders to report annually, Tier II offenders to report twice a year, and Tier III offenders to report quarterly.
- Exclude from certain Tier II offenses consensual incidents involving a minor victim who was at least 13 years of age but less than 16 if the actor was not more than 4 years older, and also certain offenses involving a minor victim who was 16 or 17 years of age and who was not under the custodial authority of the actor at the time of the violation. Define "custodial authority."
- Exclude from certain Tier III offenses consensual incidents involving a minor victim who was at least 13 years of age but less than 16 if the actor was not more than 4 years older.
- Define "minor" as a victim of a listed offense who was less than 18 years at the time of the offense.

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- Exclude from registration those offenses that involve a consensual relationship between parolees or probationers with Department of Corrections' employees or employees of a county sheriff's office if no position of authority over the victim was used to coerce or otherwise encourage the victim to engage in sexual conduct.

Registration requirements

- Extend the jurisdictions in which registration is required so as to include federally recognized Indian tribes that elect to function as a registration jurisdiction.
- Redefine "residence" to mean the village, city, or township where a homeless person spends the majority of time to make it easier for the homeless or individuals without a permanent residence to comply with reporting requirements.
- Extend the registration and reporting requirements to an individual who was previously convicted of a listed offense but who, at that time, was not required to register under the SORA but who is convicted of any other felony on or after July 1, 2011.
- Shorten the time period required for registering or reporting status changes for various scenarios from 14 days or 10 days to "immediately" and define that term to mean 3 business days.
- Require a nonresident convicted of a listed offense in Michigan on or after July 1, 2011, to register under the act; the reporting requirements would not apply as long as the person remains a nonresident. The nonresident would have to have a photograph taken as required under the act.
- Require notification of at least 21 days before changing a domicile or residence to another country or travels to another country for more than seven days.
- Specify that the reporting requirements would not apply to enrollment in an online or correspondence program at an institution of higher learning.
- If the photograph submitted for the SORA did not resemble the offender in appearance, require the officer or authorized employee of the registering authority to require the individual to obtain a current photograph.
- Increase the original registration fee from $35 to $50 and allocate $30 (instead of $20) to the MSP for deposit in the Sex Offenders Registration Fund and $20 (instead of $10) to be retained by the court, local law enforcement agency, sheriff's department or department post. The fee could be waived for 90 days for an individual who was indigent.
- Require additional information and palm prints to be provided when a person registers. This includes aliases, nicknames, and ethnic or Tribal names; name and address of each employer; name and address of any school attended; all telephone numbers registered or routinely used; all electronic mail addresses, instant message addresses, and login names or other identifiers used by the individual when signing in to those systems; vehicle information, including license plate, registration number, and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual, as well as locations where the vehicles or vessels are habitually kept or stored; driver license number; digital copy of passport or immigration documents, and occupational and professional licensing information.

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- Require a registration to also include an electronic copy of the offender's driver license or state ID, including the photograph required under the act; the text of the provision of law defining the criminal offense for which the offender is registered; any outstanding arrest warrant information; the individual's tier classification; an identifier indicating whether a DNA sample had been collected and any DNA profile entered into the federal Combined DNA Index System (CODIS); the complete criminal history record; the DOC number and status of parole, probation, or supervised release; and the FBI number.
- If an individual did not register or update registration information when required, require the law enforcement agency responsible for registering the individual to, among other things, determine whether the individual has absconded or is otherwise unlocatable, notify the MSP, revise the information in the registry to reflect that the person has absconded, seek an arrest warrant, and enter the individual into the National Crime Information Center Wanted Person File if appropriate.
- Require MSP, when notified of a failure to register or report, to notify the U.S. Marshall's Service and update the National Sex Offender Registry that the individual absconded or is unlocatable.

Reporting requirements

A resident who is required to be registered under the act must report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located immediately (defined to mean three business days) after any of the following occur:

- Changes or vacates his or her residence or domicile.
- Changes his or her place of employment, or employment is discontinued.
- Enrolls as a student with an institution of higher learning, or enrollment is discontinued.
- Changes his or her name.
- Intends to temporarily reside at any place other than his or her residence for more than seven days.
- Establishes any electronic mail or instant message address, or any other designations used in Internet communications or postings.
- Purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.

A nonresident required to register under the act who works in Michigan must report in person and notify the registering authority immediately of a change in place of employment or if employment is discontinued.

A sheriff's department must notify the MSP and provide notice of the location of the individual's proposed place of residence or domicile before releasing an individual from a county jail who is required to register. A similar provision for individuals facing release from prison already is in the act.

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Law enforcement and public databases

- Require all the revised registration information to be included in the law enforcement database.
- Specify additional information that would have to be included in the public database and specify information that could not be on the public database; for instance, the victim's name or offender's Social Security number.
- Exclude from inclusion on the public database certain registered juvenile offenders, an individual registered solely for being the subject of an order of disposition or other adjudication in a juvenile matter in another state or country, or an individual registered solely because he or she had been convicted of a single Tier I offense.
- Delete a provision under which a person who committed criminal sexual conduct in the first- or third-degree as a juvenile is kept off the public database until he or she turns 18.
- Index the compilation of individuals on the public database alphabetically by village, city, township, and county and geographically as appropriate in addition to zip code.
- If MSP determines that a person completes his or her registration period or is no longer required to register under the act, require MSP to remove the person's registration information from both databases within 7 days of the determination.

Petition to discontinue registration

- Allow an individual to petition, and a court to grant the petition, to discontinue registration under the act if certain criteria have been met, such as completing an approved sex offender treatment program and not being convicted of any felony or listed offense since conviction or release from incarceration. A Tier I offender could petition 10 years or more after conviction or release from prison, whichever was later. Certain Tier III juvenile offenders could petition after 25 or more years from the date of adjudication or release from confinement, which ever occurred last.
- Allow certain juvenile Tier I, II, or III offenders ("Romeo and Juliet" cases) to petition, and a court to grant the petition, with no waiting period.
- Require a court to deny a petition if the petitioner was determined to be a continuing threat to the public and specify criteria for making that determination.
- Allow a presentence hearing for certain Tier II and III juvenile offenders who pled guilty or were found to be guilty to determine if they are eligible for exclusion from the registry. The court's decision would be appealable as a matter of right by either the prosecuting attorney or defendant. Except for what is known as the "rape shield," the rules of evidence would not apply. The victim would have to be given notice of the hearing and could, among other things, submit a written statement to the court.

Penalties

- Delete two misdemeanor offenses and a felony offense pertaining to violations of Section 5a of the act (reporting requirements) and replace them with a

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misdemeanor offense punishable by imprisonment for not more than 2 years or a fine of not more than $2,000, or both.

MCL 28.722 et al. (Senate Bill 188)
MCL 28.726 et al. (Senate Bill 189)

Senate Bill 206
The bill would amend the Code of Criminal Procedure (MCL 777.11b) to revise the sentencing guidelines so as to incorporate the change to the felony penalty for a violation of Section 5a of the act proposed by Senate Bill 189. The bill would delete the current reference to a third or subsequent offense and instead indicate a statutory maximum of two years for failing to update a sex offender registration.

HOUSE COMMITTEE ACTION:

The House Committee adopted a series of amendments to Senate Bill 188 that were primarily technical in nature; the more substantive amendments would do the following:

- Revise the definition of the term "custodial authority" to exclude as an offense requiring registration, incidents involving consensual relationships between a corrections officer or county sheriff's deputy with a person who was under the jurisdiction of the Department of Corrections or a county, respectively, if the officer did not use his or her position of authority to coerce the sexual conduct.
- Allow a presentence hearing for certain Tier II and III juvenile offenders tried as adults to determine if they are eligible for exclusion from the registry. The court's decision would be appealable as a matter of right by either the prosecuting attorney or defendant. Except for what is known as the "rape shield," the rules of evidence would not apply. The victim would have to be given notice of the hearing and could, among other things, submit a written statement to the court.

Amendments to Senate Bill 189 were largely technical in nature.

In addition, amendments were adopted to both Senate Bills 188 and 189 to apply the provisions to "pipeline" cases – meaning cases in which the offense was committed before the bills' effective date but for which the prosecution was still pending or had not yet been commenced by the bills' effective date. However, as worded, the amendments instead apply the bills' provisions only to pipeline cases and to offenses committed after the bills' effective date of July 1, 2011. (It is anticipated that this will be corrected.)

BACKGROUND INFORMATION:

Tier I Offense
A Tier I offense would mean one or more of the following:

- Knowingly possessing child sexually abusive activity or material.
- Indecent exposure with fondling of self, if victim is a minor.

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- Unlawful imprisonment (restraining the person), if victim is a minor.
- Criminal sexual conduct (CSC) IV (contact) or assault with intent to commit CSC II (contact) if victim is 18 years or older.
- Surveillance of or distribution of recording, photograph, or visual image of individual with reasonable expectation of privacy if victim is a minor.
- Any other violation of a state law or local ordinance, other than a Tier II or Tier III offense, that by its nature constitutes a sexual offense against a minor.
- An offense committed by a person who was, at the time of the offense, a sexually delinquent person (defined in Section 10a of the penal code as any person whose sexual behavior is characterized by repetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others, or by the use of force upon another person in attempting sex relations, or by the commission of sexual aggressions against children under the age of 16.
- An attempt or conspiracy to commit an offense described above.
- An offense substantially similar to an offense described above under a law of the U.S., any other state or country, or under Tribal or military law.

Tier II Offender and Tier II Offenses

A Tier II offender would mean either a Tier I offender who is subsequently convicted of another Tier I offense or an individual convicted of a Tier II offense who is not a Tier III offender.

A Tier II offense would mean one or more of the following:

- Accosting, enticing or soliciting a child less than 16 years of age for immoral purpose.
- Persuading, inducing, enticing, coercing, causing, or knowingly allowing a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or distributing or financing the distribution of child sexually abusive material.
- Using the Internet or a computer to commit child sexually abusive activity or CSC offenses.
- Sodomy against a minor unless: (1) the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim; or, (2) the victim consented, the victim was 16 or 17 years of age at the time of the violation, and the victim was not under the custodial authority of the individual at the time of the violation.
- Gross indecency between males, females, or males and females if victim was 13 years of age or older but less than 18 unless: (1) the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim; or, (2) the victim consented, the victim was 16 or 17 years of age at the time of the violation, and the victim was not under the custodial authority of the individual at the time of the violation.
- Soliciting to commit prostitution if victim is a minor.
- Pandering.

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- CSC II, CSC IV, or assault with intent to commit CSC II unless the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim.
- CSC II if the victim is 18 years of age or older.
- An attempt or conspiracy to commit any of the above.
- An offense substantially similar to an offense described above under a law of the U.S., any other state or country, or under Tribal or military law.

Tier III Offender and Tier III Offense

A Tier III offender would mean a Tier II offender subsequently convicted of a Tier I or Tier II offense or an individual convicted of a Tier III offense. A Tier III offense would mean one or more of the following:

- Gross indecency with victim less than 13 years of age.
- Kidnapping if victim a minor.
- Taking or enticing child less than 14 years of age with intent to conceal child from parents.
- CSC I, CSC III, or assault with intent to commit CSC with sexual penetration unless the victim consented, the victim was at least 13 years of age but less than 16 at the time of the violation, and the individual was not more than four years older than the victim.
- CSC II or attempt to commit CSC II if victim less than 13 years of age.
- An attempt or conspiracy to commit any of the above.
- An offense substantially similar to an offense described above under a law of the U.S., any other state or country, or under Tribal or military law.

FISCAL INFORMATION:

Senate Bills 188 and 189 would have an indeterminate fiscal impact on state and local government and SB 206 would have no fiscal impact on state and local government.

Senate Bills 188 and 189 are required in order for the state to be in compliance with changes to the Federal Sex Offender Registration and Notification Act (SORNA). If these bills do not become law, the state may lose up to 10% in Federal Byrne Grant funds. These funds are primarily used for multijurisdictional drug enforcement teams made up of troopers and local law enforcement officers. Additionally, the State Police budget contains $1.8 million in Byrne funds as an interdepartmental grant to the Judiciary for the drug treatment court program.

Under SB 188, the sex offender registration fee would increase from $35 to $50, where the State Police would receive an additional $5 and local law enforcement agencies would receive an additional $10. The $5 increase for the State Police would be used for information systems upgrades and program enhancements to be in compliance with the federal laws. The $10 received by local agencies would likely cover some administrative costs incurred by these agencies.

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ARGUMENTS:

For:

Critics of the Michigan Sex Offenders Registry have long maintained that the registry includes so many names of people that do not pose any danger of reoffending or pose any risk of predatory behaviors as to weaken the registry to the point of being useless. Under the SORNA amendments, some offenses that currently require registration will no longer be counted as a listed offense. In addition, many juvenile offenders will no longer have to register as sex offenders and many adults and juveniles who still have to register will no longer be on the public website. Only the most serious crimes, such as forcible rapes, will require lifetime registration and reporting.

To comply with SORNA, more stringent registration and reporting requirements must be adopted. In addition to palm prints, much more information will be collected when a person registers. Some of this information will be posted on the public website. The public website will also enable people to search by city or township rather than just by zip code. Registered offenders will be required to report in person whenever important changes occur, such as buying or selling a car (important since the commission of many sex crimes involve vehicles) or changing employment.

A House committee amendment would resolve an issue addressed in legislation in previous sessions that failed to be enacted. Specifically, the bills would exempt corrections officers and county law enforcement officials from registering as sex offenders when in dating relationships with parolees or probations when the relationship did not involve the abuse of custodial authority. These amendments address situations such as the sheriff's deputy who ended up on the registry because of having sex with his live-in girlfriend after she was arrested for a misdemeanor offense, and the corrections officer who was placed on the registry after having a consensual affair with a man she had first met when he was incarcerated and then later ran into after he was paroled.

The bills are not perfect and do not address or resolve all inequities in registering or reporting, but they represent a vast improvement over the current registry. The bills remove many persons who pose little risk of reoffending or who are not predators, provide better tracking of registered offenders through increased reporting requirements – all of which should improve the usefulness of the registry and increase public safety.

Against:

When consent is disputed in certain cases, despite a conviction, Senate Bill 188 would require a trial court to conduct a hearing before sentencing to determine whether the defendant meets exemption criteria. However, the bill puts the burden of proof on the defendant to prove the sex or sexual contact was consensual rather than on the prosecutor to prove force or coercion. According to defense attorneys, proving a "negative" (meaning no coercion) is nearly impossible. Instead, the bill should require the prosecutor to prove coercion if he or she believes the facts support such a contention.

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The bills still require persons whose convictions were set aside or dismissed to register. This creates a situation where persons lawfully put "no prior convictions" on job applications only to be fired later or needlessly scrutinized when employers realize that they are on the public registry. Other states have exempted from the public registry offenses that have been expunged, set aside, or dismissed and Michigan should follow their example.

The elements of an offense for which juveniles would still have to register, even if adjudicated as a juvenile, would still leave many juveniles on the registry. This is unnecessary as the focus of juvenile court is rehabilitation, and juveniles are very receptive to rehabilitation as evidenced by a recidivism rate for juvenile sex offenders of just 5 percent. The legislation is much harsher than what SORNA requires and should be amended to fit the facts of juvenile sex offenses.

The bills require much more personal information to be included on the public website. Some offenders fear that the bills will therefore increase their risks for identity theft. It is hard enough for these people to obtain housing and employment with good credit; if jobs or housing are lost due to being targeted by information posted on the public registry, it could increase the risk that those individuals would reoffend as housing and employment are proven as playing a major role in reducing recidivism rates.

Response:

Unfortunately, the state is up against a federally-imposed deadline that is fast approaching. In addition, it is not clear at this time what types of variations can be adopted by a state and still be considered to be in "substantial compliance" with SORNA. It is better to enact the legislation in time to continue to receive the full Byrne Grant and then to tackle some of the issues raised by defense attorneys, court personnel, advocates, and those on the registry. Once the framework is approved by federal regulators, it may be easier to determine where the registry can be tweaked to address the concerns raised.

POSITIONS:

The Michigan State Police supports the bills. (3-17-11)

The Michigan Probate Judges Association testified in support of the bills. (3-17-11)

The Prosecuting Attorneys Association of Michigan indicated support for the bills. (3-17-11)

The 17th Judicial Circuit Court-Family Division indicated support for the bill if amendments were adopted to, among other things, not mandate registration for juveniles aged 14–17 for CSC crimes or gross indecency when the victim was younger than 13; eliminate gross indecency from the list of offenses for which juveniles must register; eliminate CSC 2nd and CSC 4th as offenses for which juveniles must register; eliminate the requirement that a juvenile be required to be placed back on the registry following a non-sexual offense adjudication or conviction; and allow Tier III juvenile offenders to petition sooner and more frequently than adults for removal from the registry.

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The Michigan Coalition Against Domestic and Sexual Violence indicated a position of neutrality on the bills. (3-17-11)

The Coalition for a Useful Registry testified that it is neutral on the bills. (3-17-11)

The ACLU of Michigan indicated a position of neutrality on the bills. (3-17-11)

The Criminal Defense Attorneys of Michigan indicated opposition to the Senate-passed version of the bill. Amendments adopted in committee did not fully address their concerns. (3-17-11)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Jan Wisniewski

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.