Controlled Substances Benchbook–Revised Edition

Michigan Supreme Court

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This revised edition was initially published in 2016, and the text has been revised, reordered, and updated through April 16, 2025. This benchbook is not intended to be an authoritative statement by the justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

Note on Precedential Value

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

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

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

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Chapter 1: Overview

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1.1 Scope Note

This chapter discusses the structure of Article 7 of the Public Health Code (PHC), MCL 333.7101 *et seq.*,[1] and summarizes the contents of each part of the article. This chapter also addresses procedural issues and reporting requirements relevant to controlled substance offenses.

The *Controlled Substances Benchbook* focuses primarily on criminal drug offenses described in Article 7 of the PHC, and some controlled substance offenses found in other articles of the PHC and different acts. Other topics discussed in this benchbook include specific licensee and practitioner violations, sentencing, defenses, evidentiary issues specific to controlled substance proceedings, problem-solving courts, and forfeiture proceedings under Article 7 of the PHC.

Additional matters regulated by Article 7 of the PHC but not addressed in this benchbook include licensure proceedings, civil administrative actions involving licensure, and the Board of Pharmacy's substance classification procedures. A discussion of these matters is beyond the scope of this benchbook. Because Article 7 of the PHC does not apply to the regulation of alcoholic beverages or over-the-counter drugs, discussion of those topics is also beyond the scope of this benchbook. See MCL 333.7208 and MCL 333.7227. A detailed discussion of offenses involving operating a motor vehicle while intoxicated can be found in the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9. A drug dealer's civil liability under MCL 691.1601 *et seq*. is also outside the scope of this benchbook.

1.2 Article 7 of the Public Health Code

Controlled substances are the focus of Article 7 of the PHC. Article 7 is divided into five parts:

- general provisions (Part 71);
- standards and schedules (Part 72);
- manufacture, distribution, and dispensing (Part 73);
- offenses and penalties (Part 74); and
- enforcement and administration (Part 75).

[1] MCL 333.7101 *et seq*. refers to the beginning of Article 7. The beginning of the entire Public Health Code can be found at MCL 333.1101 *et seq.*

A. Part 71—Definitions and General Provisions

Part 71 of Article 7 of the PHC contains definitions for terms appearing in Article 7 and guidelines for construction and application of the PHC. See MCL 333.7101 to MCL 333.7109; MCL 333.7121 to MCL 333.7125. Part 71 also provides structural information about the members and duties of the controlled substances advisory commission. See MCL 333.7111 to MCL 333.7113. The advisory commission consists of "13 voting members appointed by the governor with the advice and consent of the senate[.]" MCL 333.7111(1). The advisory commission monitors "indicators of controlled substance abuse and diversion" and publishes an annual report that includes information on the status of abuse and diversion in Michigan and may include recommendations for action. MCL 333.7113(1)-(3).

B. Part 72—Controlled Substances Schedules

Part 72 contains information regarding the administration of Article 7 of the PHC by the Michigan Board of Pharmacy (hereafter the "administrator"). See MCL 333.7201 to MCL 333.7206. The administrator is charged with administering Article 7 of the PHC, "and may add substances to, or delete or reschedule all substances enumerated in the schedules in [MCL 333.7212, MCL 333.7214, MCL 333.7216, MCL 333.7218, and MCL 333.7220], in compliance with the [Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*.]" MCL 333.7201.

The PHC's delegation of the classification of additional substances through the use of administrative rules is constitutional. *People v Turmon*, 417 Mich 638, 641-642 (1983) ("We hold that the Legislature's delegation of authority to add controlled substances to pre-existing schedules in accordance with specific criteria is not an unlawful delegation of power despite the fact that penal consequences flow from violation of the [administrator's] rules. The statute contains sufficient standards and safeguards to avoid infirmity under both separation of powers and due process challenges.") The Court further concluded that "the delegation of authority to the Board of Pharmacy is valid and constitutes neither an unconstitutional delegation of authority nor allows the board to act in an arbitrary or discriminatory manner." *Id.* at 648. "[A]dministrative rules have the force and effect of law." *Bloomfield Twp v Kane*, 302 Mich App 170, 183-184 (2013) ("In the area of drug regulation, resort to the flexibility of administrative rules is necessary because new drugs are developed and introduced at a rapid rate. Therefore, the Legislature's delegation to the Board of Pharmacy the authority to create penal consequences from board rules is not constitutionally infirm.") (Citation omitted.)

The administrator determines which controlled substances are assigned to each of the schedules. MCL 333.7201.

"In making a determination regarding a substance, the administrator shall consider all of the following:

> (a) The actual or relative potential for abuse.
>
> (b) The scientific evidence of its pharmacological effect, if known.
>
> (c) The state of current scientific knowledge regarding the substance.
>
> (d) The history and current pattern of abuse.
>
> (e) The scope, duration, and significance of abuse.
>
> (f) The risk to the public health.
>
> (g) The potential of the substance to produce psychic or physiological dependence liability.
>
> (h) Whether the substance is an immediate precursor of a substance already controlled under [Article 7 of the PHC]." MCL 333.7202(1)(a)-(h).

If a substance is the subject of an emergency rule, the administrator must consider all of the above-listed factors when determining whether to schedule it, as well as whether he or she "has been notified that the substance constitutes an imminent danger[.]" MCL 333.7202(2).

Lists of controlled substances comprising each of the five schedules are found in Part 72. See MCL 333.7212 (schedule 1); MCL 333.7214 (schedule 2); MCL 333.7216 (schedule 3); MCL 333.7218 (schedule 4); MCL 333.7220 (schedule 5). Part 72 also provides information regarding substances that are excluded from the formal lists of controlled substances regulated by Article 7 of the PHC. See MCL 333.7227; MCL 333.7229. Additionally, substances may be scheduled by administrative rule. MCL 333.7201. Mich Admin Code, R 338.3111 to R 338.3129 cover controlled substance schedules.

Substances with the highest potential for abuse and no accepted medical use are classified in schedule 1; the schedules flow in descending order of severity through schedule 5, which contains substances with a low potential for abuse relative to the controlled substances listed in schedule 4 and which have a currently accepted medical use. See MCL 333.7211; MCL 333.7213; MCL 333.7215; MCL 333.7217; MCL 333.7219.

Pronunciation guides are not included in the statutory lists of scheduled controlled substances. However, audio pronunciations are available from How To Pronounce, a free online pronunciation dictionary, by typing in the term for which a pronunciation is desired.

1. Schedule 1

"The administrator shall place a substance in schedule 1 if it finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." MCL 333.7211.

Controlled substances classified in schedule 1 are listed in their entirety in MCL 333.7212(1)(a)-(x). Examples of schedule 1 substances include marijuana,[2] synthetic equivalents of the substance found in marijuana, opiates and opium derivatives (e.g., heroin), hallucinogenics (e.g., LSD, peyote, mescaline, and psilocybin), MDMA (ecstasy), BZP, naphyrone ("rave"), and methylenedioxypyrovalerone ("bath salts").

Substances not included in schedule 1. 11-carboxy-THC, "a byproduct of metabolism created when the body breaks down the psychoactive ingredient of marijuana," is not a schedule 1 controlled substance because the Legislature did not intend for it to be a schedule 1 controlled substance under MCL 333.7212. *People v Feezel*, 486 Mich 184, 204-205, 207-212 (2010), overruling *People v Derror*, 475 Mich 316 (2006), to the extent that it conflicts with the holding in *Feezel*. See also *People v Stock*, 507 Mich 1008 (2021) (rejecting the prosecution's argument "for an interpretation of 'controlled substance' [for purposes of MCL 257.625(8)] that would include any metabolite of cocaine," and reversing the defendant's convictions for operating a motor vehicle while intoxicated causing death and causing serious impairment of a body function where the prosecution presented evidence "indicating the presence of an unidentified metabolite of cocaine in the defendant's urine," but "failed to present evidence that the presence of cocaine metabolites in the defendant's urine supports a reasonable inference that the defendant had cocaine in her body").

[2] To date, federal authority still classifies marijuana as a schedule 1 controlled substance. See 21 USC 812(c). Also, note that "[m]arihuana, including pharmaceutical-grade cannabis, is a schedule 2 controlled substance if it is manufactured, obtained, stored, dispensed, possessed, grown, or disposed of in compliance with [the PHC] and as authorized by federal authority." MCL 333.7212(2).

Narcotic drugs. Statutory language describing offenses involving schedule 1 substances sometimes limits the substances included to narcotic drugs. See, e.g., MCL 333.7401(2)(a). In general, opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate is classified as a narcotic drug, whether the drug is produced by natural extraction, chemical synthesis, or a combination of extraction and synthesis. MCL 333.7107(a). In addition, "[a]ny salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in [MCL 333.7107(a)], but not including the isoquinoline alkaloids of opium[,]" is classified as a narcotic drug, whether the drug is produced by natural extraction, chemical synthesis, or a combination of extraction and synthesis. MCL 333.7107(b). Narcotic drugs in schedule 1 are listed in MCL 333.7212(1)(a)-(b).

2. Schedule 2

"The administrator shall place a substance in schedule 2 if it finds all of the following:

> (a) The substance has high potential for abuse.
>
> (b) The substance has currently accepted medical use in treatment in the United States, or currently accepted medical use with severe restrictions.
>
> (c) The abuse of the substance may lead to severe psychic or physical dependence." MCL 333.7213.

Controlled substances classified in schedule 2 are listed in their entirety in MCL 333.7214(a)-(f). Examples of schedule 2 substances include opium and opiate and their derivatives (e.g., codeine, morphine, methadone, hydrocodone, and oxycodone), coca leaves and derivatives (cocaine and cocaine-related substances), amphetamines, any substance containing methamphetamine, and central nervous system depressants (e.g., methaqualone and secobarbital).[3]

Narcotic drugs. Statutory language describing offenses involving schedule 2 substances sometimes limits the substances included to narcotic drugs. See, e.g., MCL

[3] Marijuana is regulated as a schedule 2 substance "only for the purpose of treating a debilitating medical condition as that term is defined in [MCL 333.26423(b)], and as authorized under [the PHC]." MCL 333.7214(e). Under MCL 333.7212(2), "[m]arihuana, including pharmaceutical-grade cannabis, is a schedule 2 controlled substance if it is manufactured, obtained, stored, dispensed, possessed, grown, or disposed of in compliance with [the PHC] and *as authorized by federal authority*." (Emphasis added.) To date, federal authority still classifies marijuana as a schedule 1 controlled substance. See 21 USC 812(c).

333.7401(2)(a). In general, opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate is classified as a narcotic drug, whether the drug is produced by natural extraction, chemical synthesis, or a combination of extraction and synthesis. MCL 333.7107(a). In addition, "[a]ny salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in [MCL 333.7107(a)], but not including the isoquinoline alkaloids of opium[,]" is classified as a narcotic drug, whether the drug is produced by natural extraction, chemical synthesis, or a combination of extraction and synthesis. MCL 333.7107(b). Narcotic drugs in schedule 2 are found in MCL 333.7214(a)(*i*)-(*ii*), and MCL 333.7214(b).

3. Schedule 3

"The administrator shall place a substance in schedule 3 if it finds all of the following:

> (a) The substance has a potential for abuse less than the substances listed in schedules 1 and 2.
>
> (b) The substance has currently accepted medical use in treatment in the United States.
>
> (c) Abuse of the substance may lead to moderate or low physical dependence or high psychological dependence." MCL 333.7215.

Controlled substances classified in schedule 3 are listed in their entirety in MCL 333.7216(1)(a)-(h). Examples of schedule 3 substances include certain stimulants and depressants, and materials, compounds, mixtures, or preparations containing limited quantities of certain listed narcotic drugs. Precise amounts for the specific substances are described in MCL 333.7216(1)(g)(*i*)-(*viii*).

4. Schedule 4

"The administrator shall place a substance in schedule 4 if it finds all of the following:

> (a) The substance has a low potential for abuse relative to substances in schedule 3.
>
> (b) The substance has currently accepted medical use in treatment in the United States.
>
> (c) Abuse of the substance may lead to limited physical dependence or psychological dependence

> relative to the substances in schedule 3." MCL 333.7217.

Controlled substances classified in schedule 4 are listed in their entirety in MCL 333.7218(1)(a)-(c). Examples of schedule 4 substances include barbital (and other substances having a depressant effect on the central nervous system), fenfluramine, diethylpropion, and cathine.

Further, "Zolpidem is a sedative used to treat insomnia that is sold under the brand name Ambien[,]" and "is classified as a schedule-4 controlled substance pursuant to Mich Admin Code[,] R 338.3123(1)."[4] *Bloomfield Twp v Kane*, 302 Mich App 170, 173, 183-184 (2013) (noting that the PHC "appropriately delegates classification of additional drugs through the use of administrative rules, [see MCL 333.7201,] and administrative rules have the force and effect of law[]").

5. Schedule 5

"The administrator shall place a substance in schedule 5 if it finds all of the following:

> (a) The substance has low potential for abuse relative to the controlled substances listed in schedule 4.
>
> (b) The substance has currently accepted medical use in treatment in the United States.
>
> (c) The substance has limited physical dependence or psychological dependence liability relative to the controlled substances listed in schedule 4 or the incidence of abuse is such that the substance should be dispensed by a practitioner." MCL 333.7219.

Controlled substances classified in schedule 5 are listed in their entirety in MCL 333.7220(1)(a)-(c). Examples of schedule 5 substances include loperamide, substances containing limited quantities of a narcotic drug and at least one non-narcotic drug with medicinal value so that the combination of the narcotic and non-narcotic drug results in a substance having valuable medicinal qualities other than the qualities of the narcotic drug itself, and specific forms of ephedrine and ephedrine-related substances.

[4] Currently, Zolpidem is classified as a schedule 4 substance in Mich Admin Code, R 338.3123(1)(hhh).

6. Substances Excluded From Schedules

Specific substances are explicitly excluded from the controlled substances schedules:

- "A nonnarcotic substance that under the federal food, drug and cosmetic act may be lawfully dispensed without a prescription is excluded from all schedules pursuant to [MCL 333.7208(2)]." MCL 333.7227(1).

- "A substance that contains 1 or more controlled substances in a proportion or concentration to vitiate the potential for abuse is excluded." MCL 333.7227(1).

However, there is an exception to the exclusion. "Substances included in schedule 5 under [MCL 333.7220(1)(c)] are not excluded under [MCL 333.7227(1)]." MCL 333.7227(2).

"An excluded substance is a deleterious drug and may be manufactured, distributed, or dispensed only by a person who is registered to manufacture, distribute, or dispense a controlled substance under [MCL 333.7208(2)]." MCL 333.7227(3).

"A compound, mixture, or preparation containing a depressant or stimulant substance or of similar quantitative composition shown in federal regulations as an excepted compound or which is the same except that it contains a lesser quantity of a controlled substance or other substances which do not have a stimulant, depressant, or hallucinogenic effect, and which is restricted by law to dispensing on prescription is excepted from [schedules 1 to 5]. Compliance with federal law respecting an excepted compound is considered compliance with this section." MCL 333.7229. See Section 2.2(C) for a discussion on the meaning of the term *mixture*.

C. Part 73—Licensed Manufacture and Distribution of Controlled Substances

Part 73 gives the administrator the power to promulgate rules relating to the licensure and control of the manufacture, distribution, and prescription of controlled substances. MCL 333.7301. Additionally, it sets forth requirements for the labeling and identification of controlled substances. MCL 333.7302; MCL 333.7302a. In regard to licensure itself, it sets forth the circumstances under which a license is required, the privileges associated with licensure, the recordkeeping requirements associated with licensure, and exemptions from licensure. MCL 333.7303; MCL 333.7303a; MCL 333.7304. Further, it provides details regarding

disciplinary actions and factors to consider when determining whether license revocation or denial is appropriate as well as procedures for reinstatement of licensure. MCL 333.7311; MCL 333.7314; MCL 333.7315. Part 73 also addresses monitoring; it provides for the electronic monitoring of schedule 2, 3, 4, and 5 controlled substances that are dispensed and requires the submission of information upon the sale of ephedrine or pseudoephedrine. MCL 333.7333a; MCL 333.7340a. Finally, Part 73 criminalizes certain behavior associated with the distribution of controlled substances. MCL 333.7339; MCL 333.7340; MCL 333.7340a; MCL 333.7340c. These licensee and practitioner violations are discussed in Chapter 4.

D. Part 74—Criminal Offenses and Penalties

With the exception of the offenses found in Part 73, (MCL 333.7339; MCL 333.7340; MCL 333.7340a; MCL 333.7340c), all criminal offenses involving controlled substances and the corresponding penalties are contained in Part 74. Chapters 2 and 3 discuss in detail most of the criminal offenses appearing in Part 74. Licensee and practitioner violations are discussed in Chapter 4.

E. Part 75—Provisions for Enforcement and Administration

Part 75 governs the execution of administrative inspections under Article 7 of the PHC and describes the procedure for obtaining an administrative inspection warrant, the scope of administrative inspections, and the authority of agents conducting inspections. See MCL 333.7502 to MCL 333.7515. It also authorizes warrantless arrests in cases where a law enforcement officer has probable cause to believe an individual has violated Article 7 of the PHC, if the violation is punishable by more than one year of imprisonment. MCL 333.7501. Part 75 also addresses the seizure, storage, and disposition of property subject to forfeiture, which is discussed in detail in Chapter 11. See MCL 333.7521 to MCL 333.7525. It also addresses the destruction of controlled substances seized as evidence and the burden of proof regarding exemptions or exceptions. MCL 333.7527; MCL 333.7531. Finally, it discusses judicial review of the findings of the administrator and the powers and duties of the administrator. MCL 333.7533 to MCL 333.7545.

1.3 Jurisdiction

MCL 762.2 sets forth the circumstances under which a person may be prosecuted for a criminal offense in Michigan. Michigan "'has statutory territorial jurisdiction over any crime where any act constituting an

element of the crime is committed within Michigan even if there is no indication that the accused actually intended the detrimental effects of the offense to be felt in this state.'" *People v Aspy*, 292 Mich App 36, 42 (2011), quoting *People v Gayheart*, 285 Mich App 202, 209-210 (2009) (interpreting MCL 762.2).[5]

Further, "state courts in Michigan have jurisdiction over a criminal prosecution in which a defendant is a non-Indian, the offense is committed on Indian lands or in Indian country, and the offense is either victimless or the victim is not an Indian." *People v Collins (Stormy)*, 298 Mich App 166, 177 (2012) (remanding for reinstatement of delivery and possession with intent to deliver charges against the defendants, who were arrested after the alleged offenses occurred inside an Indian casino).

1.4 Major Controlled Substance Offenses

Certain offenses identified in the Code of Criminal Procedure as major controlled substance offenses are subject to specific procedural limitations and sentencing requirements not applicable to other controlled substance offenses. Sentencing issues unique to major controlled substance offenses are discussed in Chapter 6.

Major controlled substance offense is defined by MCL 761.2, as "either or both" of the following offenses:

- A violation of MCL 333.7401(2)(a), which criminalizes the manufacture, creation, delivery, or possession with the intent to manufacture, create or deliver a controlled substance classified

[5] MCL 762.2 provides:

"(1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist:

(a) He or she commits a criminal offense wholly or partly within this state.

(b) His or her conduct constitutes an attempt to commit a criminal offense within this state.

(c) His or her conduct constitutes a conspiracy to commit a criminal offense within this state and an act in furtherance of the conspiracy is committed within this state by the offender, or at his or her instigation, or by another member of the conspiracy.

(d) A victim of the offense or an employee or agent of a governmental unit posing as a victim resides in this state or is located in this state at the time the criminal offense is committed.

(e) The criminal offense produces substantial and detrimental effects within this state.

(2) A criminal offense is considered under subsection (1) to be committed partly within this state if any of the following apply:

(a) An act constituting an element of the criminal offense is committed within this state.

(b) The result or consequences of an act constituting an element of the criminal offense occur within this state.

(c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed."

in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine-related substances). MCL 761.2(a).

- A violation of MCL 333.7403(2)(a)(*i*)-(*iv*), which criminalizes the knowing or intentional possession of a controlled substance, a controlled substance analogue, or a prescription form involving a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine-related substances) and is in an amount of 25 grams or more of any mixture containing the substance. MCL 761.2(b).

- Conspiracy to commit MCL 333.7401(2)(a) or MCL 333.7403(2)(a)(*i*)-(*iv*). MCL 761.2(c).

A. Lesser Included Major Controlled Substance Offenses

"Upon an indictment for an offense specified in [MCL 333.7401(2)(a)(*i*) or MCL 333.7401(2)(a)(*ii*) or MCL 333.7403(2)(a)(*i*) or MCL 333.7403(2)(a)(*ii*)], or conspiracy to commit 1 or more of these offenses, the jury, or judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment but may find the accused guilty of a degree of that offense inferior to that charged in the indictment only if the lesser included offense is a major controlled substance offense. A jury shall not be instructed as to other lesser included offenses involving the same controlled substance nor as to an attempt to commit either a major controlled substance offense or a lesser included offense involving the same controlled substance. The jury shall be instructed to return a verdict of not guilty of an offense involving the controlled substance at issue if it finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance. A judge in a trial without a jury shall find the defendant not guilty of an offense involving the controlled substance at issue if the judge finds that the evidence does not establish the defendant's guilt as to the commission of a major controlled substance offense involving that controlled substance." MCL 768.32(2).

In other words, a defendant charged with violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*) may only be convicted on the basis of that charge or on the lesser offenses of MCL 333.7401(2)(a)(*iii*) or (*iv*) or MCL 333.7403(2)(a)(*iii*) or (*iv*).

B. Procedural Issues Involving Major Controlled Substance Offenses

Although Article 7 of the PHC does not refer to major controlled substance offenses specifically,[6] MCL 333.7415 sets forth specific procedures applicable to offenses that are defined by the Code of Criminal Procedure as major controlled substance offenses.

1. Limitations on Reduction of Charge

If a magistrate determines after a preliminary examination that there is probable cause for charging a defendant with violating or conspiring to violate MCL 333.7401(2)(a)(*i*)-(*ii*) or MCL 333.7403(2)(a)(*i*)-(*ii*), the prosecutor cannot reduce the charge against the defendant where the defendant was arraigned on a warrant. MCL 333.7415(1)-(2).

2. Dismissal of Charge

Any dismissal must be with prejudice after a defendant is arraigned on a warrant or an indictment or information for violating or conspiring to violate MCL 333.7401(2)(a)(*i*)-(*ii*) or MCL 333.7403(2)(a)(*i*)-(*ii*). MCL 333.7415(1)-(2).

3. Pleas

After a defendant is arraigned on an indictment or information for violating or conspiring to violate MCL 333.7401(2)(a)(*i*)-(*ii*) or MCL 333.7403(2)(a)(*i*)-(*ii*), the court cannot "accept a plea of guilty, guilty but mentally ill, or nolo contendere unless, with the consent of the prosecuting attorney on the record," the defendant pleads to at least one of the following felonies:

- MCL 333.7401(2)(a)(*i*), MCL 333.7401(2)(a)(*ii*), MCL 333.7401(2)(a)(*iii*), or MCL 333.7401(2)(a)(*iv*);
- MCL 333.7403(2)(a)(*i*), MCL 333.7403(2)(a)(*ii*), MCL 333.7403(2)(a)(*iii*), or MCL 333.7403(2)(a)(*iv*);
- or conspiracy to violate one of the above-listed felonies. MCL 333.7415(2)(a)-(c).

[6] Major controlled substances are defined and referenced in the Code of Criminal Procedure, MCL 760.1 *et seq.*

1.5 Court-Appointed Foreign Language Interpreter

A party or witness with limited English proficiency is entitled to a court-appointed foreign language interpreter if the interpreter's "services are necessary for the person to meaningfully participate in the case or court proceeding[.]" MCR 1.111(B)(1).[7] A person financially able to pay for the interpretation costs may be ordered to reimburse the court for those costs. MCR 1.111(F)(5).

Note that the interpreter's statements may implicate Confrontation Clause concerns. See *People v Jackson (Andre)*, 292 Mich App 583 (2011) (addressing the defendant's confrontation concerns through analysis of the "language conduit" rule). See also the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 1, for more information on foreign language interpreters, including the language conduit rule.

1.6 The Methamphetamine Abuse Reporting Act

The Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, requires the department to notify the National Association of Drug Diversion Investigators (NADDI) of convictions when the department is notified by a court[8] that a conviction is for a methamphetamine-related offense. A methamphetamine-related offense is defined to include any violation or attempted violation of Article 7 of the PHC that involves methamphetamine, a violation or attempted violation of MCL 333.17766c or MCL 333.17766f, or a conspiracy to commit any of the aforementioned offenses. MCL 28.122(b).

In its notification, the department must include: (1) the individual's full name; (2) the individual's date of birth; (3) if known, the individual's driver license number or state personal identification card number; (4) a statement that the individual has been convicted of a methamphetamine-related offense or a statutory citation to the violation; and (5) the date of conviction. MCL 28.123. "The information provided to NADDI under [MCL 28.123[9]] shall be for the purpose of generating a stop-sale alert through NPLEx for individuals who have been convicted of methamphetamine-related offenses." MCL 28.124(1). "Except as provided in [MCL 28.124(2)], the stop-sale alert applies until the

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

[8] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

[9] The statute itself says "under this section" in MCL 28.124(1), but it is clear from context that the Legislature is referring to the information provided pursuant to MCL 28.123.

expiration of 10 years after the individual is convicted of the methamphetamine-related offense." MCL 28.124(1). "The stop-sale alert applies until the expiration of 5 years after the individual is convicted of violating [MCL 333.7340c(3)]."[10] MCL 28.124(2). A statement that the stop-sale alert was generated because of a methamphetamine-related conviction may be provided on NPLEx, and the individual to whom the stop order applies may contact the department if he or she believes the information is erroneous. MCL 28.125.

The department must notify NADDI if it corrects or updates any conviction information that was reported to NADDI or if it determines that a reported conviction has been set aside or otherwise expunged. MCL 28.126(1)(a)-(b). "NADDI shall promptly correct or update information in, or remove information from, NPLEx upon receiving notification by the department under [MCL 28.126(1)]." MCL 28.126(2).

"The department of state police and NADDI are immune from civil liability for compiling, maintaining, or reporting methamphetamine-related offense information under [the Methamphetamine Abuse Reporting Act]." MCL 28.127. A person who sells ephedrine or pseudoephedrine at retail may rely on information provided by the department to NADDI for enforcing a stop-sale alert, and such person is generally "immune from civil liability for the reliance upon and use of that information under [the Methamphetamine Abuse Reporting Act]." MCL 28.128(1). However, "[a] person shall not intentionally disclose to any person any information that he or she knows was provided under [the Methamphetamine Abuse Reporting Act], except as authorized under [the Methamphetamine Abuse Reporting Act]." MCL 28.128(2). Information provided under the Methamphetamine Abuse Reporting Act is not subject to FOIA disclosure. *Id.* "A person who discloses information in violation of [MCL 28.128(2)] is guilty of a misdemeanor punishable by imprisonment of not more than 90 days or a fine of not more than $500.00, or both." MCL 28.128(3). He or she may also be subject to civil liability. See MCL 28.128(1).

[10] MCL 333.7340c(3) makes it a misdemeanor to attempt to solicit another person to purchase or otherwise obtain ephedrine or pseudoephedrine to manufacture methamphetamine. See Section 3.14 for discussion of this offense.

1.7 Mens Rea Standard

Effective December 22, 2015, 2015 PA 250 added MCL 8.9 to provide a default mens rea standard applicable to certain[11] crimes committed on or after January 1, 2016.

MCL 8.9 also codifies when a defendant's intoxication may constitute a defense to a crime. MCL 8.9(6). Intoxication as a defense is discussed in Section 7.8.

For a more detailed discussion of MCL 8.9, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

1.8 Prison Mailbox Rule

Filings by incarcerated individuals are addressed by MCR 1.112, which provides:

> "If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." MCR 1.112.

1.9 Relationship Between the Michigan Regulation and Taxation of Marihuana Act (MRTMA) and Article 7 of the Public health Code

"[T]he MRTMA does not prevent a person accused of possession with intent to deliver between 5 and 45 kilograms of marijuana from being prosecuted under MCL 333.7401(2)(d)(*ii*) [Article 7 of the Public Health Code]." *People v Soto*, ___ Mich App ___, ___ (2024). "MCL 333.7401, § § 1 and 2 of Article 7 of the Public Health Code, provides:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .

[11] As relevant to this benchbook, MCL 8.9 "does not apply to, and shall not be construed to affect, crimes under . . . [t]he [P]ublic [H]ealth [C]ode . . . MCL 333.1101 to [MCL] 333.25211[,] [t]he Michigan [P]enal [C]ode, . . . MCL 750.1 to [MCL] 750.568[, or] Chapter 752 of the Michigan Compiled Laws." MCL 8.9(7)(b); MCL 8.9(7)(d); MCL 8.9(7)(e). Crimes affected by MCL 8.9 are discussed in Chapter 5.

> (2) A person who violates this section as to:
>
> * * *
>
> (d) Marihuana [or] a mixture containing marihuana . . . is guilty of a felony punishable as follows:
>
> * * *
>
> (*ii*) If the amount is 5 kilograms or more but less than 45 kilograms, or 20 plants or more but fewer than 200 plants, by imprisonment for not more than 7 years or a fine of not more than $500,000, or both." *Soto*, ___ Mich App at ___, quoting MCL 333.7401(2)(d)(*ii*) (quotation marks omitted).

Conversely, "[t]here is no counterpart for defendant's alleged conduct in the MRTMA." *Soto*, ___ Mich App at ___. "Section 4 of the MRTMA sets forth conduct unauthorized by the Act, and provides that all other laws inconsistent with [the] act do not apply to conduct that is permitted by [the] act." *Soto*, ___ Mich App at ___ (quotation marks and some brackets omitted). "Notably, although possession with intent to deliver marijuana is addressed in Subsections (1) and (2) [of Section 15 of the MRTMA], it is absent from the provision penalizing the possession, cultivation, or delivery without remuneration more than twice the amount of marijuana allowed by § 5 as a misdemeanor[.]" *Soto*, ___ Mich App at ___. However, "the conduct underlying defendant's possession-with-intent-to-deliver-marijuana charge expressly implicates Article 7 of the Public Health Code, which . . . penalizes possession with the intent to deliver between 5 and 45 kilograms of marijuana as a felony." *Soto*, ___ Mich App at ___, citing MCL 333.7401(2)(d)(*ii*). Consequently, "the MRTMA does not supersede Article 7 . . . with regard to the felony prosecution of persons who possess with the intent to deliver more than twice the amount of marijuana allowed by MCL 333.27955." *Soto*, ___ Mich App at___.

For a detailed discussion of this issue, see Sections 8.14(E) and 8.15(C).

Chapter 2: Delivery, Distribution, Manufacture, Possession, Sale, and Use Offenses in Article 7 of the Public Health Code

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2.1 Scope Note

This chapter discusses delivery,[12] distribution, manufacture, possession, sale, and use offenses covered in Article 7 of the Public Health Code (PHC), MCL 333.7101 *et seq*.[13] At the outset, this chapter will discuss legal authority regarding general principles applicable to all the offenses discussed in this chapter. Each section of this chapter following the general discussion will focus on a specific offense and will provide the statutory authority and the penalties for commission of that offense. When applicable, each section will also include a list of relevant jury instructions and a discussion of other issues pertinent to the particular offense.

Licensing sanctions under the Michigan Vehicle Code, MCL 257.1 *et seq.*, are discussed in detail in the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 1. This discussion includes the sanctions applicable to controlled substance-related operating convictions under MCL 257.625. An SCAO table entitled, *Reporting Circuit Court Felony Convictions to the Department of State*, contains a detailed list of offenses and their abstracting requirements.

See the Michigan Judicial Institute's table for sentencing information about the offenses covered in this chapter.

2.2 Common Issues Arising in Controlled Substances Cases

The terms delivery, manufacture, *mixture*, and *possession* have been interpreted and applied by the courts. While each term has not been considered in the context of every offense discussed in this chapter, it is reasonable to apply the cases discussing these terms in a particular context broadly to all offenses in Article 7 of the PHC because Article 7 commonly defines *manufacture* and *delivery*. See MCL 333.7101 (except for definitions set forth by MCL 333.7341, words and phrases defined in MCL 333.7103 to MCL 333.7109 apply to all of Article 7 of the PHC); MCL 333.7105(1) (defining *delivery*); MCL 333.7106(3) (defining *manufacture*); MCL 333.7341(1)(c) (also defining *manufacture*, but providing a very similar definition to the definition set forth by MCL 333.7106). Moreover, *possession* and *mixture* are not statutorily defined and the interpretations of these terms in binding caselaw are broadly applicable.

---

[12]Note that the offense of delivery of a controlled substance causing death, MCL 750.317a, is codified in the Michigan Penal Code and is discussed in Section 5.4.

[13]MCL 333.7101 *et seq*. refers to the beginning of Article 7. The beginning of the entire Public Health Code can be found at MCL 333.1101 *et seq.*

A. Delivery

1. Transfer

MCL 333.7105(1) defines *deliver* or *delivery* in relevant part as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance[.]" The term *transfer* "is the element which distinguishes delivery from possession." *People v Schultz*, 246 Mich App 695, 703 (2001) (quotation marks and citation omitted). However, *transfer* is not defined by statute. *Id.* "Dictionary definitions of 'transfer,' both as a noun and as a verb, seem to broadly contemplate any conveyance of something from one person to another." *Id.* Thus, the term *transfer* "plainly and unambiguously includes sharing of controlled substances in social situations." *Id.* at 704 (quotation marks and citation omitted).

2. Examples of Delivery

- Injection of a previously acquired substance into another person constitutes delivery of a controlled substance for purposes of MCL 333.7105(1). *Schultz*, 246 Mich App at 709. In *Schultz*, the defendant's injection of heroin into the victim constituted delivery because there was sufficient evidence that the defendant obtained the heroin without assistance or participation from the victim. *Id.* at 707.

- The use of cocaine by a pregnant woman 13 hours before giving birth to a child does not constitute delivery of a controlled substance. *People v Hardy*, 188 Mich App 305, 310 (1991). The Court explained that a pregnant woman's use of cocaine, which might result in the postpartum transfer of cocaine metabolites to her infant through the umbilical cord, is not "the type of conduct that the Legislature intended to be prosecuted" under the delivery statute. *Id*.

3. Constructive Delivery

"Constructive delivery" of a controlled substance occurs "when the defendant directs another person to convey the controlled substance under the defendant's direct or indirect control to a third person or entity." *People v Plunkett (Ronald)*, 281 Mich App 721, 728-729 (2008), rev'd on other grounds 485 Mich 50 (2010)[14] (holding that even where the defendant provided transportation and money to obtain the drugs, he did

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

not constructively deliver the drugs to a third party because the drugs were not under the defendant's control and the defendant did not direct the drug dealer to transfer the drugs to the third party). See *Plunkett (Ronald)*, 485 Mich at 61 n 24 (noting that the Michigan Supreme Court "need not decide whether the Court of Appeals correctly ruled on [the constructive delivery] theory" where bindover was supported under an aiding and abetting theory).

4. General Elements of a Delivery Offense

The general elements of a delivery offense are:

> (1) the defendant's delivery;
>
> (2) of a specific quantity;
>
> (3) of a controlled substance or mixture containing a controlled substance;[15]
>
> (4) with knowledge that the defendant was delivering a specific controlled substance. See *People v Collins (Jesse)*, 298 Mich App 458, 462 (2012); *People v Williams (Robert)*, 294 Mich App 461, 470 (2011).

M Crim JI 12.2, which applies to cases where the defendant is charged with a violation of MCL 333.7401, sets forth similar elements:

> (1) the defendant delivered a controlled substance;
>
> (2) the defendant knew that he or she delivered a controlled substance; and
>
> (3) the controlled substance that the defendant delivered [was in a mixture that][16] weighed a specified amount.

A defendant claiming an exception or exemption under Article 7 of the PHC "bears both the burden of production and the burden of persuasion and must demonstrate by a

[15]The prosecution is not required to prove that the defendant intended to deliver any *particular* controlled substance, only that the defendant intended to deliver *some* controlled substance. *McFadden v United States*, 576 US 186, 194-195 (2015) (interpreting the knowledge requirement in 21 USC 841(a)(1), which uses substantially similar language to MCL 333.7401 (controlled substances) and MCL 333.7402 (counterfeit substances and controlled substance analogues)).

[16]"This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(*iv*)." M Crim JI 12.2, Use Note 2.

preponderance of the evidence that he or she is legally authorized to deliver a controlled substance."[17] *People v Robar*, 321 Mich App 106, 143 (2017). Authorization or lack thereof is not an element of a delivery offense; rather, it refers to an exemption from the crime. *Id.* at 132, 133.

Both caselaw and the jury instruction include knowledge as an element. However, in *People v Delgado*, 404 Mich 76, 85-86 (1978), the Court held that "neither the case law nor the statute mandates an instruction to the jury that knowledge is an essential element of the crime, [but] better practice suggests that the instruction be given in 'delivery' cases to guarantee fundamental criminal *mens rea* requirements[;]" however, the trial court's failure to instruct the jury that "knowledge that the substance delivered was heroin is an element of the offense of delivery of a controlled substance" did not warrant reversal of the defendant's conviction because he "did not argue that . . . he lacked knowledge . . . or that the people failed to prove his knowledge[.]"

Delivery is a general intent crime. *People v Mass*, 464 Mich 615, 627 (2001); *People v Maleski*, 220 Mich App 518, 522 (1996). Precise knowledge of the amount of a substance being delivered is not required for a conviction because knowledge of the amount is not an element of the crime. *Mass*, 464 Mich at 626. However, the quantity of the controlled substance delivered is an element of the crime of delivery that the prosecution must prove. *Id.* (holding that "the amount and *nature* of controlled substances are elements of a delivery offense under MCL 333.7401.") See also M Crim JI 12.2 (requiring an instruction regarding the weight of the controlled substance).

5. Aggregation of Separate Delivery Amounts Not Permitted

A defendant's several deliveries on different occasions may not be aggregated to support a conviction for delivering a higher amount of the controlled substance than the amount that was present in any single delivery. *People v Collins (Jesse)*, 298 Mich App 458, 463 (2012). Aggregation is not permitted by the statute because the definition of *delivery* provided in MCL 333.7105(1) "does not use a plural form of 'transfer,' indicating that delivery is a single transfer, not multiple transfers over a

[17] *People v Robar*, 321 Mich App 106, 115-117 (2017) addressed M Crim JI 12.3 (unlawful possession of a controlled substance with intent to deliver); however, that instruction contains language similar to M Crim JI 12.2.

period of time." *Collins (Jesse)*, 298 Mich App at 463 (holding that the "defendant's various deliveries of 0.5 to 28 grams of heroin on separate occasions [could] not be aggregated to support a conviction for delivering 50 grams or more, but less than 450 grams, of heroin under MCL 333.7401(2)(a)(*iii*)[]"). Moreover, MCL 333.7401 "imposes more severe punishments on those who manufacture, create, deliver, or possess greater amounts of a controlled substance[;]" thus, "allowing the prosecution to aggregate multiple small deliveries" would "undercut" the legislative system. *Collins (Jesse)*, 298 Mich App at 463. "Finally, caselaw does not support an interpretation of MCL 333.7401 that would allow the prosecution to aggregate separate deliveries." *Collins (Jesse)*, 298 Mich App at 463.

6. Delivery by a Licensed Physician or Other Practitioner

Article 7 of the PHC only imposes penalties on the unauthorized delivery of controlled substances. See MCL 333.7401(1) (prohibiting manufacture, creation, delivery, and possession "except as authorized by [Article 7 of the PHC]" and noting that appropriately licensed practitioners "shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.") Thus, a physician or other practitioner who prescribes, dispenses, or administers a controlled substance delivers the controlled substance in violation of MCL 333.7401(1) if the physician or practitioner is not carrying out a legitimate, professionally recognized therapeutic or scientific purpose within the scope of his or her practice. See *id.; People v Alford*, 405 Mich 570, 589 (1979).[18] However, prescribing a controlled substance without first conducting the necessary examination and procedures did not constitute delivery in violation of MCL 333.7401(1) where there was no evidence that the defendants acted in bad faith or that they intended to prescribe or dispense for nonmedical purposes. *People v Orzame*, 224 Mich App 551, 565-567 (1997).

[18] *Alford* analyzed a former version of MCL 333.7401(1); however, the relevant portion of the old version of the statute analyzed in *Alford* is substantially the same as the current version.

B. Manufacture

1. Examples of Manufacture

- The conversion of powder cocaine into crack cocaine by heating it with water and other chemicals constitutes *manufacture*, which includes the conversion or processing of a controlled substance by chemical synthesis. *People v Hunter*, 201 Mich App 671, 676-677 (1993).

- There was sufficient evidence to establish that the substance manufactured was methamphetamine where "[t]he liquid inside the reaction vessel contained a mixture of pseudoephedrine and methamphetamine." *People v Meshell*, 265 Mich App 616, 619-620 (2005).

- The trial court properly denied the defendant's motion to dismiss a manufacturing charge where the defendant "was using a process called butane extraction or open blasting to distill tetrahydrocannabinol (THC) from marijuana plant material." *People v Korkigian*, 334 Mich App 481, 484 (2020). While this process involves only marijuana materials and does not involve any chemical reaction, manufacture of a controlled substance can also occur directly or indirectly by extraction from substances of natural original and the evidence supported the conclusion that the process "amounted to processing or conversion" because "open blasting to distill concentrated THC from raw plant material involves a significantly higher degree of activity than rolling a marijuana cigarette or baking brownies." *Id.* at 494, 499-500 (also rejecting defendant's argument that the personal use exception applied) (quotation marks and citations omitted).

2. Personal Use Exception

The statutory definition of manufacture, "does not include . . . [t]he preparation or compounding of a controlled substance by an individual for his or her own use." MCL 333.7106(3)(a). "[T]here is no similar personal use exception for production, propagation, conversion, or processing." *People v Baham*, 321 Mich App 228, 239-240 (2017) (noting "[t]he Legislature has thus drawn a clear distinction between 'preparing or compounding' as compared to the other methods of manufacturing identified in § 7106(3)").[19] See also *People v Korkigian*, 334 Mich App 481, 499 (2020) ("To qualify as

'preparation' for personal use," the "acts must diverge from those 'manufacturing' efforts specifically prohibited by the statute: production, propagation, conversion, and processing."). "'[T]he plain intent of the statutory personal use exception is to avoid imposing felony liability on individuals who, already in possession of a controlled substance, make it ready for their own use or combine it with other ingredients for use.'" *Baham*, 321 Mich App at 240, quoting *People v Pearson*, 157 Mich App 68, 71 (1987).

Caselaw finding the personal-use exception inapplicable. "[T]he personal-use exception applies only to a controlled substance already in existence, and it does not encompass the creation of a controlled substance." *Baham*, 321 Mich App at 240, citing *Pearson*, 157 Mich App at 71-72. Accordingly, the personal use exception does not apply to growing marijuana. *Pearson*, 157 Mich App at 72. Similarly, "one may not claim the personal-use exception for making or cooking methamphetamine" because it "clearly involves the creation of methamphetamine, meaning that it constitutes production, propagation, conversion, or processing of methamphetamine as opposed to the mere 'preparation or compounding' of existing methamphetamine for personal use." *Baham*, 321 Mich App at 242-243 (holding that "one who knowingly makes or cooks methamphetamine is guilty of manufacturing methamphetamine without regard to whether the methamphetamine will be distributed or used personally"). The personal use exception does not apply to the process of butane extraction (sometimes referred to as open blasting) to distill tetrahydrocannabinol (THC) from marijuana plant material even though that process starts and ends with

[19] "In contrast to preparation and compounding, the other four methods of manufacturing controlled substances—i.e., production, propagation, conversion, and processing—'contemplate a significantly higher degree of activity involving the controlled substance' and thus these manufacturing activities are felonies regardless of 'whether the controlled substance so "manufactured" was for personal use or for distribution.'" *Baham*, 321 Mich App at 241, quoting *People v Pearson*, 157 Mich App 68, 71 (1987) (citation omitted). Although the Court of Appeals "[did] not attempt to provide an exhaustive account of the activities that constitute production, propagation, conversion and processing," it "note[d] that 'production' has been statutorily defined as: 'the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.'" *Id.*, quoting MCL 333.7109(6). "In turn, 'manufacture' means 'to make' from materials." *Baham*, 321 Mich App at 241, quoting *Merriam-Webster's Dictionary* (2014). "In comparison, as commonly understood, (1) 'propagation' involves 'the act or action of propagating,' such as to 'increase (as of a kind of organism) in numbers,' (2) 'conversion' is 'the act of converting,' and (3) 'processing' refers to 'a series of actions or operations conducing to an end' or 'a continuous operation or treatment esp. in manufacture.'" *Baham*, 321 Mich App at 241-242, quoting *Merriam-Webster's Dictionary* (2014). "From these various definitions, courts have recognized that production, propagation, conversion and processing encompass 'planting, growing, cultivating or harvesting of a controlled substance,' *creating* a controlled substance 'by any synthetic process or mixture of processes,' as well as the alteration or extraction of a controlled substance, such as 'taking a controlled substance and, by any process or conversion, changing the form of the controlled substance or concentrating it.'" *Baham*, 321 Mich App at 242, quoting *State v Childers*, 41 NC App 729, 732 (1979) and citing *People v Hunter*, 201 Mich App 671, 676-677 (1993).

marijuana materials because the process goes beyond mere preparation or compounding. *Korkigian*, 334 Mich App at 496-500. A butane extraction process "does not come within the meaning of either 'compounding' or 'preparation,'" and "is more appropriately characterized as 'production' or 'processing'" where the extraction process involves "a volatile chemical (butane), combined with filtration, followed by evaporation of the solvent, dissolving of the product in a polar solvent, additional filtration, and heating the resulting material under a vacuum." *Id.* at 497, 499-500. Accordingly, while the process is technically a preparation of marijuana for personal use, it requires processing "in several different ways to arrive at an end product," and "the 'preparation' aspect of the personal-use exception would swallow the prohibited conduct described in the rule" if any activity that technically involved preparation fell within the scope of the exception. *Id.* at 500.

Personal use is an affirmative defense. "[T]he personal use exception is an affirmative defense to a charge of manufacturing a controlled substance[.]" *Baham*, 321 Mich App at 243-244 (holding that the prosecution has no obligation to negate any exemption or exception, including personal use, and the trial court did not err by accepting the defendant's guilty plea without eliciting evidence that the defendant did not intend to use the methamphetamine for personal use).

C. Mixture

The term "mixture" is not defined by statute. When a word is not defined by statute it must be "construed according to its common and approved usage." *People v Barajas*, 198 Mich App 551, 555 (1993), aff'd 444 Mich 556 (1994).[20] Courts may consult a dictionary to determine the common meaning of a word. *Id.* In light of the dictionary definition of mixture, the *Barajas* Court concluded that a mixture "must be reasonably homogeneous or uniform." *Id.* at 556. The Court explained that the controlled substance and the filler "must be 'mixed' together to form a 'mixture' that is reasonably uniform. A sample from anywhere in the mixture should reasonably approximate in purity a sample taken elsewhere in the mixture." *Id*. at 556. Accordingly, the Court held that the contents of a box did not constitute a mixture where a rock of cocaine was taped to the inside of a box containing baking soda and the baking soda could be poured out in its entirety with the rock of cocaine still remaining in the box. *Id.* at 556. The cocaine and the baking soda

[20]In affirming the decision of the Court of Appeals in *Barajas*, the Supreme Court noted that "the analysis employed by the Court of Appeals is limited strictly to the facts of this case." *People v Barajas*, 444 Mich 556, 557 (1994).

were not "mixed" because they were easily separated, the concentration of cocaine was "not at all reasonably uniform or homogeneous[,]" and samples from different parts of the box would not be similar in purity. *Id.* at 556-557.

Similarly, the contents of a container did not constitute a mixture where cocaine and water were in the container, and the cocaine was an insoluble solid material easily separated from the water. *People v Hunter*, 201 Mich App 671, 675 (1993). The *Hunter* Court held that the jar did not contain a mixture, but rather, contained two separate items, water and particles of cocaine, because the cocaine and water were easily separated and the "concentration of cocaine was not reasonably uniform or homogeneous." *Id.*

D. Possession

1. What Constitutes Possession

The term *possession* is not defined by statute; however, it has been discussed in caselaw and is defined in M Crim JI 12.7 for purposes of instructing the jury. "The defendant need not own or have actual physical possession of the substance to be found guilty of possession; constructive possession is sufficient." *People v Cohen*, 294 Mich App 70, 76 (2011). "Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance." *Id*. at 520. "Possession is a term that signifies dominion or right of control over the drug with knowledge of its presence and character." *People v Norfleet*, 317 Mich App 649, 659 (2016) (quotation marks and citation omitted).

See also M Crim JI 12.7, which provides:

"Possession does not necessarily mean ownership. Possession means that either:

> (1) the person has actual physical control of the [substance / thing], as I do with the pen I'm now holding, or
>
> (2) the person has the right to control the [substance / thing], even though it is in a different room or place.

Possession may be sole, where one person alone possesses the [substance / thing].

Possession may be joint, where two or more people each share possession.

It is not enough if the defendant merely knew about the [*state substance or thing*]; the defendant possessed the [*state substance or thing*] only if [he / she] had control of it or the right to control it, either alone or together with someone else."

2. Constructive Possession

To establish constructive possession, "'the ultimate question is whether, viewing the evidence in a light most favorable to the government, the evidence establishes a sufficient connection between the defendant and the contraband to support the inference that the defendant exercised a dominion and control over the substance.'" *People v Wolfe*, 440 Mich 508, 521 (1992), quoting *United States v Disla*, 805 F2d 1340, 1350 (CA 9, 1986) "[A] person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe*, 440 Mich at 520 (citations omitted). "Constructive possession of an illegal substance requires proof that the defendant knew of its character." *People v McGhee*, 268 Mich App 600, 610 (2005).

Constructive possession was found in the following circumstances:

- There was sufficient evidence to support the defendant's conviction of possession with the intent to deliver less than 50 grams of heroin where there was no evidence that the defendant actually possessed the heroin recovered in a motel room, but where testimony established that the substance recovered from the motel room was heroin and "that defendant had control over it at the time because he was the one who directed [the people renting the motel room] to deliver the heroin to its intended recipients." *Norfleet*, 317 Mich App at 659-660. This testimony was corroborated by another witness "who testified that defendant was the one whom she would call to request the heroin from and that [the people renting the motel room] simply delivered it." *Id.* at 660 (holding "[t]here was clear evidence of a sufficient nexus between defendant and the contraband for the jury to conclude that, under the totality of the circumstances, defendant had constructive possession of the heroin[]").

- There was sufficient evidence for a rational trier of fact to conclude that the defendant constructively possessed drugs found on a night stand and in a closet where the evidence supported an inference that

the defendant resided at the apartment where the drugs were found. *People v Hardiman*, 466 Mich 417, 422-423 (2002). Specifically, the apartment's mailbox and the nightstand where some of the drugs were discovered contained mail addressed to the defendant, the defendant herself was discovered in the rear parking lot of the building, the heroin was in a dress hanging in the closet, and the record contained no evidence that another woman resided at the apartment. *Id.*

- It was reasonable to infer constructive possession where the defendant paid for drugs to be delivered to him by a person acting as his agent. *People v Konrad*, 449 Mich 263, 273-274 (1995).

- In *Wolfe*, there were "at least three factors" that linked the defendant to the crack cocaine found in the apartment. *Wolfe*, 440 Mich at 522. First, the evidence tended to show that the defendant was in control of the apartment because he invited others to the premises, and the defendant was the only person with a key. *Id.* Second, the defendant fled into a back room when the police entered the apartment and the evidence suggested that the defendant was trying to conceal the crack cocaine. *Id.* Finally, the evidence suggested that sales of cocaine were made from the apartment earlier that day, and that the defendant was involved in the crack sales, the arrangement of meetings, and that he possessed a beeper. *Id.* at 523.

- "Close proximity to contraband in plain view is evidence of possession." *Cohen*, 294 Mich App at 77.

- It was reasonable to infer constructive possession where the defendant had exclusive control or dominion over property on which controlled substances were found. *McGhee*, 268 Mich App at 623. The Court found that the defendant had exclusive control or dominion over the property because discovered on the premises were a recent electric bill for the property in the defendant's name, an insurance document for a car with the property's address and the defendant's name, and the registration for a vehicle in the defendant's name. *Id.* The vehicle itself was found in the garage where the raid took place. *Id.* Further, photographs of the defendant, an insurance application with the address of the property, a note addressed to the defendant, an expired driver's license belonging to the defendant bearing the property's address, and a warranty deed

to the defendant and another person for the property were all discovered on the premises. *Id.*

- It was reasonable to infer constructive possession where the defendant lived with several people in a house and controlled substances were found sitting in plain view in a room containing the defendant's belongings and a bed upon which the defendant was lying when police entered the house. *People v Head*, 211 Mich App 205, 210 (1995).

- Actual possession was found where the defendant was arrested holding a bag containing cocaine, and it was reasonable to infer constructive possession where substantial additional cocaine was found in the vehicle that the defendant was driving at the time of his arrest. *People v Catanzarite*, 211 Mich App 573, 578 (1995).

- It was reasonable to infer constructive possession where police found cocaine, receipts, and personal papers with the defendant's name on them in a drawer in a bedroom to which the defendant and others had access. *People v Richardson*, 139 Mich App 622, 625-626 (1984).

3. Joint Possession

Joint possession occurs "[w]here two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together[.]" *People v Schultz*, 246 Mich App 695, 705 (2001). "Something more than mere association must be shown to establish joint possession. The prosecution must show an additional independent factor linking the defendant with the drugs." *People v Williams (Ronald)*, 188 Mich App 54, 57-58 (1991) (there was sufficient evidence to prove joint possession where the defendant and another man, who had a packet of cocaine on his lap, were discovered in an abandoned home and the defendant was crouching over a can containing packets of cocaine in an apparent attempt to destroy them). See also *Cohen*, 294 Mich App at 77 (cocaine found on drug paraphernalia located on the center console of a car occupied by only the driver and the defendant gave the arresting officers probable cause to believe the driver and the defendant jointly possessed the cocaine where the cocaine was in clear view and in reach of both the driver and the defendant).

2.3 Controlled Substance, Controlled Substance Analogue, or Prescription Form – Possession

A. Statutory Authority

1. Generally

"A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, controlled substance analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by [Article 7 of the PHC]." MCL 333.7403(1).

2. Exemption/Affirmative Defense—Good Samaritan Law

"The following individuals are not in violation of [MCL 333.7403]:

> (a) An individual who seeks medical assistance for himself or herself or who requires medical assistance and is presented for assistance by another individual if he or she is incapacitated because of a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation of [MCL 333.7403] is obtained as a result of the individual's seeking or being presented for medical assistance.
>
> (b) An individual who in good faith attempts to procure medical assistance for another individual or who accompanies another individual who requires medical assistance for a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation of [MCL 333.7403] is obtained as a result of the individual's attempting to procure medical assistance for another individual or as a result of

> the individual's accompanying another individual who requires medical assistance to a health facility or agency." MCL 333.7403(3).[21]

"The exemption from prosecution under [MCL 333.7403(3)] does not prevent the investigation, arrest, charging, or prosecution of an individual for any other violation of the laws of this state or be grounds for suppression of evidence in the prosecution of any other criminal charges." MCL 333.7403(5).

Under MCL 333.7403, "subsection (3)(a) applies to the individual who overdosed on a controlled substance, and subsection (3)(b) applies to a separate individual who seeks medical attention for the individual who overdosed." *People v Meeker (On Remand)*, 340 Mich App 559, 565 (2022).

Burden on defendant. "The burden is on defendant to establish as an affirmative defense that the exemption to a criminal statute provided in the Good Samaritan law [under MCL 333.7403(3)] applies by presenting prima facie evidence of the elements of the defense." *People v Morrison*, 328 Mich App 647, 653 (2019). If the defendant establishes a prima facie case, the issue becomes "a subjective question of fact" for the jury; however, if the defendant fails to present a prima facie case, "the issue is a question of law for the court to decide." *Id.* at 654.

Amount sufficient only for personal use requirement. To determine whether an amount possessed is an "amount sufficient only for personal use" satisfying the statutory exemption under MCL 333.7403(3), "the court must first look at the plain language of the statute"; "[c]onsidering [dictionary] definitions, an 'amount sufficient only for personal use' requires a factual determination of what amount a specific person regularly takes" and "requires a case-by-case application of the language based on each individual defendant's personal-use habits." *Morrison*, 328 Mich App at 652, 654 (remanding for the trial court to determine whether defendant established a prima facie case where the record lacked evidence to determine what amount would be sufficient for personal use because "[t]he prosecution did not put forth any evidence about what 'personal use' typically looks like for

[21] "A health facility or agency shall develop a process for notification of the parent or parents, guardian, or custodian of a minor under the age of 18 who is not emancipated under . . . MCL 722.1 to [MCL] 722.6, and who voluntarily presents himself or herself, or is presented by another individual if he or she is incapacitated, to a health facility or agency for emergency medical treatment as provided in [MCL 333.7403(3)]. A health facility or agency shall not provide notification to a parent or parents, guardian, or custodian under this subsection for nonemergency treatment without obtaining the minor's consent." MCL 333.7403(4).

a Xanax user, and defendant did not put forth any evidence about his drug habits, or his personal Xanax use," and the trial court dismissed the case on policy grounds favoring "saving lives over the criminal prosecution of illegal drug users" rather than on the basis of the statutory requirements).

For information about the treatment of substance use disorders, see Section 10.2.

Meaning of "incapacitated" in MCL 333.7403(3)(a). "[T]he test for immunity is whether the individual was 'incapacitated because of a drug overdose,'" and while "the term 'incapacitated' is not defined in the statute . . . the clear and unambiguous language does not include the 'good faith' perspective of the person seeking help as a determining factor." *Meeker*, 340 Mich App at 567-568 (noting that consideration of a person's good faith is relevant to the analysis under MCL 333.7403(3)(b)). "[T]he plain language of [MCL 333.7403(3)(a)] does not require the individual to be unconscious" in order to be "incapacitated." *Meeker*, 340 Mich App at 570. Further, evidence that the defendant was "impaired by an intoxicant" that "rendered [him] unfit for normal functioning" was sufficient to demonstrate that the "defendant was incapacitated within the plain meaning of the term[.]" *Id.* at 569-570 (the evidence showed that defendant "was conscious and minimally responsive," "could follow simple commands," "was unfocused and stared into space," had a wandering gaze, saw things others did not see, talked to himself, and repeated that he "found it" for no apparent reason).

"[W]hen considering whether or not [a] defendant suffered a drug overdose, the question is whether [their] condition, at the time 911 was called, was such 'that a layperson would reasonably believe to be a drug overdose that requires medical assistance.'" *People v Duha*, ___ Mich App ___, ___ (2023), quoting MCL 333.7403(7)(a) (defining "drug overdose"). Accordingly, a person can be incapacitated for purposes of the Good Samaritan law even if they did not actually consume a controlled substance or if medical treatment is not ultimately needed; the relevant question is whether the caller's conclusion that a person is overdosing is reasonable. *Duha*, ___ Mich App at ___. The focus of MCL 333.7403(3)(a) "is on defendant's condition when the medical help was summoned, not on the ultimate outcome or treatment received." *Duha*, ___ Mich App at ___. Further, "the statute does not require any particular form of assistance or treatment," and "also recognizes that the determination whether to summon help is a judgment that will be made based on the perception of laypersons and not an

after-the-fact determination based on whether or not medical intervention proved necessary." *Id.* at ___. The statute "does not require that the situation ultimately be a medical emergency"; rather, "it requires that the person summoning help reasonably perceived that there was a medical emergency at the time." *Id.* at ___. "Put simply, the focus of MCL 333.7403(3)(a) is on the condition of the defendant when the decision to call 911 was made." *Duha*, ___ Mich App at ___ (holding defendant's circumstances fell within the protections of the statute where he was unresponsive and had a history of drug use at the time his mother called 911 and noting the fact that he eventually woke up was irrelevant to the analysis).

B. Relevant Jury Instructions[22]

- M Crim JI 12.5 addresses the unlawful possession of a controlled substance.
- M Crim JI 12.7 defines possession.

C. Penalties

Violations of MCL 333.7403(1) are categorized by the quantity and/or type of substance involved in the prohibited conduct.

1. Offenses Involving Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances[23]

For purposes of the Code of Criminal Procedure, a violation of or a conspiracy to violate MCL 333.7403(2)(a)(*i*)-(*iv*) is a felony characterized as a major controlled substance offense.[24] MCL 761.2(b). The quantities specified in each provision refer to any mixture containing the prohibited substance. See MCL 333.7403(2)(a)(*i*)-(*iv*).[25]

a. 1,000 Grams or More

A conviction for knowing or intentional possession of 1,000 grams or more of any mixture containing a schedule 1 or 2 narcotic drug or any substance described in MCL

[22]Note that the M Crim JI 12.5 applies to controlled substances and does not specifically reference controlled substance analogues or prescription forms.

[23]Michigan's drug schedules are codified at MCL 333.7212 – MCL 333.7220. See Section 1.2(B) for more information about the drug schedules.

[24]See Section 1.4 for more information about major controlled substance offenses.

[25]See discussion of the meaning of the term *mixture* in Section 2.2(C).

333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- life imprisonment or imprisonment for any term of years; or
- a fine of not more than $1,000,000; or
- both. MCL 333.7403(2)(a)(*i*).

b. 450 Grams or More But Less Than 1,000 Grams

A conviction for knowing or intentional possession of 450 grams or more but less than 1,000 grams of any mixture containing a schedule 1 or 2 narcotic drug or any substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- imprisonment for not more than 30 years; or
- a fine of not more than $500,000; or
- both. MCL 333.7403(2)(a)(*ii*).

c. 50 Grams or More But Less Than 450 Grams

A conviction for knowing or intentional possession of 50 grams or more but less than 450 grams of any mixture containing a schedule 1 or 2 narcotic drug or any substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $250,000; or
- both. MCL 333.7403(2)(a)(*iii*).

d. 25 Grams or More But Less Than 50 Grams

A conviction for knowing or intentional possession of 25 grams or more but less than 50 grams of any mixture containing a schedule 1 or 2 narcotic drug or any substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $25,000; or

- both. MCL 333.7403(2)(a)(*iv*).[26]

e. Less Than 25 Grams

A conviction for knowing or intentional possession of less than 25 grams of any mixture containing a schedule 1 or 2 narcotic drug or any substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $25,000; or
- both. MCL 333.7403(2)(a)(*v*).

2. Offenses Involving Ecstasy/MDMA or Methamphetamine

A conviction for knowing or intentional possession of any substance described in MCL 333.7212(1)(h) (ecstasy/MDMA) or MCL 333.7214(c)(*ii*) (methamphetamine) is a felony punishable by:

- imprisonment for not more than 10 years; or
- a fine of not more than $15,000; or
- both. MCL 333.7403(2)(b)(*i*).

3. Offenses Involving Any Other Schedule 1, 2, 3, or 4 Substance or a Controlled Substance Analogue

A conviction for knowing or intentional possession of any amount of a controlled substance analogue or any schedule 1, 2, 3, or 4 substance for which a penalty is not otherwise prescribed in MCL 333.7403(2)(a), MCL 333.7403(2)(b)(*i*), MCL 333.7403(2)(c), or MCL 333.7403(2)(d) is a felony punishable by:

- imprisonment for not more than two years; or

[26]Before March 1, 2003, the court could also punish the defendant by imposing lifetime probation. This penalty option was deleted by 2002 PA 665. Accordingly, the probation officer for an individual who was sentenced to lifetime probation under MCL 333.7403(2)(a)(*iv*) as it existed before March 1, 2003, and who has served five or more years of his or her probationary period may recommend to that court that it discharge the individual from probation, and the court may grant discharge. MCL 333.7403(6). Alternatively, the individual may petition the court for resentencing under the court rules if he or she provides notice to the prosecutor. *Id.* The individual is permitted to file more than one motion seeking resentencing under this provision. *Id.*

- a fine of not more than $2,000; or
- both. MCL 333.7403(2)(b)(*ii*)

4. Offenses Involving Other Specified Substances and Schedule 5 Substances

A conviction for knowing or intentional possession of lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5 is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $2,000; or
- both. MCL 333.7403(2)(c).

5. Offenses Involving Marijuana or a Substance Listed in MCL 333.7212(1)(d)[27]

A conviction for knowing or intentional possession of any amount of marijuana or a substance listed in MCL 333.7212(1)(d) is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $2,000; or
- both. MCL 333.7403(2)(d).

6. Offenses Involving Prescription Forms

A conviction for knowing or intentional possession of a prescription form is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $1,000; or
- both. MCL 333.7403(2)(e).

[27]The Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, is discussed in Chapter 7.

D. Issues

1. Authorization

Where a defendant argues that he or she was authorized to possess the controlled substance, controlled substance analogue, or prescription form, he or she bears the burden of proving that his or her possession was authorized.[28] MCL 333.7531(1). See also *People v Robar*, 321 Mich App 106, 142 (2017); M Crim JI 12.4a. In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to possess the controlled substance, controlled substance analogue, or prescription form. MCL 333.7531(2). For example, a valid prescription for the substances involved would exempt the defendant from prosecution for possession. *Robar*, 321 Mich App at 133.

2. Right to Privacy

"No constitutional right of privacy exists which encompasses the right to possess and use marijuana." *People v Williams (Ricky)*, 135 Mich App 537, 538 (1984).

3. Sufficiency of the Evidence – Possession of Methamphetamine

There was sufficient evidence for a rational jury to find the defendant guilty of possession of methamphetamine where no actual methamphetamine was recovered by the police but the defendant confessed to manufacturing methamphetamine once, explained how methamphetamine is made, and admitted he had used methamphetamine a week before the police interview. *People v Hartman*, 498 Mich 934, 934 (2015) (reversing the Court of Appeals' judgment for the reasons stated in the Court of Appeals dissenting opinion);[29] see *People v Hartman*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2015 (Docket No. 320032) (BECKERING, P.J., concurring in part and dissenting in part), p 3-4. Defendant's confession was properly admitted because there was sufficient circumstantial evidence to establish the *corpus delicti* of the crime — that methamphetamine existed and was possessed by

[28] For a more detailed analysis of authorization as a defense, see Chapter 7.

[29] "An order of [the Michigan Supreme Court] is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *Defrain v State Farm Mut Ins Co*, 491 Mich 359, 369 (2012) ("By referring to the Court of Appeals dissent, this Court adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own.")

the defendant — where the defendant lived in a bedroom containing a methamphetamine laboratory,[30] a witness testified to observing the defendant manufacture methamphetamine, and pharmacy records indicated that the defendant "purchased several ingredients that are commonly used to manufacture methamphetamine." *Hartman*, unpub op at 2-3.

4. The Methamphetamine Abuse Reporting Act

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[31] that an individual has been convicted of a methamphetamine-related offense. When violation of MCL 333.7403 involves possession of methamphetamine, MCL 333.7403 is a methamphetamine-related offense. MCL 28.122(b)(*i*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

5. Necessarily Included Lesser Offense

Simple possession under MCL 333.7403 can be a necessarily included lesser offense of possession with intent to deliver a controlled substance under MCL 333.7402 where the offenses involve the same amount of the controlled substance; however, "if the offenses involve differently categorized statutory amounts, possession will be treated as a cognate lesser offense." *Robar*, 321 Mich App at 130.

6. Elements of Possession

"[T]he elements of simple possession are: (1) that a defendant possessed a controlled substance; (2) that the defendant knew he or she possessed the controlled substance; and (3) the amount of the controlled substance, if applicable." *Robar*, 321 Mich App at 131, citing M Crim JI 12.3; MCL 333.7403. "[T]he

[30]The bedroom was deemed to be a methamphetamine laboratory because several ingredients and instrumentalities commonly used for manufacturing methamphetamine were discovered in the bedroom, including a pill grinder, lithium batteries, plastic bottles, Coleman fuel, aluminum foil, Drano, fertilizer, coffee filters, plastic tubing, hydrochloric acid, and a package of Sudafed. *People v Hartman*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2015 (Docket No. 320032) (Beckering, P.J., concurring in part and dissenting in part), p 2-3. Additionally, at the time of the search, there was a very strong chemical odor in the air and items recovered from the bedroom ultimately tested positive for chemicals that are produced when making methamphetamine. *Id.* at 3.

[31] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

statutory 'language concerning a prescription or other authorization refers to an exemption rather than an element of the crime.'" *Robar*, 321 Mich App at 132, quoting *People v Pegenau*, 447 Mich 278, 292 (2004).

2.4 Controlled Substance or Controlled Substance Analogue – Use

A. Statutory Authority

1. Generally

"A person shall not use a controlled substance or controlled substance analogue unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by [Article 7 of the PHC]." MCL 333.7404(1).

2. Exceptions

"The following individuals are not in violation of [MCL 333.7404]:

> (a) An individual who seeks medical assistance for himself or herself or who requires medical assistance and is presented for assistance by another individual if he or she is incapacitated because of a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation of [MCL 333.7404] is obtained as a result of the individual's seeking or being presented for medical assistance.
>
> (b) An individual who in good faith attempts to procure medical assistance for another individual or who accompanies another individual who requires medical assistance for a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation of [MCL 333.7404] is obtained as a result

of the individual's attempting to procure medical assistance for another individual or as a result of the individual's accompanying another individual who requires medical assistance to a health facility or agency." MCL 333.7404(3).[32]

"The exemption from prosecution under [MCL 333.7404(3)] does not prevent the investigation, arrest, charging, or prosecution of an individual for any other violation of the laws of this state or be grounds for suppression of evidence in the prosecution of any other criminal charges." MCL 333.7404(5).

For information about the treatment of substance use disorders, see Section 10.2.

B. Relevant Jury Instruction[33]

- M Crim JI 12.6 addresses the unlawful use of a controlled substance.

C. Penalties

Violations of MCL 333.7404(1) are categorized by the type of substance involved in the prohibited conduct.

1. Offenses Involving Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances, Ecstasy/MDMA, or Methamphetamine

Violation of MCL 333.7404(1) by the use of schedule 1 or 2 narcotic drugs, any substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances), MCL 333.7212(1)(h) (ecstasy/MDMA), or MCL 333.7214(c)(*ii*) (methamphetamine) is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $2,000; or

[32] "A health facility or agency shall develop a process for notification of the parent or parents, guardian, or custodian of a minor under the age of 18 who is not emancipated under . . . MCL 722.1 to [MCL] 722.6, and who voluntarily presents himself or herself, or is presented by another individual if he or she is incapacitated, to a health facility or agency for emergency medical treatment as provided in [MCL 333.7404(3)]. A health facility or agency shall not provide notification to a parent or parents, guardian, or custodian under this subsection for nonemergency treatment without obtaining the minor's consent." MCL 333.7404(4).

[33] Note that the jury instruction applies to controlled substances and does not specifically reference controlled substance analogues.

- both. MCL 333.7404(2)(a).

2. Offenses Involving Controlled Substance Analogues or Any Other Schedule 1, 2, 3, or 4 Substances Not Otherwise Addressed

Violation of MCL 333.7404(1) by the use of controlled substance analogues or any other schedule 1, 2, 3, or 4 substances not otherwise penalized under MCL 333.7404 is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $1,000; or
- both. MCL 333.7404(2)(b).

3. Offenses Involving Other Specified Substances and Schedule 5 Substances

Violation of MCL 333.7404(1) by the use of lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5 is a misdemeanor punishable by:

- imprisonment for not more than six months; or
- a fine of not more than $500; or
- both. MCL 333.7404(2)(c).

4. Offenses Involving Marijuana, Catha Edulis, Salvia Divinorum, or a Substance Described in MCL 333.7212(1)(d) or MCL 333.7212(1)(i)[34]

Violation of MCL 333.7404(1) by use of marijuana, catha edulis, salvia divinorum, or a substance described in MCL 333.7212(1)(d) or MCL 333.7212(1)(i) is a misdemeanor punishable by:

- imprisonment for not more than 90 days; or
- a fine of not more than $100; or
- both. MCL 333.7404(2)(d).

[34]The Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, is discussed in Chapter 7.

D. Issues

1. Authorization

Where a defendant argues that he or she was authorized to use the controlled substance or controlled substance analogue, he or she bears the burden of proving that his or her use was authorized.[35] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to use the controlled substance or controlled substance analogue. MCL 333.7531(2). See M Crim JI 12.4a.

2. Intravenous Use of Controlled Substances: Distribution of Information and Examination or Testing

MCL 333.5129 requires certain information to be distributed when an individual is arrested and charged with violation of certain crimes, including violation of MCL 333.7404 by intravenous use.

MCL 333.5129(2) provides that "[e]xcept as otherwise provided in [MCL 333.5129], if an individual is arrested and charged with violating . . . [MCL 333.7404] by intravenously using a controlled substance, or a local ordinance prohibiting . . . the intravenous use of a controlled substance, the judge or magistrate responsible for setting the individual's conditions of release pending trial shall distribute to the individual the information on . . . HIV infection required to be distributed by county clerks under [MCL 333.5119(1)] and shall recommend that the individual obtain additional information and counseling at a local health department testing and counseling center regarding . . . hepatitis B infection, hepatitis C infection, HIV infection, and acquired immunodeficiency syndrome. Counseling under this subsection is voluntary on the part of the individual."

MCL 333.5129(4) provides that "[e]xcept as otherwise provided in [MCL 333.5129], upon conviction of a defendant or the issuance . . . of an order adjudicating a child to be within the provisions of [MCL 712A.2(a)(1) (juvenile delinquency)[36]] . . . for violating . . . [MCL 333.7404] by intravenously using a controlled substance, or a local ordinance prohibiting . . . the

[35] For a more detailed analysis of authorization as a defense, see Chapter 7.

[36] See the Michigan Judicial Institute's *Juvenile Justice Benchbook* for information on proceedings involving a juvenile.

intravenous use of a controlled substance, the court that has jurisdiction of the criminal prosecution or juvenile hearing shall order the defendant or child to be examined or tested for . . . hepatitis B infection, and hepatitis C infection and for the presence of HIV or an antibody to HIV." The tests must meet statutory requirements, and the court must also order counseling and provide information regarding treatment, transmission, and protective measures. *Id.*

For other convictions listed in MCL 333.5129(2) and MCL 333.5129(4) (none of which are relevant to this benchbook), the court must also inform, recommend counseling, and examine or test an individual for a sexually transmitted infection. However, MCL 333.5129(9) provides that the requirements regarding information about, counseling about, and examining or testing for a sexually transmitted infection do not apply to individuals charged with or convicted of violating MCL 333.7404 by intravenously using a controlled substance or a local ordinance prohibiting the intravenous use of a controlled substance.

3. The Methamphetamine Abuse Reporting Act

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[37] that an individual has been convicted of a methamphetamine-related offense. If MCL 333.7404 is violated by the use of methamphetamine, MCL 333.7404 is a methamphetamine-related offense. MCL 28.122(b)(*i*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

2.5 Controlled Substance or Gamma-Butyrolactone (GBL)–Delivery to Commit or Attempt to Commit Criminal Sexual Conduct

A. Statutory Authority

"A person who, without an individual's consent, delivers a controlled substance or a substance described in [MCL 333.7401b[38]] or causes a controlled substance or a substance described in [MCL

[37] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

333.7401b] to be delivered to that individual to commit or attempt to commit a violation of . . . MCL 750.520b, MCL 750.520c, MCL 750.520d, MCL 750.520e, [or] MCL 750.520g, against that individual is guilty of a felony[.]" MCL 333.7401a(1).

B. Relevant Jury Instructions[39]

- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.
- M Crim JI 12.3 addresses the unlawful possession of a controlled substance with the intent to deliver.

C. Penalties

A conviction for delivering a controlled substance or gamma-butyrolactone (GBL) to a person without that person's permission and with the intent of committing or attempting to commit criminal sexual conduct (CSC) against that person is a felony punishable by imprisonment for not more than 20 years. MCL 333.7401a(1).

Conviction under MCL 333.7401a does not require that a defendant be convicted of committing or attempting to commit any of the CSC offenses listed in the statute. MCL 333.7401a(3).

In addition to a conviction and sentence under MCL 333.7401a, a defendant may be convicted and sentenced for any other crime arising from the same transaction as the MCL 333.7401a conviction. MCL 333.7401a(2).

2.6 Controlled Substance, Gamma-Butyrolactone (GBL), MDMA/Ecstasy, or Methamphetamine – Possession, Delivery, or Possession with Intent to Deliver to a Minor in a Park

A. Statutory Authority

"(1) An individual 18 years of age or over who does any of the following may be punished by a term of imprisonment of not more than 2 years:

[38]The substances described in MCL 333.7401b are "[GBL] or any material, compound, mixture, or preparation containing [GBL]." See discussion of the meaning of the term *mixture* in Section 2.2(C).

[39]Note that the jury instructions apply to controlled substances and do not specifically reference GBL.

(a) Violates [MCL 333.7401(2)(a)(*iv*)[40] or MCL 333.7401(2)(b)(*i*)[41] or MCL 333.7401b[42]] by delivering a controlled substance or [GBL] to a minor who is in a public park or private park or within 1,000 feet of a public park or private park.

(b) Violates [MCL 333.7401(2)(a)(*iv*) or MCL 333.7401(2)(b)(*i*) or MCL 333.7401b] by possessing with intent to deliver a controlled substance or [GBL] to a minor who is in a public park or private park or within 1,000 feet of a public park or private park.

(c) Violates [MCL 333.7403(2)(a)(*v*), MCL 333.7403(2)(b), MCL 333.7403(2)(c), or MCL 333.7403(2)(d)[43]] or [MCL 333.7401b] by possessing a controlled substance or [GBL] in a public park or private park.

(d) Violates [MCL 333.7401c[44]] within 1,000 feet of a public park or private park." MCL 333.7410a(1).

B. Relevant Jury Instructions[45]

- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.
- M Crim JI 12.3 addresses the unlawful possession of a controlled substance with the intent to deliver.
- M Crim JI 12.7 defines possession.

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[40] MCL 333.7401(2)(a)(*iv*) addresses schedule 1 or 2 narcotic drugs or substances described in MCL 333.7214(a)(*iv*) (cocaine-related substances), in quantities less than 50 grams, and mixtures less than 50 grams containing the same substances.

[41] MCL 333.7401(2)(b)(*i*) addresses 3,4-methylenedioxymethamphetamine (MDMA/ecstasy), MCL 333.7212(1)(h), and methamphetamine, including its salts, stereoisomers, and salts of stereoisomers, MCL 333.7214(c)(ii).

[42] MCL 333.7401b addresses GBL or any material, compound, mixture, or preparation containing GBL.

[43] MCL 333.7403(2)(a)(*v*) addresses mixtures of schedule 1 or 2 narcotic drugs or substances described in MCL 333.7214(a)(*iv*) (cocaine-related substances), in quantities less than 25 grams; MCL 333.7403(2)(b) addresses 3,4-methylenedioxymethamphetamine (MDMA/ecstasy), MCL 333.7212(1)(h), any substance containing methamphetamine, including its salts, stereoisomers, and salts of stereoisomers, MCL 333.7214(c)(*ii*), and schedule 1-4 substances that are not specifically addressed by MCL 333.7403(2)(a); MCL 333.7403(2)(c) addresses schedule 5 controlled substances and lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, and psilocybin; and MCL 333.7403(2)(d) addresses marijuana.

[44] MCL 333.7401c addresses locations and materials used for the manufacture of controlled substances.

[45] Note that M Crim JI 12.2 and M Crim JI 12.3 apply to controlled substances and do not specifically reference GBL.

C. Penalties

Violation of MCL 333.7410a(1) is punishable by a term of imprisonment for not more than two years. MCL 333.7410a(1).

"The term of imprisonment authorized under [MCL 333.7410a(1)] is in addition to the term of imprisonment authorized for the violation of [MCL 333.7401(2)(a)(*iv*), MCL 333.7401(2)(b)(*i*), MCL 333.7401b, MCL 333.7401c, MCL 333.7403(2)(a)(*v*), MCL 333.7403(2)(b), MCL 333.7403(2)(c), or MCL 333.7403(2)(d)]." MCL 333.7410a(2).

D. Issues

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[46] that an individual has been convicted of a methamphetamine-related offense. If the violation of MCL 333.7410a involves methamphetamine, MCL 333.7410a is a methamphetamine-related offense. MCL 28.122(b)(*i*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

2.7 Controlled Substance – Manufacture, Creation, Delivery, or Possession with Intent to Manufacture, Create, or Deliver

A. Statutory Authority

"Except as authorized by [Article 7 of the PHC], a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under [Article 7 of the PHC] shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant." MCL 333.7401(1).

[46] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

B. Relevant Jury Instructions

- M Crim JI 12.1 addresses the unlawful manufacture of a controlled substance.
- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.
- M Crim JI 12.3 addresses the unlawful possession of a controlled substance with the intent to deliver.
- M Crim JI 12.4 applies to a violation of MCL 333.7401 by a practitioner or a practitioner's agent.
- M Crim JI 12.7 defines possession.

C. Penalties

Violations of MCL 333.7401 are categorized by the quantity and/or type of substance involved in the prohibited conduct.

1. Offenses Involving Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances

For purposes of the Code of Criminal Procedure, a violation of or a conspiracy to violate MCL 333.7401(2)(a)(*i*)-(*iv*) is a felony characterized as a major controlled substance offense.[47] MCL 761.2(a). The quantities specified in each provision refer to any mixture containing the prohibited substance. See MCL 333.7401(2)(a)(*i*)-(*iv*).

A term of imprisonment for a conviction of MCL 333.7401(2)(a)(*i*)-(*iv*) may be made consecutive to a term of imprisonment imposed for the commission of any other felony. MCL 333.7401(3).

a. 1,000 Grams or More

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 1,000 grams or more of any mixture containing a schedule 1 or 2 narcotic drug or a substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

[47] See Section 1.4 for more information about major controlled substance offenses.

- life imprisonment or imprisonment for any term of years; or
- a fine of not more than $1,000,000; or
- both. MCL 333.7401(2)(a)(*i*).

b. 450 Grams or More But Less Than 1,000 Grams

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 450 grams or more but less than 1,000 grams of any mixture containing a schedule 1 or 2 narcotic drug or a substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- imprisonment for not more than 30 years; or
- a fine of not more than $500,000; or
- both. MCL 333.7401(2)(a)(*ii*).

c. 50 Grams or More But Less Than 450 Grams

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 50 grams or more but less than 450 grams of any mixture containing a schedule 1 or 2 narcotic drug or a substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $250,000; or
- both. MCL 333.7401(2)(a)(*iii*).

d. Less Than 50 Grams

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver less than 50 grams of any mixture containing a schedule 1 or 2 narcotic drug or a substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances) is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $25,000; or
- both. MCL 333.7401(2)(a)(*iv*).[48]

2. Offenses Involving Ecstasy/MDMA or Methamphetamine

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver any substance described in MCL 333.7212(1)(h) (ecstasy/MDMA) or MCL 333.7214(c)(*ii*) (methamphetamine) is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $25,000; or
- both. MCL 333.7401(2)(b)(*i*).

3. Offenses Involving Any Other Schedule 1, 2, or 3 Substance, Except Marijuana or a Substance Listed in MCL 333.7212(1)(d) (Synthetic Equivalents)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver any other schedule 1, 2, or 3 substance except marijuana or a substance listed in MCL 333.7212(1)(d)[49] is a felony punishable by:

- imprisonment for not more than seven years; or
- a fine of not more than $10,000; or
- both. MCL 333.7401(2)(b)(*ii*).

4. Offenses Involving Schedule 4 Substances

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a schedule 4 substance is a felony punishable by:

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[48] Before March 1, 2003, the court could also punish the defendant by imposing lifetime probation. This penalty option was deleted by 2002 PA 665. Accordingly, the probation officer for an individual who was sentenced to lifetime probation under MCL 333.7401(2)(a)(*iv*) as it existed before March 1, 2003, and who has served five or more years of his or her probationary period may recommend to that court that it discharge the individual from probation, and the court may grant discharge. MCL 333.7401(4). Alternatively, the individual may petition the court for resentencing under the court rules if he or she provides notice to the prosecutor. *Id.* The individual is permitted to file more than one motion seeking resentencing under this provision. *Id.*

[49] MCL 333.7212(1)(d) provides: "Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis and synthetic substances, derivatives, and their isomers with similar chemical structure or pharmacological activity, or both, such as the following, are included in schedule 1: (*i*) /\1 cis or trans tetrahydrocannabinol, and their optical isomers[;] (*ii*) /\6 cis or trans tetrahydrocannabinol, and their optical isomers[;] (*iii*) /\3,4, cis or trans tetrahydrocannabinol, and their optical isomers."

- imprisonment for not more than four years; or
- a fine of not more than $2,000; or
- both. MCL 333.7401(2)(c).

5. Offenses Involving Marijuana, Mixtures Containing Marijuana, or a Substance Listed in MCL 333.7212(1)(d) (Synthetic Equivalents)[50]

See Section 2.7(E)(10) regarding the impact of the Michigan Regulation and Taxation of Marihuana Act (MRTMA).

a. 45 Kilograms or More, or 200 Plants or More

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 45 kilograms or more or 200 plants or more of marijuana or a mixture containing marijuana is a felony punishable by:

- imprisonment for not more than 15 years; or
- a fine of not more than $10,000,000; or
- both. MCL 333.7401(2)(d)(*i*).

b. 5 Kilograms or More But Less Than 45 Kilograms, or 20 Plants or More But Fewer Than 200 Plants

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 5 kilograms or more but less than 45 kilograms or 20 plants or more but fewer than 200 plants of marijuana or a mixture containing marijuana is a felony punishable by:

- imprisonment for not more than seven years; or
- a fine of not more than $500,000; or

[50]The Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, is discussed in Chapter 7. MCL 333.7212(1)(d) provides: "Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis and synthetic substances, derivatives, and their isomers with similar chemical structure or pharmacological activity, or both, such as the following, are included in schedule 1: (*i*) /\1 cis or trans tetrahydrocannabinol, and their optical isomers[;] (*ii*) /\6 cis or trans tetrahydrocannabinol, and their optical isomers[;] (*iii*) /\3,4, cis or trans tetrahydrocannabinol, and their optical isomers."

- both. MCL 333.7401(2)(d)(*ii*).

c. Less Than 5 Kilograms or Fewer Than 20 Plants

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver less than 5 kilograms or fewer than 20 plants of marijuana or a mixture containing marijuana is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $20,000; or
- both. MCL 333.7401(2)(d)(*iii*).

6. Offenses Involving Schedule 5 Substances

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a schedule 5 substance is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $2,000; or
- both. MCL 333.7401(2)(e).

7. Offenses Involving Prescription Forms or Counterfeit Prescription Forms

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a prescription form or a counterfeit prescription form is a felony punishable by:

- imprisonment for not more than seven years; or
- a fine of not more than $5,000; or
- both. MCL 333.7401(2)(f).

D. Enhanced Penalties for Violations of § 7401 Involving Minors, Library Property, and School Property

1. Violation of MCL 333.7401(2)(a)(*iv*) (less than 50 grams)

"Except as otherwise provided in [MCL 333.7410(2) and MCL 333.7410(3)], an individual 18 years of age or over who violates [MCL 333.7401(2)(a)(*iv*) (less than 50 grams)] by delivering or distributing a controlled substance listed in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(*iv*) (cocaine-related substances)] to an individual under 18 years of age who is at least 3 years the deliverer's or distributor's junior may be punished by the fine authorized by [MCL 333.7401(2)(a)(*iv*)] or by a term of imprisonment of not less than 1 year nor more than twice that authorized by [MCL 333.7401(2)(a)(*iv*)], or both." MCL 333.7410(1).

2. Delivery or Distribution of Controlled Substances Listed in Schedules 1 to 5

"An individual 18 years of age or over who violates [MCL 333.7401[51]] by delivering or distributing any other controlled substance listed in schedules 1 to 5 or gamma-butyrolactone to an individual under 18 years of age who is at least 3 years the distributor's junior may be punished by the fine authorized by [MCL 333.7401(2)(b), MCL 333.7401(2)(c), or MCL 333.7401(2)(d)], or by a term of imprisonment not more than twice that authorized by [MCL 333.7401(2)(b), MCL 333.7401(2)(c), or MCL 333.7401(2)(d)], or both." MCL 333.7410(1).

3. Delivery of Narcotic Drugs or Cocaine-Related Substances

"An individual 18 years of age or over who violates [MCL 333.7401(2)(a)(*iv*) (less than 50 grams)] by delivering a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(*iv*) (cocaine and related substances)] to another person on or within 1,000 feet of school property[52] or a library shall be punished, subject to [MCL 333.7410(5)[53]], by a term of imprisonment of not less than 2 years or more than 3 times that authorized by

[51] This enhanced penalty provision also applies to violations of MCL 333.7401b (offenses involving gamma-butyrolactone). See Section 2.11 for more information on those offenses.

[52] See Section 2.6(E)(2) for discussion of school property issues.

[MCL 333.7401(2)(a)(*iv*] and, in addition, may be punished by a fine of not more than 3 times that authorized by [MCL 333.7401(2)(a)(*iv)*]." MCL 333.7410(2).

4. Possession With Intent to Deliver Narcotic Drugs or Cocaine-Related Substances

"An individual 18 years of age or over who violates [MCL 333.7401(2)(a)(*iv*) (less than 50 grams)] by possessing with intent to deliver to another person on or within 1,000 feet of school property[54] or a library a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(*iv*) (cocaine and related substances)] shall be punished, subject to [MCL 333.7410(5)[55]], by a term of imprisonment of not less than 2 years or more than twice that authorized by [MCL 333.7401(2)(a)(*iv*)] and, in addition, may be punished by a fine of not more than 3 times that authorized by [MCL 333.7401(2)(a)(*iv*)]." MCL 333.7410(3).

5. Manufacture of Methamphetamine

"An individual 18 years of age or over who violates [MCL 333.7401] by manufacturing methamphetamine as that term is described in [MCL 333.7214(c)(*ii*)] on or within 1,000 feet of school property or a library shall be punished by a term of imprisonment or a fine, or both, of not more than twice that authorized by [MCL 333.7401(2)(b)(*i*)]." MCL 333.7410(6).

E. Issues

1. Authorization

Where a defendant argues that he or she was authorized to manufacture, create, deliver, or possess the controlled substance, he or she bears the burden of proving that his or her

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[53] MCL 333.7410(5) allows a court to depart from the mandatory minimum sentence for "substantial and compelling reasons[.]" However, now that the statutory sentencing guidelines are advisory only, departures from the guidelines do not need to be justified by substantial and compelling reasons; MCL 769.34—which previously required a substantial and compelling reason to depart—has been amended to permit a "reasonable" departure. See 2020 PA 395, effective March 24, 2021; *People v Lockridge*, 498 Mich 358, 364-365 (2015); MCL 769.34(3). The *Lockridge* Court additionally stated that "[t]o the extent that any part of MCL 769.34 or *another statute* refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1 (emphasis added). It is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. For a detailed discussion of *Lockridge*, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1.

[54] See Section 2.6(E)(2) for discussion of school property issues.

conduct was authorized.[56] MCL 333.7531(1). See also *People v Robar*, 321 Mich App 106, 142 (2017); M Crim JI 12.4a. In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to manufacture, create, deliver, or possess the controlled substance. MCL 333.7531(2).

2. Consecutive Sentences

"[W]hen a statute grants a trial court . . . discretion to impose a consecutive sentence, the trial court's decision to do so is reviewed on an abuse of discretion standard, i.e., whether the trial court's decision was outside the reasonable and principled range of outcomes," and "trial courts imposing one or more discretionary consecutive sentences are required to articulate on the record reasons for each consecutive sentence imposed." *People v Norfleet*, 317 Mich App 649, 654 (2016). "[A]lthough the combined term [resulting from the imposition of consecutive sentences] is not itself subject to a proportionality review," "[t]he decision regarding each consecutive sentence is its own discretionary act and must be separately justified on the record[;] . . . [w]hile imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each such sentence so as to allow appellate review." *Id.* at 664-665. Where "the trial court spoke only in general terms, stating that it took into account defendant's 'background, his history, [and] the nature of the offenses involved,'" and failed to give particularized reasons to impose five consecutive sentences for drug offenses under MCL 333.7401(2)(a)(*iv*), it was necessary to remand the case "so that the trial court [could] fully articulate its rationale for each consecutive sentence imposed," "with reference to the specific offenses and the defendant." *Norfleet*, 317 Mich App at 666 (third alteration in original).

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[55] MCL 333.7410(5) allows a court to depart from the mandatory minimum sentence for "substantial and compelling reasons[.]" However, now that the statutory sentencing guidelines are advisory only, departures from the guidelines do not need to be justified by substantial and compelling reasons; MCL 769.34—which previously required a substantial and compelling reason to depart—has been amended to permit a "reasonable" departure. See 2020 PA 395, effective March 24, 2021; *People v Lockridge*, 498 Mich 358, 364-365 (2015); MCL 769.34(3). The *Lockridge* Court additionally stated that "[t]o the extent that any part of MCL 769.34 or *another statute* refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1 (emphasis added). It is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. For a detailed discussion of *Lockridge*, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1.

[56] For a more detailed analysis of authorization as a defense, see Chapter 7.

After remand "to properly articulate its rationale for imposing [multiple] consecutive sentences" for five drug convictions under MCL 333.7401, the trial court properly ordered one of the sentences to be served consecutively and ordered the remaining sentences to be served concurrently; "[t]he trial court properly recognized that it could not impose multiple consecutive sentences as a single act of discretion" and appropriately concluded that the single consecutive sentence was justified on grounds including "defendant's extensive violent criminal history, multiple failures to rehabilitate, and the manipulation of several less culpable individuals in his ongoing criminal operation." *People v Norfleet (After Remand)*, 321 Mich App 68, 73 (2017).

"[T]he trial court abused its discretion by failing to adequately explain its decision to impose discretionary consecutive sentences for [defendant's] fentanyl conviction (Count 1) and [defendant's] imitation-controlled-substance conviction (Count 2) under MCL 768.7b(2). *People v Hines*, ___ Mich App ___, ___ (2025). "'In Michigan concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute.'" *Id*. at ___, quoting *People v Baskerville*, 333 Mich App 276, 289 (2020). "At the time of the instant offenses, [defendant] was on bond in connection with additional drug charges arising from his criminal activities in early 2020." *Hines*, ___ Mich App at ___. Defendant "acknowledge[d] that his . . . convictions were subject to discretionary consecutive sentences pursuant to MCL 768.7b(2)(a) because he committed those felonies while the 2020 felony charges were pending." *Hines*, ___ Mich App at ___. However, defendant argued that "he should be resentenced because the trial court did not adequately explain its reasons for ordering that [his current] convictions be served consecutive to his sentences for the 2020 convictions." *Id*. at ___. The *Hines* Court applied *People v Norfleet*, 317 Mich App 649, 665 (2016), noting that "the trial court was required to articulate its reasons for ordering each consecutive sentence." *Hines*, ___ Mich App at ___. Here, "[t]he trial court's reference to [defendant's] criminal history and parole status were mentioned in the context of its discretion to double [defendant's] authorized terms of imprisonment under MCL 333.7413, and there [was] no indication that it applied the same reasoning to the discretionary consecutive sentences imposed under MCL 768.7b(2)(a)." *Hines*, ___ Mich App at ___. "The failure to state its reasoning for imposing a discretionary consecutive sentence amounted to an abuse of discretion." *Id*. at ___. Therefore, the *Hines* Court remanded the matter "to

allow the trial court to articulate its rationale for imposing consecutive sentences . . . ." *Id*. at ___.

3. Definition of *Marijuana* Under § 7401

"[W]hat constitutes 'usable marijuana' under the MMMA is irrelevant to what constitutes marijuana under MCL 333.7401." *People v Ventura*, 316 Mich App 671, 679 (2016). The relevant definition of *marijuana* for offenses under MCL 333.7401 is found in MCL 333.7106(4). *Ventura*, 316 Mich App at 679. Accordingly, the "seeds, stems, and residue" found by police constituted marijuana for purposes of MCL 333.7401. *Ventura*, 316 Mich App at 679.

4. Enhanced Penalty Provision (§ 7410) Issues

A school parking lot constitutes "school property" for purposes of conviction under MCL 333.7410. *People v McCrady*, 213 Mich App 474, 485 (1995). A defendant's knowledge that he or she is on school property is not required for purposes of conviction under MCL 333.7410. *McCrady*, 213 Mich App at 485.

A defendant is subject to an enhanced penalty under MCL 333.7410(3) only if the prosecution presents "proof that the defendant specifically intended to deliver a controlled substance to a 'person on or within 1,000 feet of school property or a library,'" rather than that the defendant possessed the drugs on or within 1,000 feet of school property or a library. *People v English*, 317 Mich App 607, 610, 616-617 (2016) (opinion by WILDER, P.J.) (quoting MCL 333.7410(3) and holding that the trial court properly dismissed the charges against the defendants where "although the prosecution presented evidence to establish that [they] were arrested within 1,000 feet of school property while in possession of drugs, the prosecution failed to demonstrate that [they] intended to deliver those drugs to a person on or within 1,000 feet of school property"). See also *English*, 317 Mich App at 617 (MURPHY, J., concurring in decision to affirm dismissal because "the Legislature intended MCL 333.7410(3) to apply when an offender possesses a controlled substance either inside or outside of a school zone with the intent to deliver the controlled substance within a school zone").

5. Licensed Caregivers Under the Michigan Medical Marihuana Act[57]

Sufficient evidence existed to support the defendant's conviction of manufacturing marijuana even though the defendant was a licensed primary caregiver under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, where at least 78 marijuana plants and 578.6 grams of harvested marijuana were confiscated from the defendant's home and testimony was presented indicating that the marijuana was discovered throughout the residence, and that the odor of marijuana was so pervasive it could be detected from the driveway. *People v Bosca*, 310 Mich App 1, 24 (2015), rev'd in part on other grounds 509 Mich 851 (2022).[58] "Although defendant was acknowledged to be a licensed grower, the dispute actually centered on whether the amount he manufactured and maintained exceeded the legal amount permitted by his licensure. While contradictory testimony was adduced on this issue, it is apparent from defendant's conviction that the jury found the testimony of an excessive amount of marijuana within the home to be more credible." *Id.*

6. Manufacturing Issues

"With respect to manufacturing methamphetamine, the elements are (1) the defendant manufactured a controlled substance, (2) the substance manufactured was methamphetamine, and (3) the defendant knew he [or she] was manufacturing methamphetamine." *People v Meshell*, 265 Mich App 616, 619 (2005). See also M Crim JI 12.1 (including proof of the weight of the substance, that the defendant was not legally authorized to manufacture the substance, and that the defendant was not preparing/compounding the substance for his or her own use as elements in addition to the elements set forth in *Meshell*). See also *People v Bosca*, 310 Mich App 1, 23 (2015), rev'd in part on other grounds 509 Mich 851 (2022) (citing the elements of manufacturing set forth by *Meshell*, 265 Mich App at 619, in the context of manufacturing marijuana).[59]

[57]The Michigan Medical Marihuana Act, MCL 333.26421 *et seq.*, is discussed in detail in Chapter 7.

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

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

7. Possession with Intent to Deliver Issues

Michigan courts have articulated the elements of possession with intent to deliver in different ways. *Robar*, 321 Mich App at 120. "In [*People v Wolfe*, 440 Mich 508, 516-517 (1992), mod on other grounds 441 Mich 1201 (1992)[60]], our Supreme Court set forth the following elements for the offense of possession with intent to deliver cocaine: '(1) that the recovered substance is cocaine, (2) that the cocaine is in a mixture weighing less than fifty grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver.'" *Robar*, 321 Mich App at 117. "In [*People v Crawford*, 458 Mich 376, 383, 389 (1998)], our Supreme Court stated that the elements of the offense of possession with intent to deliver cocaine are as follows: '(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and 225 grams.'" *Robar*, 321 Mich App at 119.

The *Robar* Court criticized the articulation of the elements by the *Wolfe* Court, particularly the third element, holding that "the plain language of MCL 333.7401(1) does not support a conclusion that possessing a valid prescription is relevant to whether a defendant committed the offense of possession with intent to deliver a controlled substance." *Robar*, 321 Mich App at 118 (declining to accept the *Wolfe* formulation of elements under the rule of stare decisis because *Wolfe* "did not involve the same or substantially similar issues as those presented [in *Robar*]" where *Wolfe* only discussed in detail the fourth element, knowing possession with intent to deliver, and the *Wolfe* case involved cocaine, not a controlled substance that could be obtained by a valid prescription) (quotation marks and citation omitted). The Court held that "[t]he legality of a person's possession, by itself, is irrelevant to the crime of possession with intent to deliver a controlled substance." *Robar*, 321 Mich App at 122. "[T]he only statutory exception to [the] offense[of possession with intent to deliver] is created by the opening phrase, 'Except as authorized by this article . . . .'" *Id.*, quoting MCL 333.7401(1). Accordingly, "MCL 333.7401(1) makes it a crime to possess a controlled substance - whether lawfully or not - *with the intent to deliver that substance* unless the person possessing the controlled substance either (1) has

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

obtained a valid license to deliver the substance under MCL 333.7303(1) and [MCL 333.7303(2)], or (2) falls within one of the limited exceptions provided by MCL 333.7303(4) and [MCL 333.7303(5)]." *Robar*, 321 Mich App at 122, 126. "The statutory offense is aimed at preventing a person from possessing a controlled substance *with unlawful intent* regardless of whether the possession would otherwise be lawful absent this intent." *Id.* at 126. See also M Crim JI 12.3 (citing *Robar* and noting that M Crim JI 12.4a should be read where "the defense presents competent evidence that the defendant was authorized to deliver the substance").

"[K]nowledge of quantity is not an element of possession with intent to deliver[.]" *People v Marion*, 250 Mich App 446, 451 (2002).

The prosecution is "obligated under the statute to prove that the defendant knowingly possessed cocaine and that he [or she] did so with the specific intent of distributing it[.]" *People v Crawford*, 458 Mich 376, 389 (1998). Accordingly, possession with intent to deliver is a specific intent crime. See *id.*

Where an amount of a controlled substance is visible to the naked eye, regardless of whether there is enough of the substance present to make it usable, there is a sufficient amount present from which a jury may infer knowing possession. *People v Harrington*, 396 Mich 33, 49 (1976). However, where the controlled substance present is not visible to the naked eye, the presence of the substance alone is insufficient to support an inference of knowing possession. *People v Hunten*, 115 Mich App 167, 171 (1982).

Proof of actual delivery of a controlled substance is not required to prove intent to deliver for purposes of conviction of possession with intent to deliver under MCL 333.7401. *Wolfe*, 440 Mich at 524. See also *People v Ventura*, 316 Mich App 671, 678-679 (2016) (finding sufficient evidence to support the defendant's possession with intent to deliver conviction where the defendant only argued that there was insufficient evidence that he delivered marijuana and failed to argue that there was insufficient evidence to support the conclusion that he possessed marijuana with the intent to deliver). "An intent to deliver 'may be proven by circumstantial evidence and also may be inferred from the amount of controlled substance possessed.'" *People v Williams (John)*, 268 Mich App 416, 422 (2005), quoting *People v Ray*, 191 Mich App 706, 708 (1991).

Intent to deliver may not be inferred from the fact that a defendant matches a drug dealer profile. *People v Hubbard*, 209

Mich App 234, 238, 241-243 (1995). But see also *People v Murray*, 234 Mich App 46, 54-55 (1999) (drug profile evidence is admissible under certain circumstances to prove background or modus operandi); and *People v Hines*, ___ Mich App ___, ___ (2025) (holding that the defendant "[could not] establish that the improper drug profile evidence affected the outcome of the trial").[61]

"'A person need not have actual physical possession of a controlled substance to be guilty of possessing it.'" *People v Norfleet*, 317 Mich App 649, 659 (2016), quoting *People v Wolfe*, 440 Mich 508, 519-520 (1992) (alteration omitted). There was sufficient evidence to support the defendant's conviction of possession with the intent to deliver less than 50 grams of heroin where there was no evidence that the defendant actually possessed the heroin recovered in a motel room, but where testimony established that the substance recovered from the motel room was heroin and "that defendant had control over it at the time because he was the one who directed [the people renting the motel room] to deliver the heroin to its intended recipients." *Norfleet*, 317 Mich App at 659-660. This testimony was corroborated by another witness "who testified that defendant was the one whom she would call to request the heroin from and that [the people renting the motel room] simply delivered it." *Id.* at 660 (holding "[t]here was clear evidence of a sufficient nexus between defendant and the contraband for the jury to conclude that under the totality of the circumstances, defendant had constructive possession of the heroin").

The following circumstances may be relevant to the determination of whether a defendant possessed a controlled substance with an intent to deliver:

- The manner in which drugs are packaged. See, e.g., *Williams (John)*, 268 Mich App at 422-423 (intent to deliver inferred from the fact that marijuana was divided into more parcels than the number of the defendant's roommates with whom the defendant purchased marijuana, and the presence of additional packaging material).

- The quantity of controlled substances in the defendant's possession. See, e.g., *Ray*, 191 Mich App at 708 (intent to deliver could be inferred where the defendant possessed six rocks of crack cocaine).

[61]For a more detailed discussion of the admissibility of drug profile evidence, see Section 9.5.

- Absence of drug paraphernalia commonly associated with the use of drugs. See, e.g., *People v Delongchamps*, 103 Mich App 151, 159-160 (1981) (although the amount of marijuana alone supported an inference of intent to deliver, the absence of drug use paraphernalia supported the inference).

- The presence of packaging material or paraphernalia commonly used for packaging drugs. See, e.g., *People v Tolbert*, 77 Mich App 162, 166 (1977) ("several pre-cut foil packets indicate[d] that the defendant was engaged in more than personal use of the drug[]"); *People v Mumford*, 60 Mich App 279, 283 (1975) (a coffee table in the location where the defendant was arrested was set up for packaging a heroin mixture in foil packets).

Simple possession under MCL 333.7403 "is a lesser included offense of possession with intent to deliver a controlled substance." *Robar*, 321 Mich App at 131. However, evidence of a valid prescription, which exempts a defendant from prosecution for simple possession, is not a defense to possession with intent to deliver a controlled substance. *Id.* at 133, 134. "[T]o establish the exception under MCL 333.7401(1), a defendant must show that he or she was authorized to deliver the controlled substance possessed by either having a valid license to deliver the substance or by falling within one of the exceptions to the general licensure requirement." *Robar*, 321 Mich App at 134.[62] The defendant "bears both the burden of production and the burden of persuasion to establish these exceptions or exemptions and must do so by a preponderance of the evidence." *Id.* at 142.[63]

8. The Methamphetamine Abuse Reporting Act

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[64] that an individual has been convicted of a methamphetamine-related offense. If

[62] "[A] person may possess a controlled substance with intent to deliver the same if the person either (1) holds a valid license to deliver the substance under MCL 333.7303(1) and [MCL 333.7303(2)] or (2) falls within one of the limited exceptions provided by MCL 333.7303(4) and [MCL 333.7303(5)]." *Robar*, 321 Mich App at 133.

[63] For a detailed discussion of the defense of authorization, see Section 7.3.

[64] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

methamphetamine is the controlled substance manufactured, created, delivered, or possessed with intent to manufacture, create, or deliver, MCL 333.7401 is a methamphetamine-related offense. MCL 28.122(b)(*i*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

9. Quality of the Controlled Substance

Sufficient evidence existed to support the defendant's conviction of manufacturing marijuana despite questions about the quality of some of the marijuana plants because "[w]hile the efficacy of certain plants and products derived from the plants was in dispute, the identification of the plant materials as marijuana was not contested[,]" and it was up to the jury to make credibility determinations during the trial. *People v Bosca*, 310 Mich App 1, 24 (2015), rev'd in part on other grounds 509 Mich 851 (2022).[65]

10. Michigan Regulation and Taxation of Marihuana Act (MRTMA)

In the context of manufacturing charges brought against an unlicensed commercial grow operation, the Court held that the MRTMA has effectively "repealed, moderated, or otherwise supplanted" Article 7 of the PHC. *People v Kejbou*, ___ Mich App ___, ___ (2023) (defendant was charged with manufacturing 200 or more marijuana plants in violation of MCL 333.7401(2)(d)(*i*)). Accordingly, the Court concluded "that the circuit court correctly held that defendant's manufacturing-marijuana charge is now covered by the MRTMA, and thus defendant was not subject to prosecution under MCL 333.7401(1) and (2)(d)(i)." *Kejbou*, ___ Mich App at ___.

"[T]he MRTMA does not prevent a person accused of possession with intent to deliver between 5 and 45 kilograms of marijuana from being prosecuted under MCL 333.7401(2)(d)(*ii*) [Article 7 of the Public Health Code]." *People v Soto*, ___ Mich App ___, ___ (2024). "MCL 333.7401 provides that 'a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .'" *Soto*, ___ Mich App at ___, quoting MCL 333.7401(1). A person who violates the statute involving between 5 and 45 kilograms of marijuana is guilty of a felony and may be sentenced to "imprisonment for not more than 7

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

years or a fine of not more than $500,000 or both.'" *Soto*, ___ Mich App at ___, quoting MCL 333.7401(2)(d)(*ii*). Conversely, "[t]here is no counterpart for defendant's alleged conduct in the MRTMA." *Soto*, ___ Mich App at ___. "Section 4 of the MRTMA sets forth conduct unauthorized by the Act, and provides that all other laws inconsistent with [the] act do not apply to conduct that is permitted by [the] act." *Soto*, ___ Mich App at ___ (quotation marks and some brackets omitted). "Notably, although possession with intent to deliver marijuana is addressed in Subsections (1) and (2) [of Section 15 of the MRTMA], it is absent from the provision penalizing the possession, cultivation, or delivery without remuneration more than twice the amount of marijuana allowed by § 5 as a misdemeanor[.]" *Soto*, ___ Mich App at ___. However, "the conduct underlying defendant's possession-with-intent-to-deliver-marijuana charge expressly implicates Article 7 of the Public Health Code, which . . . penalizes possession with the intent to deliver between 5 and 45 kilograms of marijuana as a felony." *Soto*, ___ Mich App at ___, citing MCL 333.7401(2)(d)(*ii*). Consequently, "the MRTMA does not supersede Article 7 . . . with regard to the felony prosecution of persons who possess with the intent to deliver more than twice the amount of marijuana allowed by MCL 333.27955." *Soto*, ___ Mich App at___.

The decision in *Soto* "does not conflict with [the] decision [in *Kejbou*] that a defendant's manufacturing-marijuana charge was covered by the MRTMA rather than Article 7 of the Public Health Code." *Soto*, ___ Mich App at ___, citing *People v Kejbou*, ___ Mich App ___, ___ (2023). The *Soto* Court was "not limited by the decision in *Kejbou* . . . because the relevant statutory provisions [in *Kejbou* were] not in conflict in this case." *Soto*, ___ Mich App at ___.

See Section 8.14(E) and Section 8.15(C) for a detailed discussion of the *Kejbou* and *Soto* opinions and the relationship between the MRTMA and the Public Health Code.

2.8 Counterfeit Substance or a Controlled Substance Analogue – Manufacture, Creation, Delivery, or Possession with Intent to Deliver

A. Statutory Authority

"Except as authorized by [Article 7 of the PHC], a person shall not create, manufacture, deliver, or possess with intent to deliver a

counterfeit substance or a controlled substance analogue intended for human consumption." MCL 333.7402(1).[66]

B. Relevant Jury Instructions[67]

- M Crim JI 12.1 addresses the unlawful manufacture of a controlled substance.
- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.
- M Crim JI 12.3 addresses the unlawful possession of a controlled substance with the intent to deliver.
- M Crim JI 12.7 defines possession.

C. Penalties

Violations of MCL 333.7402 are categorized by the type of substance involved in the prohibited conduct.

1. Counterfeit Substances Classified in Schedule 1 or 2 That Are Narcotic Drugs, Ecstasy/MDMA, Cocaine-Related Substances, or Methamphetamine

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a counterfeit substance classified in schedule 1 or 2 as a narcotic drug or any substance described in MCL 333.7212(1)(h) (ecstasy/MDMA), MCL 333.7214(a)(*iv*) (cocaine-related substances), or MCL 333.7214(c)(*ii*) (methamphetamine) is a felony punishable by:

- imprisonment for not more than 10 years; or
- a fine of not more than $10,000; or
- both. MCL 333.7402(2)(a).

2. Other Counterfeit Substances Classified in Schedule 1, 2, or 3

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver any other counterfeit

[66] MCL 333.7402 does not apply to persons who manufacture or deliver substances under federal provisions governing new drugs or investigational use exemptions. MCL 333.7402(1).

[67] Note that M Crim JI 12.1, M Crim JI 12.2, and M Crim JI 12.3 apply to controlled substances and do not specifically reference counterfeit substances or controlled substance analogues.

substance classified in schedule 1, 2, or 3 and not otherwise addressed by MCL 333.7402(2)(a) is a felony punishable by:

- imprisonment for not more than five years; or
- a fine of not more than $5,000; or
- both. MCL 333.7402(2)(b).

3. Counterfeit Substances Classified in Schedule 4

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a counterfeit substance classified in schedule 4 is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $2,000; or
- both. MCL 333.7402(2)(c).

4. Counterfeit Substances Classified in Schedule 5

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a counterfeit substance classified in schedule 5 is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $2,000; or
- both. MCL 333.7402(2)(d).

5. Controlled Substance Analogue Offenses

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a controlled substance analogue intended for human consumption is a felony punishable by:

- imprisonment for not more than 15 years; or
- a fine of not more than $250,000; or
- both. MCL 333.7402(2)(e).

D. Issues

Where a defendant argues that he or she was authorized to manufacture, create, deliver, or possess the counterfeit substance or

controlled substance analogue, he or she bears the burden of proving that his or her conduct was authorized.[68] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to manufacture, create, deliver, or possess the counterfeit substance or controlled substance analogue. MCL 333.7531(2).

2.9 Counterfeit Prescription Forms – Possession

A. Statutory Authority

"A person shall not knowingly or intentionally[] . . . [p]ossess counterfeit prescription forms, except as an agent of government while engaged in the enforcement of [Article 7 of the PHC]." MCL 333.7407(1)(f).

B. Relevant Jury Instruction

- M Crim JI 12.7 defines possession.

C. Penalties

Violation of MCL 333.7407(1)(f) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $30,000; or
- both. MCL 333.7407(3).

D. Issues

Where a defendant argues that he or she was authorized to possess the counterfeit prescription forms, he or she bears the burden of proving that his or her possession was authorized.[69] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to possess the counterfeit prescription forms. MCL 333.7531(2).

[68]For a more detailed analysis of authorization as a defense, see Chapter 7.

[69]For a more detailed analysis of authorization as a defense, see Chapter 7.

2.10 Distribution of Marijuana Without Remuneration

A. Statutory Authority

"A person who distributes marihuana without remuneration and not to further commercial distribution and who does not violate [MCL 333.7410(1)[70]] is guilty of a misdemeanor . . . unless the distribution is in accordance with the federal law or the law of [Michigan]." MCL 333.7410(7).

B. Penalties

Violation of MCL 333.7410(7) is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $1,000; or
- both. MCL 333.7410(7).

C. Issues

Where a defendant argues that he or she was authorized to distribute marijuana, he or she bears the burden of proving that his or her possession was authorized.[71] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to distribute marijuana. MCL 333.7531(2).

2.11 Gamma-Butyrolactone (GBL) – Possession, Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver

A. Statutory Authority

1. Generally

"(1) A person shall not do any of the following:

(a) Manufacture, deliver, or possess with intent to manufacture or deliver [GBL] or any material,

[70] MCL 333.7410(1) is violated when an individual 18 years of age or older "deliver[s] or distribut[es] [marijuana] to an individual under 18 years of age who is at least 3 years the deliverer's or distributor's junior . . . ." MCL 333.7410(1).

[71] For a more detailed analysis of authorization as a defense, see Chapter 7.

compound, mixture, or preparation containing [GBL].

(b) Knowingly or intentionally possess [GBL] or any material, compound, mixture, or preparation containing [GBL]." MCL 333.7401b(1).[72]

2. Exceptions

A person authorized to manufacture, deliver, or possess GBL "for use in a commercial application and not for human consumption" is not subject to the prohibitions in MCL 333.7401b(1)(a). MCL 333.7401b(2). "It is an affirmative defense to a prosecution under [MCL 333.7401b] that the person manufactured, delivered, possessed with intent to manufacture or deliver, or possessed [GBL] or the material, compound, mixture, or preparation containing [GBL] in accordance with this subsection." MCL 333.7401b(2).

B. Relevant Jury Instructions[73]

- M Crim JI 12.1 addresses the unlawful manufacture of a controlled substance.
- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.
- M Crim JI 12.3 addresses the unlawful possession of a controlled substance with the intent to deliver.
- M Crim JI 12.7 defines possession.

C. Penalties

1. Generally

A conviction for the unauthorized manufacture, delivery, or possession with the intent to manufacture or deliver Gamma-butyrolactone (GBL) (or any material, compound, mixture, or preparation containing GBL) is a felony punishable by:

- imprisonment for not more than seven years; or
- a fine of not more than $5,000; or

[72]See discussion of the meaning of the term *mixture* in Section 2.2(C).

[73]Note that M Crim JI 12.1, M Crim JI 12.2, and M Crim JI 12.3 apply to controlled substances and do not specifically reference GBL.

- both. MCL 333.7401b(3)(a).

A conviction for knowingly or intentionally possessing GBL is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $2,000; or
- both. MCL 333.7401b(3)(b).

2. Enhanced Penalties

"An individual 18 years of age or over who violates [MCL 333.7401b[74]] by delivering or distributing . . . [GBL] to an individual under 18 years of age who is at least 3 years the distributor's junior may be punished by the fine authorized by [MCL 333.7401b], or by a term of imprisonment not more than twice that authorized by [MCL 333.7401b], or both." MCL 333.7410(1).

"An individual 18 years of age or over who violates [MCL 333.7401b] by possessing [GBL] . . . on or within 1,000 feet of school property or a library shall be punished by a term of imprisonment or a fine, or both, of not more than twice that authorized by [MCL 333.7401b]." MCL 333.7410(4).

D. Issues

Gamma-butyrolactone (GBL) turns into gamma-hydroxybutyrate (GHB) when it is ingested. *People v Holtschlag*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2003 (Docket No. 226715), p 2 n 4[75]; House Legislative Analysis, HB 5556 and House Legislative Analysis, HB 5557, October 9, 2000. GHB is listed in MCL 333.7212(1)(g) as a schedule 1 controlled substance. The statute discussed in this section, MCL 333.7401b(1)(a), makes it a crime to manufacture, deliver, or possess with intent to manufacture or deliver GBL. The manufacture, delivery, or possession with intent to manufacture or deliver GHB is prohibited under the general statute prohibiting the manufacture, delivery, or possession with intent to deliver a controlled substance, MCL 333.7401(1), discussed in Section 2.7.

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[74] This enhanced penalty provision also applies to violations of MCL 333.7401 (offenses involving the manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver a controlled substance). See Section 2.7(D) for more information on those offenses.

[75] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions may be "instructive or persuasive." *People v Jamison*, 292 Mich App 440, 445 (2011).

2.12 Imitation Controlled Substance – Use, Possession with Intent to Use, Manufacture, Distribution, or Possession with Intent to Distribute

A. Statutory Authority

1. Generally

"Except as provided in [MCL 333.7341(7)], a person shall not manufacture, distribute, or possess with intent to distribute, an imitation controlled substance." MCL 333.7341(3).

"A person shall not use, or possess with intent to use, an imitation controlled substance, except under the direction of a person authorized pursuant to [MCL 333.7341(7)]." MCL 333.7341(4).

"A person shall not place an advertisement or solicitation in this state to be distributed by any electronic media in this state, or place an advertisement or solicitation in this state in any newspaper, magazine, handbill, or other publication; or post or distribute an advertisement or solicitation in any public place in this state, knowing or having reason to know that the purpose of the advertisement or solicitation is to promote the distribution of an imitation controlled substance." MCL 333.7341(6).

2. Exceptions

MCL 333.7341 "does not apply to any person who is authorized by the administrator or the federal food and drug administration to manufacture, distribute, prescribe, or possess an imitation controlled substance for use as a placebo for legitimate medical, therapeutic, or research purposes." MCL 333.7341(7).

B. Relevant Jury Instructions[76]

- M Crim JI 12.1 addresses the unlawful manufacture of a controlled substance.
- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.

[76]Note that M Crim JI 12.1, M Crim JI 12.2, and M Crim JI 12.3 apply to controlled substances and do not specifically reference imitation controlled substances.

- M Crim JI 12.3 addresses the unlawful possession of a controlled substance with the intent to deliver.
- M Crim JI 12.7 defines possession.

C. Penalties

Violation of MCL 333.7341(3) is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $10,000; or
- both. MCL 333.7341(8).

"A person who violates [MCL 333.7341(4)] is subject to a civil fine of not more than $100.00 and costs." MCL 333.7341(4). However, a second or subsequent violation of MCL 333.7341(4) is a misdemeanor punishable by:

- imprisonment for not more than 90 days; or
- a fine of not more than $100; or
- both. MCL 333.7341(4).

Violation of MCL 333.7341(6) is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $5,000; or
- both. MCL 333.7341(6).

"A default in the payment of a civil fine or costs ordered under [MCL 333.7341(4)] or an installment thereof may be collected by any means authorized for the enforcement of a judgment under . . . MCL 600.4001 to [MCL 600.4065 and MCL 600.6001 to MCL 600.6098]." MCL 333.7341(5).

D. Issues

Where a defendant argues that he or she was authorized to manufacture, distribute, possess, or use an imitation controlled substance, he or she bears the burden of proving that his or her conduct was authorized.[77] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not

[77] For a more detailed analysis of authorization as a defense, see Chapter 7.

authorized to manufacture, distribute, possess, or use the imitation controlled substance. MCL 333.7531(2).

2.13 Product Containing Ephedrine or Pseudoephedrine – Sale, Distribution, or Delivery by Mail, Internet, Telephone, or Other Electronic Means

A. Statutory Authority

1. Generally

"A person shall not sell, distribute, deliver, or otherwise furnish a product that contains any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer of ephedrine or pseudoephedrine to an individual if the sale is transacted through use of the mail, internet, telephone, or other electronic means." MCL 333.7340(1).[78]

2. Exceptions

The prohibition in MCL 333.7340(1) does not apply to:

- "A pediatric product primarily intended for administration to children under 12 years of age according to label instructions." MCL 333.7340(2)(a).
- "A product containing pseudoephedrine that is in a liquid form if pseudoephedrine is not the only active ingredient." MCL 333.7340(2)(b).
- "A product that the state board of pharmacy, upon application of the manufacturer or certification by the United States drug enforcement administration as inconvertible, exempts from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine." MCL 333.7340(2)(c).
- "A person who dispenses a product described in [MCL 333.7340(1)] pursuant to a prescription." MCL 333.7340(2)(d).

[78]See discussion of the meaning of the term *mixture* in Section 2.2(C).

- "A person who, in the course of his or her business, sells or distributes products described in [MCL 333.7340(1)] to either of the following:

  (*i*) A person licensed by this state to manufacture, deliver, dispense, or possess with intent to manufacture or deliver a controlled substance, prescription drug, or other drug.

  (*ii*) A person who orders those products described in [MCL 333.7340(1)] for retail sale pursuant to a license issued under the general sales tax act, 1933 PA 167, MCL 205.51 to [MCL] 205.78." MCL 333.7340(2)(e).

- "A manufacturer or distributor who donates product samples to a nonprofit charitable organization that has tax-exempt status pursuant to section 501(c)(3) of the internal revenue code of 1986, a licensed practitioner, or a governmental entity." MCL 333.7340(2)(f).

B. Relevant Jury Instructions

- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.

- M Crim JI 12.3 addresses the unlawful possession of a controlled substance with the intent to deliver.

C. Penalties

Violation of MCL 333.7340(1) is a felony punishable by:

- imprisonment for not more than four years; or

- a fine of not more than $5,000; or

- both. MCL 333.7340(3).

D. Issues

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[79] that an individual has been convicted of a methamphetamine-related offense. It is unclear whether violation of MCL 333.7340 constitutes a methamphetamine-related offense because it does not directly reference methamphetamine but does reference ephedrine and pseudoephedrine, which are ingredients in

methamphetamine. See MCL 28.122(b) (defining methamphetamine-related offense as a violation of Article 7 of the PHC that involves methamphetamine). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

[79] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

Chapter 3: Other Controlled Substance Offenses in Article 7 of the Public Health Code

3.1. Scope Note 3-3
3.2 Attempt 3-3
3.3 Dispensing or Selling a Food Product or Dietary Supplement Containing Ephedrine 3-5
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3.7 Obtaining a Controlled Substance by Misrepresentation, Fraud, Deception, or Forgery 3-11
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3.1 Scope Note

This chapter discusses controlled substance offenses codified in Article 7 of the Public Health Code (PHC), MCL 333.7101 *et seq.*[80] Delivery, distribution, manufacture, possession, sale, and use offenses codified in Article 7 of the PHC are discussed in Chapter 2. Licensee and practitioner offenses codified in Article 7 of the PHC are discussed in Chapter 4. Each section of this chapter will focus on a specific offense and will provide the statutory authority and the penalties imposed for commission of that offense. When applicable, each section will also include a list of relevant jury instructions and a discussion of other issues pertinent to the particular offense.

Licensing sanctions under the Michigan Vehicle Code, MCL 257.1 *et seq.*, are discussed in detail in the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 1. This discussion includes the sanctions applicable to controlled substance-related operating convictions under MCL 257.625. An SCAO table entitled, *Reporting Circuit Court Felony Convictions to the Department of State*, contains a detailed list of offenses and their abstracting requirements.

See the Michigan Judicial Institute's table for sentencing information about the offenses covered in this chapter.

3.2 Attempt

A. Statutory Authority

"A person shall not attempt to violate [MCL 333.7401 to MCL 333.7461]." MCL 333.7407a(1).

B. Relevant Jury Instructions

- M Crim JI 12.2(6) addresses attempt in the context of the unlawful delivery of a controlled substance.
- M Crim JI 9.1 addresses attempt generally.
- M Crim JI 9.2 addresses attempt as a lesser offense.
- M Crim JI 9.3 addresses impossibility and notes that it is not a defense to the crime of attempt.
- M Crim JI 9.4 addresses abandonment as a defense to attempt.

[80] MCL 333.7101 *et seq.* refers to the beginning of Article 7. The beginning of the entire Public Health Code can be found at MCL 333.1101 *et seq.*

C. Penalties

"Except as otherwise provided in [MCL 333.7416[81]], a person who violates [MCL 333.7407a] is guilty of a crime punishable by the penalty for the crime he or she attempted to commit[.]" MCL 333.7407a(3).[82]

D. Issues

1. Abandonment Defense

"Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose." *People v Cross*, 187 Mich App 204, 206 (1991). Failure to complete a crime because of unanticipated difficulties, unexpected resistance, circumstances different than expected, or mere postponement does not constitute the defense of abandonment. *Id.* at 206-207 (explaining that abandonment that results from the victim's resistance or the defendant's fear of being caught is not a defense to attempt).

Abandonment as a defense to attempt is addressed by M Crim JI 9.4.

2. Intent

Attempt is a specific intent crime. *People v Langworthy*, 416 Mich 630, 644-645 (1982).

3. Jury Instruction

"A judge has the discretion, without request, to instruct on attempt when the defense is that there was only an attempt and there is evidence that the completed offense may not have been committed or the defense is that the jury should not credit evidence tending to show that it was completed."*People v Adams*, 416 Mich 53, 60 (1982). Where warranted by the evidence, an instruction on attempt must be provided when requested. MCL 768.32(1); *People v Smith (Jack)*, 483 Mich 1112 (2009) (Markman, J., concurring).

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[81] MCL 333.7416 prohibits and sets forth penalties for recruiting, inducing, soliciting, or coercing a minor to commit a felony. See Section 3.10 for a discussion of this offense.

[82] MCL 333.7340c(3) sets forth a specific penalty for attempting to solicit another person to purchase or otherwise obtain ephedrine or pseudoephedrine for the manufacture of methamphetamine. See Section 3.14 for a discussion of this offense.

4. The Methamphetamine Abuse Reporting Act

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[83] that an individual has been convicted of a methamphetamine-related offense. If the crime attempted is a methamphetamine-related offense, an attempt conviction is reportable. MCL 28.122(b). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

3.3 Dispensing or Selling a Food Product or Dietary Supplement Containing Ephedrine

A. Statutory Authority

1. Generally

"A person shall not dispense, sell, or otherwise give a product described in [MCL 333.7220(1)(c)(*ii*)[84]] to an individual less than 18 years of age." MCL 333.7339(1).

"In the course of selling, offering for sale, or otherwise distributing a product described in [MCL 333.7220(1)(c)(*ii*)], a person shall not advertise or represent in any manner that the product causes euphoria, ecstasy, a 'buzz' or 'high', or an altered mental state, heightens sexual performance, or, because it contains ephedrine alkaloids, increases muscle mass." MCL 333.7339(2).

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[83] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

[84] MCL 333.7220(1)(c)(*ii*) describes the following schedule 5 controlled substances:

"(*ii*) A food product or a dietary supplement containing ephedrine, if the food product or dietary supplement meets all of the following criteria:

(A) It contains, per dosage unit or serving, not more than the lesser of 25 milligrams of ephedrine alkaloids or the maximum amount of ephedrine alkaloids provided in applicable regulations adopted by the United States food and drug administration and contains no other controlled substance.

(B) It contains no hydrochloride or sulfate salts of ephedrine alkaloids.

(C) It is packaged with a prominent label securely affixed to each package that states the amount in milligrams of ephedrine in a serving or dosage unit; the amount of the food product or dietary supplement that constitutes a serving or dosage unit; that the maximum recommended dosage of ephedrine for a healthy adult human is the lesser of 100 milligrams in a 24-hour period or the maximum recommended dosage or period of use provided in applicable regulations adopted by the United States food and drug administration; and that improper use of the product may be hazardous to a person's health."

2. Exceptions

MCL 333.7339 "does not apply to a physician or pharmacist who prescribes, dispenses, administers, or delivers a product described in [MCL 333.7220(1)(c)(*ii*)] to an individual less than 18 years of age, to a parent or guardian of an individual less than 18 years of age who delivers the product to the individual, or to a person authorized by the individual's parent or legal guardian who dispenses or delivers the product to the individual." MCL 333.7339(1).

B. Penalties

Violation of MCL 333.7339 is a misdemeanor punishable by:

- imprisonment for not more than 93 days; or
- a fine of not more than $100; or
- both. MCL 333.7339(3).

C. Issues

1. Authorization

Where a defendant argues that he or she was authorized to prescribe, dispense, administer, or deliver the product at issue, he or she bears the burden of proving that his or her conduct was authorized.[85] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to prescribe, dispense, administer, or deliver the product at issue. MCL 333.7531(2). See M Crim JI 12.4a.

2. The Methamphetamine Abuse Reporting Act

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[86] that an individual has been convicted of a methamphetamine-related offense. It is unclear whether violation of MCL 333.7339 constitutes a methamphetamine-related offense because it does not directly reference methamphetamine but does reference ephedrine, an

[85]For a more detailed discussion of authorization as a defense, see Chapter 7.

[86] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

ingredient in methamphetamine. See MCL 28.122(b) (defining methamphetamine-related offense as a violation of Article 7 of the PHC that involves methamphetamine). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

3.4 Failure to Mark or Imprint Prescription Drug

A. Statutory Authority

1. Generally

"A prescription drug that is in finished solid oral dosage form shall not be manufactured or distributed in this state after June 1, 1985 unless the drug is clearly and prominently marked or imprinted with an individual symbol, number, company name, words, letters, marking, national drug code, or a combination of any of the foregoing that identifies the prescription drug and the manufacturer or distributor of the drug." MCL 333.7302a(1).

2. Exceptions

There are two statutory exceptions to MCL 333.7302a:

- MCL 333.7302a(4) provides that upon application of a person who distributes or manufactures a prescription drug, the Department of Commerce must exempt a particular prescription drug from the requirements of MCL 333.7302a if the department determines "that marking or imprinting the prescription drug is not feasible because of the drug's size, texture, or other unique characteristic."

- MCL 333.7302a(5) provides that MCL 333.7302a does not apply to a prescription drug that is compounded by a pharmacist licensed under Article 15 (MCL 333.16101 to MCL 333.18838).

B. Penalties

"A person who knowingly or intentionally violates [MCL 333.7302a] is guilty of a misdemeanor[]" punishable by:

- imprisonment for not more than one year; or

- a fine of not more than $25,000;

- or both. MCL 333.7302a(8).

C. Issues

Where a defendant argues that he or she was authorized to manufacture or distribute the prescription drug at issue, he or she bears the burden of proving that his or her conduct was authorized.[87] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to manufacture or distribute the prescription drug at issue. MCL 333.7531(2). See M Crim JI 12.4a.

3.5 Failure to Report Sale of Ephedrine or Pseudoephedrine Product

A. Statutory Authority

"Before completing a sale under [MCL 333.17766f[88]], a retailer shall electronically submit the required information to the national precursor log exchange (NPLEx) administered by the national association of drug diversion investigators (NADDI). A retailer shall not be required to pay a fee for using the NPLEx system." MCL 333.7340a(1).

B. Penalties

Violation of MCL 333.7340a is a misdemeanor punishable by a fine of not more than $500. MCL 333.7340a(6).

However, "absent a direct and proximate cause" of damages, a person is immune from civil liability arising out of his or her "failure to comply with the [statute's] record-keeping or sales verification requirements[.]" MCL 333.7340a(5).

C. Issues

1. Electronic Tracking

MCL 333.7340a(1) requires retailers to electronically track the sale of nonprescription products containing ephedrine and pseudoephedrine through NPLEx. If there is a mechanical or

[87] For a more detailed discussion of authorization as a defense, see Chapter 7.

[88] MCL 333.17766f governs the possession and sale of products containing ephedrine or pseudoephedrine. For more information on MCL 333.17766f, see Section 5.16.

electronic failure of the tracking system, the retailer must maintain a written log or alternative electronic record-keeping mechanism until compliance with the electronic sales tracking requirement is possible. MCL 333.7340a(2).

The electronic system must be able to generate a "stop sale alert notifying the retailer that the person is prohibited from purchasing a nonprescription product containing ephedrine or pseudoephedrine due to a conviction reported under the methamphetamine abuse reporting act or that completing the sale will result in the seller's or purchaser's violating the quantity limits set forth in [MCL 333.17766f]." MCL 333.7340a(4). "Except as otherwise provided by law, the seller shall not complete the sale if the system generates a stop sale alert." *Id*. However, the dispenser may override the system if he or she "has a reasonable fear of imminent bodily harm if the dispenser does not complete a sale." *Id*.

2. The Methamphetamine Abuse Reporting Act

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[89] that an individual has been convicted of a methamphetamine-related offense. It is unclear whether violation of MCL 333.7340a constitutes a methamphetamine-related offense because it does not directly reference methamphetamine but does reference ephedrine, an ingredient in methamphetamine. See MCL 28.122(b) (defining methamphetamine-related offense as a violation of Article 7 of the PHC that involves methamphetamine). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

[89] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

3.6 Fraudulently Obtaining or Attempting to Obtain a Controlled Substance or a Prescription for a Controlled Substance from a Health Care Provider

A. Statutory Authority

"A person shall not fraudulently obtain or attempt to obtain a controlled substance or a prescription for a controlled substance from a health care provider." MCL 333.7403a(1).

The following privileges do not apply to medical records or information released or made available under MCL 333.7403a(1):

- the physician-patient privilege, MCL 600.2157; or
- the dentist-patient privilege, MCL 333.16648; or
- any other health professional-patient privilege created or recognized by law. MCL 333.7403a(2).

"To the extent not protected by the [governmental] immunity conferred by . . . MCL 691.1401 to [MCL] 691.1419, an individual who in good faith provides access to medical records or information under [MCL 333.7403a] is immune from civil or administrative liability arising from that conduct, unless the conduct was gross negligence or willful and wanton misconduct." MCL 333.7403a(3).

Committee Tip: Note that an attempt to commit this offense is part of the actual offense. MCL 333.7403a(1).

B. Penalties

Violation of MCL 333.7403a is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $5,000; or
- both. MCL 333.7403a(4)(a).

However, "[t]he court may place a person who has not previously been convicted of violating [MCL 333.7403a] on probation subject to

the terms and conditions set forth in [MCL 333.7411]."[90] MCL 333.7403a(5).

The court may also order screening and assessment to determine whether a defendant is likely to benefit from rehabilitative services. MCL 333.7403a(6). The court may order participation in one or more rehabilitative programs as part of the defendant's sentence. *Id.* Failure to complete a program is considered a probation violation.[91] *Id.* The defendant is responsible for the costs of screening, assessment, and rehabilitative services. *Id.*

MCL 333.7403a "does not prohibit the person from being charged with, convicted of, or sentenced for any other violation of law arising out of the violation of [MCL 333.7403a]." MCL 333.7403a(7).

3.7 Obtaining a Controlled Substance by Misrepresentation, Fraud, Deception, or Forgery

A. Statutory Authority

"A person shall not knowingly or intentionally . . . [a]cquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." MCL 333.7407(1)(c).

B. Relevant Jury Instruction

- M Crim JI 12.7 defines possession in the context of controlled substance offenses.

C. Penalties

Violation of MCL 333.7407(1)(c) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $30,000; or
- both. MCL 333.7407(3).

[90] For further discussion of MCL 333.7411, see Section 6.14.

[91] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2, for more information on probation violations.

D. Issues

1. Constructive Possession

Constructive possession[92] of a controlled substance by means of forgery existed where the defendant gave a forged prescription to a coworker, who agreed to take it to a pharmacist, pick it up, and deliver it to the defendant. *People v Davis (Neil)*, 109 Mich App 521, 525, 527 (1981) (finding it irrelevant that the coworker, who did not know the prescription was forged, was apprehended before he could actually deliver the substance to the defendant).

2. Forgery

It is not a defense to MCL 333.7407(1)(c) that the pharmacist to whom a forged prescription was presented knew or had reason to know that the prescription was forged and nonetheless filled it. *Davis (Neil)*, 109 Mich App at 524. There is no requirement under MCL 333.7407(1)(c) that the supplier of the proscribed substance be deceived by the forged prescription. *Id.*

3.8 Ownership, Possession, Use, or Provision of a Location and/or the Materials for the Manufacture of a Controlled Substance, Counterfeit Substance, or a Controlled Substance Analogue

A. Statutory Authority

1. Generally

"A person shall not do any of the following:

> (a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of [MCL 333.7401] or a counterfeit substance or a controlled substance analogue in violation of [MCL 333.7402].
>
> (b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to

[92] For a more detailed discussion of constructive possession see Section 2.2(D).

> know is to be used for the purpose of manufacturing a controlled substance in violation of [MCL 333.7401] or a counterfeit substance or a controlled substance analogue in violation of [MCL 333.7402].
>
> (c) Provide any chemical or laboratory equipment to another person knowing or having reason to know that the other person intends to use that chemical or laboratory equipment for the purpose of manufacturing a controlled substance in violation of [MCL 333.7401] or a counterfeit substance or a controlled substance analogue in violation of [MCL 333.7402]." MCL 333.7401c(1).

2. Exceptions

MCL 333.7401c "does not apply to a violation involving only a substance described in [MCL 333.7214(a)(*iv*) (cocaine-related substance)] or marihuana, or both." MCL 333.7401c(3).

B. Relevant Jury Instructions

- M Crim JI 12.1 addresses the unlawful manufacture of a controlled substance.
- M Crim JI 12.1a addresses the elements of MCL 333.7401c(1)(a) (owning, possessing or using vehicles, buildings, structures or areas used for manufacturing controlled substances).
- M Crim JI 12.1b addresses the elements of MCL 333.7401c(1)(b) (owning or possessing chemicals or laboratory equipment for manufacturing controlled substances).
- M Crim JI 12.1c addresses the elements of MCL 333.7401c(1)(c) (providing chemicals or laboratory equipment for manufacturing controlled substances).
- M Crim JI 12.7 defines possession in the context of controlled substance offenses.

C. Penalties

1. Generally

Except as otherwise provided by MCL 333.7401c(2)(b)-(f), violation of MCL 333.7401c is a felony punishable by:

- imprisonment for not more than 10 years; or
- a fine of not more than $100,000; or
- both. MCL 333.7401c(2)(a).

MCL 333.7401c "does not prohibit the person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate [MCL 333.7401c]." MCL 333.7401c(4).

"A term of imprisonment imposed under [MCL 333.7401c] may be served consecutively to any other term of imprisonment imposed for a violation of law arising out of the same transaction." MCL 333.7401c(5).

2. Exceptions

MCL 333.7401c(2)(b)-(f) specify different penalties when certain circumstances are present:

MCL 333.7401c(2)(b). If the violation of MCL 333.7401c(1) is committed in the presence of a minor, it is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $100,000; or
- both. MCL 333.7401c(2)(b).

MCL 333.7401c(2)(c). If the violation of MCL 333.7401c(1) involves the unlawful generation, treatment, storage, or disposal of a hazardous waste, it is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $100,000; or
- both. MCL 333.7401c(2)(c).

"The court may, as a condition of sentence, order a person convicted of a violation punishable under [MCL 333.7401c(2)(c)] to pay response activity costs arising out of the violation." MCL 333.7401c(6).

MCL 333.7401c(2)(d). If the violation of MCL 333.7401c(1) occurs within 500 feet of a residence, business establishment, school property,[93] or church or other house of worship, it is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $100,000; or
- both. MCL 333.7401c(2)(d).

MCL 333.7401c(2)(e). If the violation of MCL 333.7401c(1) involves the possession, placement, or use of a firearm or any other device designed or intended to be used to injure another person, it is a felony punishable by:

- imprisonment for not more than 25 years; or
- a fine of not more than $100,000; or
- both. MCL 333.7401c(2)(e).

MCL 333.7401c(2)(f). If the violation of MCL 333.7401c(1) involves or is intended to involve the manufacture of a substance described in MCL 333.7214(c)(*ii*) (any substance containing methamphetamine or its salts, stereoisomers, or salts of stereoisomers), it is a felony punishable by:

- imprisonment for not more than 20 years; or
- a fine of not more than $25,000: or
- both. MCL 333.7401c(2)(f).

D. Issues

1. Caselaw

Sufficient evidence to support a conviction of operating or maintaining a methamphetamine laboratory and of doing so within 500 feet of a residence existed where it was reasonable to infer that "defendant used the garage[,]" he "knew or had reason to know that the garage was to be used for manufacturing methamphetamine[,]" and testimony established that "the garage was within five hundred feet of a residence." *People v Meshell*, 265 Mich App 616, 624-625 (2005). The defendant's use of the garage and knowledge of its use was established by testimony that police observed the defendant walking out of a garage inside which methamphetamine was cooking or "off-gassing" and giving off steam or smoke visible from outside of the garage. *Id.* at 624-625. There was also a strong chemical odor detectable near

[93]For a discussion of the term *school property* see Section 2.6(E)(2).

the garage, and the methamphetamine had not been cooking for very long at the time police observed the defendant leaving the garage. *Id.* at 625. Further, the defendant was the only person in the area of the garage at the time. *Id.* Finally, testimony established that the garage was approximately 22 feet from a residence. *Id.*

2. The Methamphetamine Abuse Reporting Act

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[94] that an individual has been convicted of a methamphetamine-related offense. MCL 333.7401c is a methamphetamine-related offense when its violation involves the manufacture of methamphetamine. MCL 28.122(b)(*i*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

3.9 Possession of Tools to Make Counterfeit Drugs

A. Statutory Authority

"A person shall not knowingly or intentionally . . . [m]ake, distribute, or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon a drug or container or labeling thereof so as to render the drug a counterfeit substance." MCL 333.7407(1)(e).

B. Relevant Jury Instructions

M Crim JI 12.7 defines possession in the context of controlled substance offenses.

C. Penalties

Violation of MCL 333.7407(1)(e) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $30,000; or

[94] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

- both. MCL 333.7407(3).

3.10 Recruiting or Inducing a Minor to Commit a Felony Under Article 7 of the PHC

A. Statutory Authority

1. Generally

"A person 17 years of age or over who recruits, induces, solicits, or coerces a minor less than 17 years of age to commit or attempt to commit any act that would be a felony under [Article 7 of the PHC] if committed by an adult is guilty of a felony[.]" MCL 333.7416(1).

2. Exceptions

"[MCL 333.7416(1)(a)] does not apply to an act that is a violation of [MCL 333.7401(2)(d)] and that involves the manufacture, delivery, or possession with intent to deliver of [sic] marihuana. [MCL 333.7416] applies whether or not the person 17 years of age or older knew or had reason to know the age of the minor less than 17 years of age." MCL 333.7416(4).

B. Relevant Jury Instructions

- M Crim JI 8.4 addresses inducement (in the context of aiding and abetting).
- M Crim JI 10.6 addresses solicitation to commit a felony generally.

C. Penalties

A defendant sentenced for the violation of MCL 333.7416(1) "shall not be subject to a delayed sentence or a suspended sentence and shall not be eligible for probation." MCL 333.7416(2).

"The court may depart from a minimum term of imprisonment authorized under [MCL 333.7416(1)(a) or MCL 333.7416(1)(b)] if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7416(3).[95]

1. Generally

Violation of MCL 333.7416 is a felony and, except as otherwise provided, "shall be punished" by imprisonment for not less than half of the maximum term of imprisonment and not more than the maximum term of imprisonment authorized for an adult who commits such an act. MCL 333.7416(1)(a). Violations of MCL 333.7416 may also be punished by a fine not more than the fine authorized for an adult who commits such an act. MCL 333.7416(1).

2. Exceptions

"If the act to be committed or attempted by the minor is a violation of [MCL 333.7401(2)(a)(*i*),[96] the violation of MCL 333.7416 is a felony punishable] by imprisonment for life." MCL 333.7416(1)(b).

3.11 Refusing Entry or Keeping or Maintaining a Drug House

A. Statutory Authority

"A person:

* * *

(c) Shall not refuse an entry into any premises for an inspection authorized by [Article 7 of the PHC].

(d) Shall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of [Article 7 of

[95] MCL 333.7410(5) allows a court to depart from the mandatory minimum sentence for "substantial and compelling reasons[.]" However, now that the statutory sentencing guidelines are advisory only, departures from the guidelines do not need to be justified by substantial and compelling reasons; MCL 769.34—which previously required a substantial and compelling reason to depart—has been amended to permit a "reasonable" departure. See 2020 PA 395, effective March 24, 2021; *People v Lockridge*, 498 Mich 358, 364-365 (2015); MCL 769.34(3). The *Lockridge* Court additionally stated that "[t]o the extent that any part of MCL 769.34 or *another statute* refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1 (emphasis added). It is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. For a detailed discussion of *Lockridge*, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1.

[96] MCL 333.7401(2)(a)(*i*) involves controlled substances classified in schedule 1 or 2 that are narcotic drugs or cocaine-related substances in an amount of 1,000 grams or more.

> the PHC] for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of [Article 7 of the PHC]." MCL 333.7405(1)(c)-(d).

B. Penalties

If the violation of MCL 333.7405 "is prosecuted by a criminal indictment alleging that the violation was committed knowingly or intentionally, and the trier of the fact specifically finds that the violation was committed knowingly or intentionally," the violation is a misdemeanor punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $25,000; or
- both. MCL 333.7406.

If it is not alleged and proved that the violation of MCL 333.7405 was committed knowingly or intentionally, the violation may only be punished by a civil fine of not more than $25,000. MCL 333.7406.

C. Issues

1. Keep or Maintain Element

In order to satisfy the "keep or maintain" element of MCL 333.7405(1)(d), the prosecution must prove that the defendant exercised authority or control over the property; the defendant need not own or reside at the property. *People v Griffin*, 235 Mich App 27, 32 (1999), overruled on other grounds by *People v Thompson (Keith)*, 477 Mich 146 (2007).[97, 98] In addition, the prosecution "'need not prove that the property was used for the exclusive purpose of keeping or distributing controlled substances, but such use must be a substantial purpose of the users of the property, and the use must be continuous to some degree; incidental use of the property for keeping or distributing drugs or a single, isolated occurrence of drug-related activity will not suffice.'" *Thompson (Keith)*, 477 Mich at 152-153 (case involving drugs sold from a vehicle), quoting *Dawson v State*, 894 P2d 672, 678-679 (Alas App, 1995). The Court further explained that "'keep or maintain' is not

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

[98] *Thompson* overruled the *Griffin* Court's determination that the defendant's exercise of authority or control must occur "continuously for an appreciable period." *Thompson*, 477 Mich at 148.

synonymous with 'use.' Hence, if the evidence only shows that defendant used a vehicle to keep or deliver drugs on one occasion, and there is no other evidence of continuity, the evidence is insufficient to establish that defendant kept or maintained a drug vehicle in violation of MCL 333.7405(1)(d)." *Thompson*, 477 Mich at 157-158.

Payment of rent for a building is indicative of "control" over the building. *People v Bartlett*, 231 Mich App 139, 156 (1998).

There was sufficient evidence to support the defendant's conviction of keeping or maintaining a drug house where the only dispute during trial was whether the defendant manufactured more marijuana than was permitted under his license,[99] and it was undisputed that the defendant owned and resided at the premises where 78 marijuana plants and 578.6 grams of harvested marijuana were found and that he used the premises to grow marijuana. *People v Bosca*, 310 Mich App 1, 24 (2015), rev'd in part on other grounds 509 Mich 851 (2022).[100]

The defendant could not show that the failure to instruct the jury on the definition of "keep or maintain" or on the requirement of continuous use prejudiced him where "the jury would have convicted defendant on the basis of the evidence at trial even if the jury had been more fully instructed on the intricacies of the 'keep or maintain' element." *People v Norfleet*, 317 Mich App 649, 658 (2016). "The evidence of continuous use of his home and Jeep to keep and sell heroin and the evidence that a substantial purpose of his home and Jeep was to keep and sell heroin was the testimony of various witnesses indicating that the Jeep was used to make heroin deliveries and that the home was used to store both the heroin and the proceeds of the heroin's sale." *Id.* at 659 (rejecting the defendant's argument that the instructional error was prejudicial where no heroin was found by the police in either his home or his Jeep because even if evidence was presented that heroin was discovered in his home or his Jeep that evidence would not be direct evidence of continuous use or a substantial purpose).

[99]The defendant was a licensed caregiver under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq. Bosca*, 310 Mich App at 9-10.

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

2. When Keeping or Maintaining a Drug House is Considered a Felony

Despite being categorized as a misdemeanor by the PHC, keeping or maintaining a drug house "may serve as the predicate felony for a felony-firearm conviction."[101] *People v Washington*, 501 Mich 342, 363 (2018). "When the government charges a criminal defendant with felony-firearm under the Penal Code, th[e] Court must look to the Penal Code to ascertain the meaning of the word 'felony,' which is defined as an offense punishable by imprisonment in state prison," and "[a]lthough the Legislature intended the offense of keeping or maintaining a drug house to be a misdemeanor for purposes of the Public Health Code, that offense is punishable by imprisonment in a state prison, and, therefore, it unquestionably satisfies the definition of 'felony' in the Penal Code." *Id.* at 347. In reaching its conclusion, the Court stated that "an offense expressly labeled a misdemeanor in one code does not necessarily mean the same offense is a misdemeanor for purposes of interpreting and applying a different code." *Id.* at 357.

3.12 Representing a Product to Contain an Ingredient Producing the Same or Similar Effect as a Named Product Containing or Previously Containing a Schedule 1 Controlled Substance

A. Statutory Authority

"A person who knows that a named product contains or previously contained an ingredient that was designated to be a schedule 1 controlled substance shall not sell or offer to sell any other product while representing that it contains an ingredient that produces the same or a substantially similar physiological or psychological effect as that scheduled ingredient. [MCL 333.7417(1)] does not apply to a product approved by the federal food and drug administration." MCL 333.7417(1).

B. Penalties

Violation of MCL 333.7417(1) is a felony punishable by:

- imprisonment for not more than four years; or

[101]The offense of felony-firearm is in the Michigan Penal Code, codified at MCL 750.227b(1).

- a fine of not more than $20,000; or
- both. MCL 333.7417(2).

3.13 Sale of Drug Paraphernalia

A. Statutory Authority

1. Offense

"Subject to [MCL 333.7453(2)[102]], a person shall not sell or offer for sale an object specifically designed for inhaling nitrous oxide for recreational purposes or drug paraphernalia, knowing that the object specifically designed for inhaling nitrous oxide for recreational purposes will be used to inhale nitrous oxide for recreational purposes or that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." MCL 333.7453(1).

2. Exceptions and Exemptions

a. Pre-Arrest Notice

"Before a person is arrested for a violation of [MCL 333.7453(1)], the attorney general or a prosecuting attorney shall notify the person in writing, not less than 2 business days before the person is to be arrested, that the person is in possession of specific, defined material that has been determined by the attorney general or prosecuting attorney to be an object specifically designed for inhaling nitrous oxide for recreational purposes or drug paraphernalia. The notice also must request that the person refrain from selling or offering for sale the material and must state that if the person complies with the notice, no arrest will be made for a violation of [MCL 333.7453(1)]." MCL 333.7453(2).

Compliance with the notice from the prosecutor or attorney general is a complete defense in a prosecution under [MCL 333.7453] as long as compliance continues. MCL 333.7453(3).

[102] MCL 333.7453(2) requires notice be given prior to any arrest under MCL 333.7453.

A person who has received notice under MCL 333.7453(2) may commence a declaratory action against the attorney general or prosecuting attorney who sent the notice to obtain an adjudication of the legality of the intended sale or offer to sell. MCL 333.7459(1)-(2).

A declaratory judgment issued pursuant to an action brought under MCL 333.7459 and stating that the sale or the offer for sale of specified material does not violate MCL 333.7453(1) is a complete defense against prosecution under MCL 333.7453(1). MCL 333.7461.

b. Items Not Constituting Drug Paraphernalia

"[MCL 333.7451 to MCL 333.7455] do not apply to any of the following:

> (a) An object sold or offered for sale to a person licensed under article 15 or under the occupational code, 1980 PA 299, MCL 339.101 to 339.2721, or any intern, trainee, apprentice, or assistant in a profession licensed under article 15 or under the occupational code, 1980 PA 299, MCL 339.101 to 339.2721, for use in that profession.
>
> (b) An object sold or offered for sale to any hospital, sanitarium, clinical laboratory, or other health care institution including a penal, correctional, or juvenile detention facility for use in that institution.
>
> (c) An object sold or offered for sale to a dealer in medical, dental, surgical, or pharmaceutical supplies.
>
> (d) A blender, bowl, container, spoon, or mixing device not specifically designed for a use described in [MCL 333.7451].
>
> (e) A hypodermic syringe or needle sold or offered for sale for the purpose of injecting or otherwise treating livestock or other animals.
>
> (f) An object sold, offered for sale, or given away by a state or local governmental agency or by a person specifically authorized by a state or local governmental agency to prevent the transmission of infectious agents." MCL 333.7457.

B. Penalties

1. Generally

Except as provided in MCL 333.7453(2), violation of MCL 333.7453 is a misdemeanor punishable by:

- imprisonment for not more than 90 days; or
- a fine of not more than $5,000; or
- both. MCL 333.7455(1).

2. Exceptions

Violation of MCL 333.7453 by a person 18 years of age or older who sells or offers to sell an object specifically designed for inhaling nitrous oxide for recreational purposes or drug paraphernalia to a person less than 18 years of age is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $7,500; or
- both. MCL 333.7455(2).

3.14 Soliciting Another Person to Purchase or Obtain Ephedrine or Pseudoephedrine to Manufacture Methamphetamine

A. Statutory Authority

"A person shall not solicit another person to purchase or otherwise obtain any amount of ephedrine or pseudoephedrine knowing that it is to be used for the purpose of illegally manufacturing methamphetamine." MCL 333.7340c(1).

B. Relevant Jury Instruction

- M Crim JI 10.6 addresses solicitation to commit a felony generally.

C. Penalties

Violation of MCL 333.7340c is a felony punishable by:

- imprisonment for not more than 10 years; or
- a fine of not more than $10,000; or
- both. MCL 333.7340c(2).

Attempt to violate MCL 333.7340c is a misdemeanor punishable by:

- imprisonment for not more than 1 year; or
- a fine of not more than $1,000; or
- both. MCL 333.7340c(3).

MCL 333.7340c "does not prohibit the person from being charged with, convicted of, or sentenced for any other violation of law committed by the person while violating this section." MCL 333.7340c(4).

The court must report all convictions under MCL 333.7340c to the department of state police.MCL 333.7340c(5).

D. Issues

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions upon notification by a court[103] that an individual has been convicted of a methamphetamine-related offense. Violation of MCL 333.7340c constitutes a methamphetamine-related offense. MCL 28.122(b)(*i*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

3.15 Soliciting, Inducing, or Intimidating Another to Violate Article 7 of the PHC

A. Statutory Authority

"A person shall not knowingly or intentionally solicit, induce, or intimidate another person to violate [MCL 333.7401 to MCL 333.7461]." MCL 333.7407a(2).

[103] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

B. Relevant Jury Instructions

- M Crim JI 8.4 addresses inducement (in the context of aiding and abetting).
- M Crim JI 10.6 addresses solicitation to commit a felony generally.

C. Penalties

"Except as otherwise provided in [MCL 333.7416[104]], a person who violates [MCL 333.7407a] is guilty of a crime punishable . . . by the penalty for the crime he or she solicited, induced, or intimidated another person to commit." MCL 333.7407a(3).

D. Issues

1. Definitions

Article 7 of the PHC does not define *solicitation*, and Michigan courts have not construed the term in the context of MCL 333.7407a. However, where a term has developed "a peculiar and appropriate meaning in the law," it must be construed in accordance with that meaning. MCL 8.3a. Moreover, "[i]t is a general rule of construction that lawmakers are presumed to know of and legislate in harmony with existing laws." *People v Veling*, 443 Mich 23, 36 n 15 (1993) (quotation marks and citation omitted). Accordingly, the definition of *solicitation* found in the general solicitation statute, MCL 750.157b(1) may be instructive in regard to the term as used in MCL 333.7407a. MCL 750.157b(1) defines *solicit* as "to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation."

Similarly, Article 7 of the PHC does not define *induce*; however, in the context of MCL 750.157c (inducing a minor to commit a felony), the Michigan Court of Appeals noted that *induce* means "to lead or move by persuasion or influence, as to some action or state of mind." *People v Pfaffle*, 246 Mich App 282, 298 (2001) (quotation marks and citation omitted). M Crim JI 8.4, which defines the term *induce* in the context of the aiding and abetting statute, explains that the amount of help, advice, or encouragement does not matter; rather, the jury must

[104] MCL 333.7416 prohibits and sets forth penalties for recruiting, inducing, soliciting, or coercing a minor to commit a felony. See Section 3.10 for a discussion of this offense.

determine whether the help, advice, or encouragement actually did help, advise, or encourage the crime.

Finally, Article 7 of the PHC does not define *intimidate*, and the term has not developed a peculiar and appropriate meaning in the law. "[U]ndefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art." *People v Thompson (Keith)*, 477 Mich 146, 151 (2007). Lay dictionaries may be consulted to define "common words or phrases that lack a unique legal meaning." *Id.* at 151-152.

2. Renunciation

The general solicitation statute, MCL 750.157b, provides a renunciation affirmative defense; however, MCL 333.7407a makes no mention of such a defense, and Michigan courts have not considered the question of whether the renunciation defense is applicable to MCL 333.7407a. Therefore, it is uncertain at this time whether such a defense exists in connection with MCL 333.7407a.

Chapter 4: Licensee and Practitioner Offenses in Article 7 of the Public Health Code

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4.1 Scope Note

This chapter discusses licensee and practitioner violations codified in Article 7 of the Public Health Code (PHC), MCL 333.7101 *et seq*.[105] Each section of this chapter will focus on a specific offense or violation and will provide the statutory authority, any civil sanctions, and any penalties imposed for commission of that offense. When applicable, each section will also include a list of relevant jury instructions and a discussion of other issues pertinent to the particular offense.

Licensing sanctions under the Michigan Vehicle Code, MCL 257.1 *et seq.*, are discussed in detail in the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 1. This discussion includes the sanctions applicable to controlled substance-related operating convictions under MCL 257.625. An SCAO table entitled, *Reporting Circuit Court Felony Convictions to the Department of State*, contains a detailed list of offenses and their abstracting requirements.

See the Michigan Judicial Institute's table for sentencing information about the offenses covered in this chapter.

4.2 Licensee Definition and Requirements

Although neither Article 7 of the PHC nor Article 1 of the PHC[106] specifically define *licensee*, that term is defined in different articles of the PHC, and these definitions may be instructive regarding the meaning of the term as it is used in Article 7. See MCL 8.3a (where a term has developed "a peculiar and appropriate meaning in the law," it must be construed in accordance with that meaning); *People v Veling*, 443 Mich 23, 36 n 15 (1993) ("lawmakers are presumed to know of and legislate in harmony with existing laws").

- Article 15 of the PHC, which addresses occupations, states that *licensee* "as used in a part that regulates a specific health profession, means an individual to whom a license is issued under that part, and as used in [part 161] means each licensee regulated by [Article 15]." MCL 333.16106(3).

- Article 17 of the PHC, which addresses facilities and agencies, defines *licensee* as "the holder of a license or permit to establish or maintain and operate, or both, a health facility or agency." MCL 333.20108(3).

---

[105] MCL 333.7101 *et seq*. refers to the beginning of Article 7. The beginning of the entire Public Health Code can be found at MCL 333.1101 *et seq*.

[106] MCL 333.7101 provides that general definitions contained in Article 1 apply to all articles of the PHC.

Further, the Michigan Administrative Code defines *licensee* to mean "a person who is licensed pursuant to [MCL 333.7303]." Mich Admin Code, R 338.3102(1)(b).[107] MCL 333.7303(1) provides:

> "A person who manufactures, distributes, prescribes, or dispenses a controlled substance in this state or who proposes to engage in the manufacture, distribution, prescribing, or dispensing of a controlled substance in this state shall obtain a license issued by the administrator in accordance with the rules. A person who has been issued a controlled substances license by the administrator under [Article 7 of the PHC] and a license under [Article 15 of the PHC] shall renew the controlled substances license concurrently with the renewal of the license issued under article 15, and for an equal number of years."

Certain individuals may be exempt from the licensing requirement if they meet the criteria listed in MCL 333.7303(4).

4.3 Circumstances Under Which a Licensee or Practitioner Shall Not Distribute, Prescribe, Dispense, or Manufacture a Controlled Substance

A. Statutory Authority

"(1) A person:

> (a) Who is licensed by the administrator under [Article 7 of the PHC] shall not distribute, prescribe, or dispense a controlled substance in violation of [MCL 333.7333[108]].
>
> (b) Who is a licensee[109] shall not manufacture a controlled substance not authorized by his or her license or distribute, prescribe, or dispense a controlled substance not authorized by his or her license to another licensee or other authorized person, except as authorized by rules promulgated by the administrator.

---

[107] "[A]dministrative rules have the force and effect of law." *Bloomfield Twp v Kane*, 302 Mich App 170, 183 (2013).

[108] In relevant part, MCL 333.7333 governs when a schedule 2, 3, 4, or 5 substance may be dispensed and the use of prescription forms for those substances. MCL 333.7333 permits a practitioner to, in good faith, dispense a controlled substance in schedule 2 that is a prescription drug upon receipt of either a prescription form, an electronically transmitted prescription, or an oral prescription if it is a qualifying emergency situation, or in the case of substances in schedules 3-5, upon receipt of a prescription form, an oral prescription of a practitioner, or an electronically transmitted prescription. MCL 333.7333(2)-(4).

[109] *Licensee* is not defined by Article 7 of the PHC, see Section 4.2 for a discussion of this term.

* * *

> (e) Who is a practitioner shall not dispense a controlled substance under a prescription written and signed; written or created in an electronic format, signed, and transmitted by facsimile; or transmitted electronically or by other means of communication by a physician prescriber or dentist prescriber licensed to practice in a state other than Michigan, unless the prescription is issued by a physician prescriber or dentist prescriber who is authorized under the laws of that state to practice dentistry, medicine, or osteopathic medicine and surgery and to prescribe controlled substances." MCL 333.7405(1).

B. Relevant Jury Instructions

- M Crim JI 12.1 addresses the unlawful manufacture of a controlled substance.
- M Crim JI 12.4 addresses the preparation of a controlled substance by a practitioner or a practitioner's agent.

C. Penalties

If the violation of MCL 333.7405 "is prosecuted by a criminal indictment alleging that the violation was committed knowingly or intentionally, and the trier of the fact specifically finds that the violation was committed knowingly or intentionally," the violation is a misdemeanor punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $25,000; or
- both. MCL 333.7406.

If it is not alleged and proved that the violation of MCL 333.7405 was committed knowingly or intentionally, the violation may only be punished by a civil fine of not more than $25,000. MCL 333.7406.

D. Issues

Where a defendant argues that he or she was authorized to distribute, prescribe, dispense, and/or manufacture the controlled substance at issue, he or she bears the burden of proving that his or her conduct was authorized.[110] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not

authorized to distribute, prescribe, dispense, and/or manufacture the controlled substance. MCL 333.7531(2). See M Crim JI 12.4a.

4.4 Furnishing False or Fraudulent Information on an Application, Report, or Other Required Document

A. Statutory Authority

"A person shall not knowingly or intentionally . . . [f]urnish false or fraudulent material information in, or omit any material information from, an application, report, or other document required to be kept or filed under [Article 7 of the PHC], or any record required to be kept by [Article 7 of the PHC]." MCL 333.7407(1)(d).

B. Penalties

Violation of MCL 333.7407(1)(d) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $30,000; or
- both. MCL 333.7407(3).

4.5 Licensee Distribution of Schedule 1 or 2 Controlled Substances

A. Statutory Authority

"A person shall not knowingly or intentionally . . . [d]istribute as a licensee[111] a controlled substance classified in schedule 1 or 2, except pursuant to an order form as required by [MCL 333.7331[112]]." MCL 333.7407(1)(a).

---

[110] For a more detailed discussion of authorization as a defense, see Chapter 7.

[111] *Licensee* is not defined by Article 7 of the PHC, see Section 4.2 for a discussion of this term.

[112] MCL 333.7331 provides:

"(1) Only a practitioner who holds a license under [Article 7 of the PHC] to prescribe or dispense controlled substances may purchase from a licensed manufacturer or distributor a schedule 1 or 2 controlled substance. The authority granted under this subsection to purchase a schedule 1 or 2 controlled substance is not assignable or transferable.

(2) A purchase of a schedule 1 or 2 controlled substance under subsection (1) shall be made only pursuant to an order form which is in compliance with federal law."

B. Penalties

Violation of MCL 333.7407(1)(a) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $30,000; or
- both. MCL 333.7407(3).

C. Issues

Where a defendant argues that he or she was authorized to distribute the controlled substance at issue, he or she bears the burden of proving that his or her conduct was authorized.[113] MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not authorized to distribute a controlled substance. MCL 333.7531(2). See M Crim JI 12.4a.

4.6 Refusal to Make, Keep, or Furnish Any Record, Notification, Order Form, Statement, Invoice, or Other Required Information

A. Statutory Authority

"A person shall not refuse or knowingly fail to make, keep, or furnish any record, notification, order form, statement, invoice, or other information required under [Article 7 of the PHC]." MCL 333.7407(2).

B. Penalties

Violation of MCL 333.7407(2) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $30,000; or
- both. MCL 333.7407(3).

[113] For a more detailed discussion of authorization as a defense, see Chapter 7.

4.7 Use of a Fictitious License Number

A. Statutory Authority

"A person shall not knowingly or intentionally . . . [u]se in the course of the manufacture or distribution of a controlled substance a license number that is fictitious, revoked, suspended, or issued to another person." MCL 333.7407(1)(b).

B. Penalties

Violation of MCL 333.7407(1)(b) is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $30,000; or
- both. MCL 333.7407(3).

Chapter 5: Controlled Substance Offenses Codified in Other Articles of the PHC and in Other Acts

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5.1 Scope Note

This chapter discusses controlled substance offenses that are codified in the Code of Criminal Procedure, MCL 760.1 *et seq.*; the Michigan Penal Code, MCL 750.1 *et seq.*; the Public Health Code (PHC), MCL 333.1101 *et seq.* (with the exception of the Article 7 offenses discussed in chapters 2-4); Act 119 of 1967 (chemical agents); Act 17 of 1909 (liquor, narcotics, and weapons prohibited in prisons); Act 7 of 1981 (liquor, narcotics, and weapons prohibited in jails); and the Medical Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101 *et seq*. Each section of this chapter will focus on a specific offense and will provide the statutory authority and the penalties for commission of that offense. When applicable, each section will also include a list of relevant jury instructions and a discussion of other issues pertinent to the particular offense. Offenses related to operating a motor vehicle while under the influence of a controlled substance are discussed in Chapter 9 of the Michigan Judicial Institute's *Traffic Benchbook* and offenses related to operating an off-road recreational vehicle, motorboat, or snowmobile while under the influence of a controlled substance are discussed in the Michigan Judicial Institute's *Recreational Vehicles Benchbook*.

See the Michigan Judicial Institute's table for sentencing information about the offenses covered in this chapter.

Part I: Offense Codified in the Code of Criminal Procedure

5.2 Aiding and Abetting

A. Statutory Authority

"Every person concerned in the commission of an offense, whether he [or she] directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he [or she] had directly committed such offense." MCL 767.39.

B. Relevant Jury Instruction

- M Crim JI 8.1 addresses aiding and abetting.

C. Penalties

A person who aids and abets in the commission of an offense is subject to the same penalties as if he or she directly committed the offense. MCL 767.39.

D. Issues

1. Elements of Aiding and Abetting

In order to convict a defendant of aiding and abetting, the prosecution must prove three elements: "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v Robinson*, 475 Mich 1, 6 (2006) (quotation and citation omitted, alteration in original). "A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Id.* at 15.

"[A] person may be prosecuted for aiding and abetting without regard to the conviction or acquittal of the principal." *People v Mann*, 395 Mich 472, 478 (1975). "Although a defendant may not be convicted of aiding and abetting if the guilt of the principal has not been shown, the identity of the principal is not necessary if the existence of a guilty principal is proven." *People v Wilson (Carolyn)*, 196 Mich App 604, 611 (1992) (internal citation omitted). Accordingly, "so long as there is evidence that 'tends to establish that more than one person committed the crime,' the issue of aiding and abetting may be put before the trier of fact." *Id*. at 472, quoting *People v Vaughn*, 186 Mich App 376, 382 (1990) (alteration omitted).

2. Examples of Aiding and Abetting

Delivery. Evidence that the defendant "transported another person to an illegal narcotics transaction, provided the money for th[e] transaction, and intended that the money be used to purchase narcotics" supported a finding of probable cause that the defendant "aided and abetted *the delivery itself* by assisting [a] party to the transaction." *People v Plunkett*, 485 Mich 50, 62, 65 (2010) ("[A] criminal 'delivery' of narcotics necessarily requires *both* a deliverer and a recipient. Accordingly, a

defendant who assists *either* party to a criminal delivery necessarily aids and abets the deliverer's commission of the crime because such assistance aids and abets the *delivery*.")

Delivery and possession with intent to deliver. Evidence that the defendant purchased cocaine later sold by another person to an undercover officer, discussed the price of the cocaine with the person who sold it, and drove the person who completed the sale to the sale location was sufficient to support the defendant's conviction of aiding and abetting delivery and possession with intent to deliver in violation of MCL 333.7401(2)(a)(*iii*) and MCL 333.7401(2)(a)(*iv*). *People v Izarraras-Placante*, 246 Mich App 490, 496 (2001).

3. Instruction on Aiding and Abetting

"[S]o long as there is evidence that 'tends to establish that more than one person committed the crime,' the issue of aiding and abetting may be put before the trier of fact." *Pinkney*, 316 Mich App at 472, quoting *Vaughn*, 186 Mich App at 382 (alteration omitted). "[T]here exist scenarios . . . where an aiding-and-abetting instruction may be given despite the fact that the evidence could lend itself to a defendant's guilt as the principal *or* the aider-and-abettor." *Id.* at 473-474.

4. Proof of Knowledge or Intent

"An aider and abetter's knowledge of the principal's intent can be inferred from the facts and circumstances surrounding an event." *People v Bennett*, 290 Mich App 465, 474 (2010) (Sufficient evidence existed from which a jury could conclude that the defendant was guilty of first-degree murder on a theory of aiding and abetting where evidence that the defendant was reluctant to have the principal kill the victim did "not negate the critical element of [the defendant's] knowledge of [the principal's] specific intent to kill the victim.")

5. Correct Venue for Criminal Prosecution

Unless there is "an applicable statutory exception, a crime must be prosecuted in the county in which the crime occurs[.]" *People v White*, 509 Mich 96, 100 (2022). The aiding and abetting theory of prosecution under MCL 767.39 is a statutory exception to the default rule that venue is proper in the county where the crime was committed. *White*, 509 Mich at 100, 102. Thus, "for a criminal prosecution under an aiding and abetting theory, . . . the county in which the criminal act of the principal

occurred is a proper venue," regardless of the county in which the accomplice's actions occurred. *Id.* at 99 (holding that the proper venue for prosecution of defendant under the aiding and abetting statute was Livingston County where the principal—charged with delivery of a controlled substance causing death—allegedly purchased the controlled substance from defendant in Macomb County but delivered the controlled substance in Livingston County).

Part II: Offenses Codified in the Michigan Penal Code

5.3 Conspiracy

A. Statutory Authority

"Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy[.]" MCL 750.157a.

B. Relevant Jury Instructions

- M Crim JI 10.1 addresses conspiracy.
- M Crim JI 10.2 addresses agreement as it relates to conspiracy.
- M Crim JI 10.3 addresses membership as it relates to conspiracy.
- M Crim JI 10.4 addresses scope as it relates to a defendant's liability for the acts of other members of a conspiracy.

C. Penalties

MCL 750.157a(a)-(d) set forth the following penalties for conspiracy convictions:

> "(a) Except as provided in paragraphs (b),[114] (c), and (d) if commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he

[114] MCL 750.157a(b) addresses illegal gambling or wagering and is not relevant to this benchbook.

> [or she] had been convicted of committing the crime he [or she] conspired to commit and in the discretion of the court an additional penalty of a fine of $10,000.00 may be imposed.
>
> * * *
>
> (c) If commission of the offense prohibited by law is punishable by imprisonment for less than 1 year, except as provided in paragraph (b), the person convicted under this section shall be imprisoned for not more than 1 year nor fined more than $1,000.00 or both such fine and imprisonment.
>
> (d) Any person convicted of conspiring to commit a legal act in an illegal manner shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than $10,000.00, or both such fine and imprisonment in the discretion of the court."

D. Issues

1. Conspiracy Generally

In Michigan, "the statutory crime of conspiracy can be established in one of two ways: by proof that two or more persons have agreed to do an act that is in itself unlawful, or by proof that two or more persons have agreed to do a legal act using illegal means." *People v Seewald*, 499 Mich 111, 118 (2016). The statutory language of MCL 750.157a clearly proscribes two forms of conspiracy. *Seewald*, 499 Mich at 118.

The crime of conspiracy is "complete upon formation of the agreement," and "it is not necessary to establish any overt act in furtherance of the conspiracy." *People v Carter (Alvin)*, 415 Mich 558, 568 (1982), overruled in part on other grounds by *People v Robideau*, 419 Mich 458 (1984).[115] An agreement may be proved by circumstantial evidence; direct proof of the agreement is not required. *Carter (Alvin)*, 415 Mich at 568. Further, a conspiracy can exist without a formal agreement. *Id.* An agreement in fact is sufficient and may be proved by circumstances, acts, and conduct of the parties. *Id.* Because the crime of conspiracy is complete upon formation of the agreement, "[t]he guilt or innocence of a conspirator does not

[115] *Robideau* was overruled by *People v Smith (Bobby)*, 478 Mich 292 (2007) (construing the appropriate test for double jeopardy).

depend upon the accomplishment of the goals of the conspiracy." *Id*. at 569.

"In general, each conspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all the conspirators." *People v Grant*, 455 Mich 221, 236 (1997). To be convicted of conspiracy, a defendant need not "know the full scope of the conspiracy or participate in carrying out each detail." *Id.* at 236-237 n 20. Nor does a conspiracy conviction require the defendant to be acquainted with or know the exact part played by each of his or her coconspirators. *Id.* at 236 n 20.

"Wharton's Rule operates as a substantive limitation on the scope of the crime of conspiracy . . . ." *People v Weathersby*, 204 Mich App 98, 107 (1994). See also *Carter (Alvin)*, 415 Mich at 570-571. Wharton's Rule "provides that an agreement by two persons to commit a crime cannot be prosecuted as a conspiracy where the target crime requires the participation of two persons." *Id.* "The rule does not apply where the number of alleged coconspirators exceeds the number necessary to commit the target crime, or where the Legislature intends to impose separate punishment for the conspiracy aspect of the target crime[.]" *Id.* (citations omitted).

Wharton's Rule does not apply to a conspiracy-to-deliver offense involving only two persons because simple delivery of a controlled substance to another person "does not necessarily require the cooperative acts of more than one person[.]" *People v Betancourt*, 120 Mich App 58, 65 (1982) (quotation and citation omitted).

2. Required Intent

Conspiracy is a two-fold specific intent crime:

- the defendant must intend to combine with others; and

- the defendant must intend to accomplish the illegal objective. *Carter (Alvin)*, 415 Mich at 568.

Because there can be no conspiracy without a combination of two or more persons, the prosecution must prove that both the defendant and at least one other person had the required specific intent. *People v Anderson (James)*, 418 Mich 31, 35 (1983); *People v Williams (Charles)*, 240 Mich App 316, 325 (2000). Thus, where only one person can be shown to have had the *mens rea*

to commit an illegal act, no conspiracy exists. See *People v Barajas*, 198 Mich App 551, 559 (1993), aff'd 444 Mich 556 (1994)[116] (no conspiracy to deliver over 650 grams of cocaine was found where the defendant's coconspirator intended to defraud the defendant at the time the criminal agreement was made, by planning to deliver baking soda in place of most of the cocaine).

The rule barring a one-person conspiracy is commonly used to prevent inconsistent verdicts where coconspirators are tried jointly by a single fact finder for a conspiracy in which no additional persons are implicated. Under the rule barring a one-person conspiracy, a verdict finding one coconspirator guilty but not the other requires a judgment of acquittal as to both coconspirators. *Williams (Charles)*, 240 Mich App at 325, quoting *Anderson (James)*, 418 Mich at 36.

However, the rule barring a one-person conspiracy does not apply under the following circumstances:

- Where the defendant and his or her coconspirator are tried separately, an acquittal in one case does not require acquittal in the other. *Anderson (James)*, 418 Mich at 38.

- Where the defendant and his or her coconspirator are tried jointly, but with separate fact-finders, an acquittal in one case does not require acquittal in the other. *People v Jemison*, 187 Mich App 90, 93 (1991).

- There was sufficient evidence to support the defendant's conspiracy conviction despite the fact that the conspiracy charges against a coconspirator were dismissed in exchange for a guilty plea to a different offense. See *People v Turner*, 86 Mich App 177, 182-183 (1978), vacated 407 Mich 890 (1979) and *People v Turner (On Remand)*, 100 Mich App 214, 217 (1980).[117]

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[116]In affirming the decision of the Court of Appeals in *Barajas*, the Supreme Court noted that "the analysis employed by the Court of Appeals is limited strictly to the facts of this case." *People v Barajas*, 444 Mich 556, 557 (1994).

[117]In its order vacating the Court of Appeals' decision, the Michigan Supreme Court did not discuss the issue concerning the rule barring a one-person conspiracy that was initially addressed by the Court of Appeals. Additionally, on remand, the Court of Appeals did not specifically discuss the rule against a one-person conspiracy; however, it did hold that there was sufficient evidence to support the conspiracy charges. Thus, in its opinion on remand, the Court of Appeals implicitly held that the dismissal of charges against the coconspirator did not violate the rule against a one-person conspiracy. See *People v Turner*, 86 Mich App 177, 182-183 (1978), vacated 407 Mich 890 (1979) and *People v Turner (On Remand)*, 100 Mich App 214, 217 (1980).

- Where a coconspirator is granted immunity from prosecution in exchange for his or her testimony against the defendant, the defendant's conviction need not be set aside. *People v Berry*, 84 Mich App 604, 607 (1978).

3. Joining a Conspiracy

A defendant may become a member of an already existing conspiracy by cooperating knowingly to further the object of the conspiracy. *People v Blume*, 443 Mich 476, 483-484 (1993) (citations omitted). "Mere knowledge that someone proposes unlawful action alone is not enough to find involvement in a conspiracy[.]" *Id.* at 484. Rather, intent[118] must be proven: "the defendant must know of the conspiracy, must know of the objective of the conspiracy, and must intend to participate cooperatively to further that objective." *Id.* at 485. However, "[i]t is not necessary to conviction for conspiracy that one must have knowledge of its inception or of all its many ramifications. One who joins in a criminal conspiracy after it has been formed is as guilty as though he [or she] were an original conspirator." *People v Ryan*, 307 Mich 610, 612 (1943).

4. Duration of a Conspiracy

A conspiracy "continues until the common enterprise has been fully completed, abandoned, or terminated." *People v Martin*, 271 Mich App 280, 317 (2006) (quotation marks and citation omitted). In fact, "[a] conspiracy may continue even after the substantive crime which was the primary object of the conspiracy is complete until financial and other arrangements among the conspirators are also complete." *People v Centers*, 141 Mich App 364, 374-375 (1985), rev'd in part on other grounds 453 Mich 882 (1996).[119] However, subsequent acts taken for the purpose of concealing the conspiracy's crime do not show a continuation of the conspiracy. See *Grunewald v United States*, 353 US 391, 401-402 (1957); *Centers*, 141 Mich App at 375.

Withdrawal is not a defense to the crime of conspiracy under MCL 750.157a. *People v Cotton*, 191 Mich App 377, 393 (1991). "[W]ithdrawal from the conspiracy is ineffective because the heart of the offense is the participation in the unlawful agreement." *Id.* See also *People v Jahner*, 433 Mich 490, 510

[118] See Section 5.3(D)(2) for more information on required intent.

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

(1989) (The Court stated, in dicta, that "[t]he crime of conspiracy is complete 'upon formation of the agreement,' *Carter (Alvin)*, 415 Mich at 568, and it has been held that a withdrawal after this point is ineffectual. *People v Juarez*, 158 Mich App 66, 73 (1987)."). But see *People v Denio*, 454 Mich 691, 710 (1997), quoting *United States v Castro*, 972 F2d 1107, 1112 (CA 9, 1992), overruled on other grounds by *United States v Jimenez Recio*, 537 US 270 (2003) (noting, in dicta, that "[t]he crime of conspiracy is a continuing offense; it 'is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy'").

5. Elements of Conspiracy to Possess With Intent to Deliver a Controlled Substance

"To be convicted of conspiracy to possess with intent to deliver a controlled substance, the people must prove that (1) the defendant possessed the specific intent to deliver the statutory minimum as charged, (2) his [or her] coconspirator possessed the specific intent to deliver the statutory minimum as charged, and (3) the defendant and his [or her] coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person." *People v Hunter*, 466 Mich 1, 6 (2002), quoting *People v Justice (After Remand)*, 454 Mich 334, 349 (1997).

The jury must be instructed that the defendant conspired to deliver the amount of the controlled substance alleged in the underlying offense; that the defendant conspired to deliver an unspecified amount of a controlled substance is not sufficient. *People v Mass*, 464 Mich 615, 639 (2001). Stated differently, "[i]n a conspiracy case, the amount the defendant and his [or her] coconspirators *agree to deliver* is significant, while the amount *actually delivered* is what matters in a non-conspiracy case." *People v Collins (Jesse)*, 298 Mich App 458, 462-463, 465-466 (2012) (rejecting the prosecution's reliance on conspiracy caselaw and finding insufficient evidence to convict the defendant of delivering 50 grams or more but less than 450 grams of heroin where the evidence showed that the largest amount the defendant actually delivered on any one occasion was 28 grams).

6. Statements of Coconspirators[120]

"'Hearsay' means a statement that:

> (1) the declarant does not make while testifying at the current trial or hearing; and
>
> (2) a party offers in evidence to prove the truth of the matter asserted in the statement." MRE 801(c).

Hearsay is generally inadmissible. MRE 802. However, a statement is not hearsay when it is offered against an opposing party and "was made by the party's coconspirator during and in furtherance of the conspiracy, if there is independent proof of the conspiracy." MRE 801(d)(2)(E). Accordingly, statements of coconspirators may be admissible during trial. See, e.g., *People v Martin*, 271 Mich App 280, 316-319 (2006). For a more detailed discussion on the admission of statements by coconspirators, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

7. Double Jeopardy Considerations[121]

Conspiracy to commit an offense is a separate and distinct crime from its target offense, and as a general rule both crimes may be punished even though they arise out of the same criminal transaction. *People v Mass*, 464 Mich 615, 632 (2001); *People v Denio*, 454 Mich 691, 695-696 (1997).

Similarly, although conspiracy and aiding and abetting have common elements, it is possible to accomplish each without the other. *People v Carter (Alvin)*, 415 Mich 558, 579-580 (1982), overruled in part on other grounds by *People v Robideau*, 419 Mich 458 (1984).[122] Thus, a person may be convicted of both crimes stemming from the same completed offense without violating the rule against double jeopardy. *Carter*, 415 Mich at 582.

8. Jurisdiction and Venue

Michigan "has statutory territorial jurisdiction over any crime where any act constituting an element of the crime is committed within Michigan even if there is no indication that

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[120]For additional discussion of the admissibility of a coconspirator's statements, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

[121]For a more complete discussion of double jeopardy, see Section 7.6

[122]*Robideau* was overruled by *People v Smith (Bobby)*, 478 Mich 292 (2007).

the accused actually intended the detrimental effects of the offense to be felt in this state." *People v Aspy*, 292 Mich App 36, 42 (2011); MCL 762.2.[123]

Venue in a conspiracy case properly lies in any county where an overt act was committed in furtherance of the conspiracy. *People v Meredith (On Remand)*, 209 Mich App 403, 408 (1995). See also MCL 762.8 ("Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect.")

9. Conspiracy to Commit a Legal Act in an Illegal Manner

Where a physician and another "were in the business of providing, for a price, physician certifications required to obtain [Michigan Medical Marihuana Act] registry identification cards," the physician was improperly charged with conspiracy to commit a legal act in an illegal manner in violation of MCL 750.157a because failure to comply with MCL 333.26424(g)[124] (governing physician certification for registry identification cards) is not illegal. *People v Butler-Jackson*, 307 Mich App 667, 677 (2014), vacated in part on other grounds 499 Mich 965 (2016).[125]

MCL 750.157a "requir[es] proof of an agreement to perform an act legal in generic terms, [not] legal as it would be performed in the particular circumstances of the case." *Seewald*, 499 Mich at 120, 121. Accordingly, where the defendant "testified under oath that [he and another individual] agreed to [falsely] sign [nominating] petitions 'for the purpose of having [the] signatures included in' the Secretary of State's count for the nomination," and the other individual "similarly testified that the purpose for agreeing to do so was 'to make [the] signatures count towards the nomination,'" there was sufficient evidence to establish probable cause that the defendant committed the felony of conspiracy to commit a legal act in an illegal manner.

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[123]Prior to the enactment of MCL 762.2 in 2002, caselaw held that Michigan courts have no jurisdiction to try a non-resident for conspiracy offenses without proof that the non-resident's acts were intended to have, and actually did have, a detrimental effect in Michigan. *People v Blume*, 443 Mich 476, 486, 494 (1993). For further discussion of jurisdiction, see Section 1.3

[124]Formerly MCL 333.26424(f). See 2016 PA 283.

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

Id. at 125 (rejecting the defendant's argument that "the only agreement between defendant and [the other individual] was to do an illegal act through illegal means").

5.4 Delivery of a Schedule 1 or 2 Controlled Substance Causing Death

A. Statutory Authority

"A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of . . . MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years." MCL 750.317a.

B. Relevant Jury Instruction

- M Crim JI 12.2 addresses the unlawful delivery of a controlled substance.

C. Penalties

Violation of MCL 750.317a is a felony punishable by life imprisonment or any term of years. MCL 750.317a.[126]

D. Issues

1. Delivery

Delivery is discussed in detail in Section 2.2(A).

[126]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See Section 6.6(B).

2. Elements

To establish violation of MCL 750.317a, the prosecution must prove beyond a reasonable doubt: "(1) delivery to another person, (2) of a schedule 1 or 2 controlled substance (excluding marijuana), (3) with intent to deliver a controlled substance as proscribed by MCL 333.7401, (4) consumption of the controlled substance by a person, and (5) death that results from the consumption of the controlled substance." *People v McBurrows*, 504 Mich 308, 319 (2019) (noting "MCL 750.317a is predicated on a violation of MCL 333.7401" but "it adds elements that make it a distinct offense," and rejecting the Court of Appeals' characterization of MCL 750.317a as a "penalty enhancement").

3. Purpose of MCL 750.317a

"It is clear from the plain language of the statute that MCL 750.317a provides an additional punishment for persons who 'deliver[]' a controlled substance in violation of MCL 333.7401 when that substance is subsequently consumed by 'any . . . person' and it causes that person's death. It punishes an individual's role in placing the controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death." *People v Plunkett*, 485 Mich 50, 60 (2010) (alterations in original).

4. Required Intent

MCL 750.317a is a general intent crime, and "does not require the intent that death occur from the controlled substance first delivered in violation of MCL 333.7401." *Plunkett*, 485 Mich at 60. "[T]he general intent required to violate MCL 750.317a is identical to the general intent required to violate MCL 333.7401(2)(a): the *delivery* of a schedule 1 or 2 controlled substance." *Plunkett*, 485 Mich at 60. "A defendant who transported another person to an illegal narcotics transaction, provided the money for this transaction, and intended that the money be used to purchase narcotics may be bound over for trial under MCL 750.317a . . ." on an aiding and abetting theory when use of the narcotics results in the user's death. *Plunkett*, 485 Mich at 65-66.

5. Venue

The default rule is that venue is proper in the county where the crime was committed; however, "the Legislature is free to adjust" the default rule by passing statutory exceptions. *People*

v McBurrows, 504 Mich 308, 324 (2019). "In a prosecution for delivery of a controlled substance causing death, the proper venue at common law is in the county where the delivery occurred." *Id.* at 320.

Wayne County was the proper venue where the defendant was charged with violation of MCL 750.317a, and there was no dispute that the heroin presumably mixed with fentanyl was delivered in Wayne County, but the victim died as a result of fentanyl toxicity in Monroe County. *McBurrows*, 504 Mich at 329. "[N]either MCL 762.5[127] nor MCL 762.8[128] provide[d] an exception to the general rule sufficient to establish venue in" the county where the death occurred, instead of where the controlled substance was delivered. *McBurrows*, 504 Mich at 329. Specifically, "venue under MCL 762.5 requires . . . direct interaction with the victim," and in *McBurrows*, the only allegation was "that defendant *delivered* certain substances to the decedent, and only through an intermediary at that, with no allegation that defendant even was aware of the decedent's existence"; accordingly, the defendant "did not *interact with* the decedent" in the way required by caselaw or contemplated by MCL 762.5. *McBurrows*, 504 Mich at 326. For the venue exception under MCL 762.8 to apply, "there must have been an 'act done in the perpetration of defendant's felony' in Monroe County," and that act is limited "to the conduct of a criminal actor or his agent"; accordingly, "[i]n the absence of some indication that the decedent was *implicated* in or *culpable* for defendant's action, he has not done something in *perpetration* of defendant's offense," and MCL 762.8 does not apply. *McBurrows*, 504 Mich at 327, 328 (noting that while the decedent's actions of ingesting the heroin and dying "were necessary to complete the elements of the offense," they were "unconnected" to any actions of the defendant and "did not implicate the decedent or make him culpable for defendant's behavior") (cleaned up).

[127] MCL 762.5 addresses situations where an injury or violence is inflicted or poison is administered in one county and death occurs in a different county (allowing venue in either county).

[128] MCL 762.8 addresses situations where a felony consists or is the culmination of two or more acts done in perpetrating the felony (allowing venue in either the county where any of the acts occurred or in any county where the defendant intended for the felony or acts to have an effect).

5.5 Knowingly Allowing Consumption or Possession of a Controlled Substance at a Social Gathering

A. Statutory Authority

1. Generally

"[A]n owner, tenant, or other person having control over any premises, residence, or other real property shall not . . . [k]nowingly allow any individual to consume or possess a controlled substance at a social gathering on or within that premises, residence, or other real property." MCL 750.141a(2)(b).

2. Exceptions

MCL 750.141a "does not apply to the use, consumption, or possession of a controlled substance by an individual pursuant to a lawful prescription[.]" MCL 750.141a(3).

3. Rebuttable Presumption

"Evidence of all of the following gives rise to a rebuttable presumption that the defendant allowed the consumption or possession of . . . a controlled substance on or within a premises, residence, or other real property, in violation of this section:

> (a) The defendant had control over the premises, residence, or other real property.
>
> (b) The defendant . . . knew that an individual was consuming or in possession of a controlled substance at a social gathering on or within that premises, residence, or other real property.
>
> (c) The defendant failed to take corrective action." MCL 750.141a(6).

B. Relevant Jury Instructions

- M Crim JI 12.5 addresses the unlawful possession of a controlled substance.
- M Crim JI 12.7 addresses the meaning of possession.

C. Penalties

"A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct." MCL 750.141a(8).

1. First Offense

Violation of MCL 750.141a(2) is a misdemeanor punishable by:

- imprisonment for not more than 30 days; or
- a fine of not more than $1,000; or
- both. MCL 750.141a(4).

2. Second or Subsequent Offense

A second or subsequent violation of MCL 750.141a(2) is a misdemeanor punishable by:

- imprisonment for not more than 90 days; or
- a fine of not more than $1,000; or
- both. MCL 750.141a(5).

5.6 Mixing a Drug or Medicine so as to Injuriously Affect Its Quality or Potency or Selling Such a Drug

A. Statutory Authority

"(1) Except for the purpose of compounding in the necessary preparation of medicine, a person shall not knowingly or recklessly mix, color, stain, or powder, or order or permit another person to mix, color, stain, or powder, a drug or medicine with an ingredient or material so as to injuriously affect the quality or potency of the drug or medicine.

(2) A person shall not sell, offer for sale, possess for sale, cause to be sold, or manufacture for sale a drug or medicine mixed, colored, stained, or powdered in the manner proscribed in subsection (1)." MCL 750.18(1)-(2).

B. Penalties

MCL 750.18 "does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is

committed by that individual while violating this section." MCL 750.18(9).

1. Generally

Violation of MCL 750.18 is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $1,000; or
- both. MCL 750.18(3).

2. Exceptions

Violation of MCL 750.18 that results in personal injury is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $4,000; or
- both. MCL 750.18(4)

Violation of MCL 750.18 that results in serious impairment of a body function is a felony punishable by:

- imprisonment for not more than five years; or
- a fine of not more than $5,000; or
- both. MCL 750.18(5).

Violation of MCL 750.18 that results in death is a felony punishable by:

- imprisonment for not more than 15 years; or
- a fine of not more than $20,000; or
- both. MCL 750.18(6).

Except as provided in MCL 769.25 and MCL 769.25a,[129] "a person who commits a violation of subsection (1) or (2) with the intent to kill or to cause serious impairment of a body function of 2 or more individuals that results in death is guilty of a felony punishable by imprisonment for life without possibility of parole or life without possibility of parole and a fine of not more than $40,000.00. It is not a defense to a charge under this subsection that the person did not intend to kill a specific individual or did not intend to cause serious

impairment of a body function of 2 or more specific individuals." MCL 750.18(7).

5.7 Practicing a Health Profession With an Unlawful Bodily Alcohol Content or While Under the Influence of a Controlled Substance and Visibly Impaired

A. Statutory Authority

1. Generally

"A licensed health care professional shall not do either of the following:

> (a) Engage in the practice of his or her health profession with a bodily alcohol content of .05 or more grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> (b) Engage in the practice of his or her health profession while he or she is under the influence of a controlled substance and, due to the illegal or improper use of the controlled substance, his or her ability to safely and skillfully engage in the practice of his or her health profession is visibly impaired." MCL 750.430(1).

2. Exception

"[MCL 750.430] does not apply to a licensed health care professional who in good faith renders emergency care without compensation at the scene of an emergency unless the acts or omissions by the licensed health care professional amount to gross negligence or willful and wanton misconduct." MCL 750.430(6).

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[129] MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, §16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See Section 6.6(B).

B. Penalties

"[MCL 750.430] does not prohibit the individual from being charged with, convicted of, or sentenced for any other violation of law arising out of the same transaction as the violation of [MCL 750.430] in lieu of being charged with, convicted of, or sentenced for the violation of [MCL 750.430]." MCL 750.430(5).

"If an individual is convicted under [MCL 750.430], the court shall order that individual to participate in the health professional recovery program established under . . . MCL 333.16167." MCL 750.430(7).

1. First Offense

Violation of MCL 750.430 is a misdemeanor punishable by:

- imprisonment for not more than 180 days; or
- a fine of not more than $1,000; or
- both. MCL 750.430(8)(a).

2. Second or Subsequent Offense

A second or subsequent violation of MCL 750.430 is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not less than $1,000 or more than $2,500; or
- both. MCL 750.430(8)(b).

3. Possible Deferment

Terms and conditions. "If the individual's conduct did not result in physical harm or injury to the patient and the individual has not been convicted previously for violating [MCL 750.430], the court, without entering a judgment of guilt and with the consent of the accused and of the prosecuting attorney, may defer further proceedings and place the accused on probation upon terms and conditions that shall include, but are not limited to, participation in the health professional recovery program established under . . . MCL 333.16167. The terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to [MCL] 600.1084." MCL 750.430(9).

Violation of Term or Condition. "Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided under [MCL 750.430(8)]." MCL 750.430(9).

Discharge. "Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under [MCL 750.430] shall be without adjudication of guilt and are not a conviction for purposes of [MCL 750.430] or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including additional penalties imposed for second or subsequent convictions under this subsection.[130] There may only be 1 discharge and dismissal under [MCL 750.430] as to an individual." MCL 750.430(9).

Records. "Unless the court enters a judgment of guilt under this subsection, the records and identifications division of the department of state police shall retain a nonpublic record of the arrest, court proceedings, and disposition under this subsection. This record shall only be furnished to any of the following:

> (a) To the courts of this state, law enforcement personnel, and prosecuting attorneys upon request for the purpose of showing whether the individual accused of violating this section has already once utilized this subdivision.
>
> (b) To the courts of this state, law enforcement personnel, and prosecuting attorneys upon request for the purpose of determining whether the defendant in a criminal action is eligible for discharge and dismissal of proceedings by a drug treatment court under . . . MCL 600.1076.
>
> (c) To the courts of this state, law enforcement personnel, the department of corrections, and prosecuting attorneys for use only in the performance of their duties or to determine whether an employee of the department of corrections has violated his or her conditions of employment or whether an applicant meets criteria for employment with the department of corrections." MCL 750.430(9).

[130] "This subsection" refers to MCL 750.430(9); however, there is no provision imposing additional penalties for second or subsequent convictions in MCL 750.430(9). MCL 750.430(8)(b) imposes additional penalties for second or subsequent violations of MCL 750.430.

C. Chemical Analysis

"A peace officer who has reasonable cause to believe an individual violated [MCL 750.430(1)] may require the individual to submit to a chemical analysis of his or her breath, blood, or urine." MCL 750.430(2).

Required notice. "Before an individual is required to submit to a chemical analysis under [MCL 750.430(2)], the peace officer shall inform the individual of all of the following:

> (a) The individual may refuse to submit to the chemical analysis, but if he or she refuses, the officer may obtain a court order requiring the individual to submit to a chemical analysis.
>
> (b) If the individual submits to the chemical analysis, he or she may obtain a chemical analysis from a person of his or her own choosing." MCL 750.430(2).

Noncompliance. "The failure of a peace officer to comply with the requirements of [MCL 750.430(2)] renders the results of a chemical analysis inadmissible as evidence in a criminal prosecution for violating this section, in a civil action arising out of a violation of [MCL 750.430], or in any administrative proceeding arising out of a violation of [MCL 750.430]." MCL 750.430(3).

Collection and testing. "The collection and testing of breath, blood, or urine specimens under [MCL 750.430] shall be conducted in the same manner that breath, blood, or urine specimens are collected and tested for alcohol-related and controlled substance-related driving violations under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to [MCL] 257.923." MCL 750.430(4).

5.8 Rendering a Drug or Medicine Injurious to Health or Selling an Adulterated Drug or Medicine

A. Statutory Authority

"(1) . . . [A] person who knowingly or recklessly commits any of the following actions is guilty of a felony . . . :

> (a) Adulterates, misbrands, removes, or substitutes a drug or medicine so as to render that drug or medicine injurious to health.
>
> (b) Sells, offers for sale, possesses for sale, causes to be sold, or manufactures for sale a drug or medicine that

has been adulterated, misbranded, removed, or substituted so as to render it injurious to health." MCL 750.16(1).

B. Penalties

MCL 750.16 "does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section." MCL 750.16(7).

1. Generally

Violation of MCL 750.16 is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $1,000; or
- both. MCL 750.16(1).

2. Exceptions

Violation of MCL 750.16 that results in personal injury is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $4,000; or
- both. MCL 750.16(2).

Violation of MCL 750.16 that results in serious impairment of a body function is a felony punishable by:

- imprisonment for not more than five years; or
- a fine of not more than $5,000; or
- both. MCL 750.16(3).

Violation of MCL 750.16 that results in death is a felony punishable by:

- imprisonment for not more than 15 years; or
- a fine of not more than $20,000; or
- both. MCL 750.16(4).

Except as provided in MCL 769.25 and MCL 769.25a,[131] "a person who commits a violation of subsection (1) with the intent to kill or to cause serious impairment of a body function of 2 or more individuals that results in death is guilty of a felony punishable by imprisonment for life without possibility of parole or life without possibility of parole and a fine of not more than $40,000.00. It is not a defense to a charge under this subsection that the person did not intend to kill a specific individual or did not intend to cause serious impairment of a body function of 2 or more specific individuals." MCL 750.16(5).

5.9 Transporting or Possessing Non-Enclosed Usable Marihuana In or Upon a Vehicle

A. Statutory Authority

"(1) A person shall not transport or possess usable marihuana . . . in or upon a motor vehicle or any self-propelled vehicle designed for land travel unless the usable marihuana is 1 or more of the following:

(a) Enclosed in a case that is carried in the trunk of the vehicle.

(b) Enclosed in a case that is not readily accessible from the interior of the vehicle, if the vehicle in which the person is traveling does not have a trunk." MCL 750.474(1).

B. Relevant Jury Instructions

- M Crim JI 12.5 addresses the unlawful possession of a controlled substance.
- M Crim JI 12.7 defines the term possession.

[131] MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, §16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See Section 6.6(B).

C. Penalties

Violation of MCL 750.474 is a misdemeanor punishable by:

- imprisonment for not more than 93 days; or
- a fine of not more than $500; or
- both. MCL 750.474(2).

D. Compliance With the MMMA Precludes Prosecution

The "defendant, as a compliant medical marijuana patient, [could not] be prosecuted for violating" MCL 750.474, concerning the illegal transportation of marijuana, because "MCL 750.474 is not part of the MMMA[]" and "unambiguously seeks to *place additional requirements* on the transportation of medical marijuana beyond those imposed by the MMMA[;]" "if another statute is inconsistent with the MMMA such that it punishes the proper use of medical marijuana, the MMMA controls and the person properly using medical marijuana is immune from punishment." *People v Latz*, 318 Mich App 380, 385 (2016).

Part III: Offenses Codified in Other Articles of the Public Health Code[132]

5.10 Misdemeanor Prescription Violations

A. Statutory Authority

"Except as provided in [MCL 333.17766d, MCL 333.17780, and MCL 333.21418[133]], a person that does any of the following is guilty of a misdemeanor:

> (a) Obtains or attempts to obtain a prescription drug by giving a false name to a pharmacist or other authorized seller, prescriber, or dispenser.

[132] Article 7 of the PHC is the controlled substances article; however, some offenses relevant to controlled substances are codified in other articles. Article 7 offenses are discussed in chapters 2–4.

[133] MCL 333.17766d governs the acceptance and resale or redistribution of prescription drugs by pharmacies operated by the Department of Corrections or under contract with a county jail. MCL 333.17780 governs the cancer drug repository program. MCL 333.21418 governs hospice and hospice residence controlled substance disposal policies.

(b) Obtains or attempts to obtain a prescription drug by falsely representing that he or she is a lawful prescriber, dispenser, or licensee, or acting on behalf of a lawful prescriber, dispenser, or licensee.

(c) Falsely makes, utters, publishes, passes, alters, or forges a prescription.

(d) Knowingly possesses a false, forged, or altered prescription.

(e) Knowingly attempts to obtain, obtains, or possesses a drug by means of a prescription for other than a legitimate therapeutic purpose, or as a result of a false, forged, or altered prescription.

(f) Possesses or controls for the purpose of resale, or sells, offers to sell, dispenses, or gives away, a drug, pharmaceutical preparation, or chemical that has been dispensed on prescription and has left the control of a pharmacist.

(g) Possesses or controls for the purpose of resale, or sells, offers to sell, dispenses, or gives away, a drug, pharmaceutical preparation, or chemical that has been damaged by heat, smoke, fire, water, or other cause and is unfit for human or animal use.

(h) Prepares or permits the preparation of a prescription drug, except as delegated by a pharmacist.

(i) Sells a drug in bulk or in an open package at auction, unless the sale has been approved in accordance with rules of the board." MCL 333.17766.

B. Relevant Jury Instructions

- M Crim JI 12.5 addresses the unlawful possession of a controlled substance.
- M Crim JI 12.7 addresses the meaning of possession.

C. Penalties

Violation of MCL 333.17766 is a misdemeanor punishable by:

- imprisonment for not more than 90 days; or
- a fine of not more than $500; or

- both. MCL 750.504.

D. Issues

Where a defendant obtains a prescription drug that is also a controlled substance by means of a false, forged, or altered prescription, the prosecutor has discretion to charge the defendant under the felony statute for acquiring a controlled substance by any form of misrepresentation or deception, MCL 333.7407(1)(c),[134] or under the misdemeanor statute for obtaining a prescription drug as a result of a false, forged, or altered prescription, MCL 333.17766(e). *People v Joseph (On Remand)*, 127 Mich App 78, 82-83 (1983).

5.11 Sale of Marijuana By Qualifying Patient or Primary Caregiver to Person Who is Not Qualified to Use Marijuana for Medical Purposes

A. Statutory Authority

"Any registered qualifying patient or registered primary caregiver who sells marihuana to someone who is not allowed the medical use of marihuana under this act shall have his or her registry identification card revoked and is guilty of a felony[.]"MCL 333.26424(*l*).

B. Penalties

Violation of MCL 333.26424(*l*) is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $2,000; or
- both.MCL 333.26424(*l*).

The penalties for violation of MCL 333.26424(*l*) are "in addition to any other penalties for the distribution of marihuana."MCL 333.26424(*l*).

[134]See Section 3.7.

5.12 Sale or Use of Adulterated, Misbranded, or Misleading Drugs or Devices

A. Statutory Authority

"(1) A person shall not sell, offer for sale, possess for sale, or manufacture for sale a drug or device bearing or accompanied by a label that is misleading as to the contents, uses, or purposes of the drug or device. A person who violates this subsection is guilty of a misdemeanor. In determining whether a label is misleading, consideration shall be given to the representations made or suggested by the statement, word, design, device, sound, or any combination thereof, and the extent to which the label fails to reveal facts material in view of the representations made or material as to consequences that may result from use of the drug or device to which the label relates under conditions of use prescribed in the label or under customary or usual conditions of use.

(2) A person shall not knowingly or recklessly do either of the following:

> (a) Adulterate, misbrand, remove, or substitute a drug or device knowing or intending that the drug or device shall be used.
>
> (b) Sell, offer for sale, possess for sale, cause to be sold, or manufacture for sale an adulterated or misbranded drug." MCL 333.17764(1)-(2).

B. Penalties

MCL 333.17764 "does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section." MCL 333.17764(8).

1. Generally

Violation of MCL 333.17764(1) is a misdemeanor punishable by:

- imprisonment for not more than 90 days; or
- a fine of not more than $500; or
- both. MCL 333.17764(1); MCL 750.504.

Violation of MCL 333.17764(2) is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $1,000; or
- both. MCL 333.17764(3).

2. Exceptions

Violation of MCL 333.17764(2) that results in personal injury is a felony punishable by:

- imprisonment for not more than four years; or
- a fine of not more than $4,000; or
- both. MCL 333.17764(4).

Violation of MCL 333.17764(2) that results in serious impairment of a body function is a felony punishable by:

- imprisonment for not more than five years; or
- a fine of not more than $5,000; or
- both. MCL 333.17764(5).

Violation of MCL 333.17764(2) that results in death is a felony punishable by:

- imprisonment for not more than 15 years; or
- a fine of not more than $20,000; or
- both. MCL 333.17764(6).

"A person who violates subsection (2) with the intent to kill or to cause serious impairment of a body function of 2 or more individuals, which violation results in death, is guilty of a felony punishable by imprisonment for life without the possibility of parole or life without the possibility of parole and a fine of not more than $40,000.00. It is not a defense to a charge under this subsection that the person did not intend to kill a specific individual, or did not intend to cause serious impairment of a body function of 2 or more specific individuals." MCL 333.17764(7).[135]

5.13 Transporting or Possessing a Marihuana-Infused Product

A. Statutory Authority

1. Generally

"Except as provided in [MCL 333.26424b(2)-(4)], a qualifying patient or primary caregiver shall not transport or possess a marihuana-infused product in or upon a motor vehicle." MCL 333.26424b(1).

2. Exception — Qualifying Patients

A qualifying patient may transport or possess a marihuana-infused product in or upon a motor vehicle if the marihuana-infused product is:

- in a sealed and labeled package; and
- the package is in the trunk, or if the vehicle does not have a trunk, is not readily accessible from the interior of the vehicle.

The label of the package must state the:

- weight of the marihuana-infused product in ounces;[136]
- name of the manufacturer;
- date of manufacture;
- name of the person from whom the marihuana-infused product was received; and

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[135]Note that MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, §16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See Section 6.6(B).

[136]"For purposes of determining compliance with quantity limitations under [MCL 333.26424], there is a rebuttable presumption that the weight of a marihuana-infused product listed on its package label or on a marihuana transportation manifest is accurate." MCL 333.26424b(5).

- date of receipt. MCL 333.26424b(2).

3. Exceptions — Primary Caregivers

A primary caregiver may transport or possess a marihuana-infused product in or upon a motor vehicle if the marihuana-infused product is:

- accompanied by an accurate marihuana transportation manifest; and
- enclosed in a case carried in the trunk of the vehicle or, if the vehicle does not have a trunk, is enclosed in a case and carried so as not to be readily accessible from the interior of the vehicle.

The manifest form must state the:

- weight of each marihuana-infused product in ounces;[137]
- name and address of the manufacturer;
- date of manufacture;
- destination name and address;
- date and time of departure;
- estimated date and time of arrival; and
- name and address of the person from whom the product was received and date of receipt, if applicable. MCL 333.26424b(3).

Additionally, a primary caregiver may transport or possess a marihuana-infused product in or upon a motor vehicle for the use of his or her child, spouse, or parent who is a qualifying patient if:

- the marihuana-infused product is in a sealed and labeled package;
- the package is carried in the trunk of the vehicle or, if the vehicle does not have a trunk, is not readily accessible from the interior of the vehicle.

[137] "For purposes of determining compliance with quantity limitations under [MCL 333.26424], there is a rebuttable presumption that the weight of a marihuana-infused product listed on its package label or on a marihuana transportation manifest is accurate." MCL 333.26424b(5).

The label must state the:

- weight of the marihuana-infused product in ounces;[138]
- name of the manufacturer;
- date of manufacture;
- name of the qualifying patient; and
- name of the person from whom the marihuana-infused product was received and date of receipt, if applicable. MCL 333.26424b(4).

B. Penalties

Violation of MCL 333.26424b is a civil infraction punishable by a civil fine of not more than $250. MCL 333.26424b(6).

5.14 Unauthorized Purchase or Possession of Ephedrine or Pseudoephedrine

A. Statutory Authority

1. Generally

"A person shall not do any of the following:

> (a) Purchase more than 3.6 grams of ephedrine or pseudoephedrine alone or in a mixture within a single calendar day.
>
> (b) Purchase more than 9 grams of ephedrine or pseudoephedrine alone or in a mixture within a 30-day period.
>
> (c) Possess more than 12 grams of ephedrine or pseudoephedrine alone or in a mixture.
>
> (d) Purchase or possess any amount of ephedrine or pseudoephedrine knowing or having reason to know that it is to be used to manufacture methamphetamine." MCL 333.17766c(1).

[138] "For purposes of determining compliance with quantity limitations under [MCL 333.26424], there is a rebuttable presumption that the weight of a marihuana-infused product listed on its package label or on a marihuana transportation manifest is accurate." MCL 333.26424b(5).

2. Exceptions

The provisions of MCL 333.17766c(1) prohibiting the purchase and possession of certain amounts of ephedrine or pseudoephedrine do not apply to any of the following:

> "(a) A person who possesses ephedrine or pseudoephedrine pursuant to a license issued by this state or the United States to manufacture, deliver, dispense, possess with intent to manufacture or deliver, or possess a controlled substance, prescription drug, or other drug.
>
> (b) An individual who possesses ephedrine or pseudoephedrine pursuant to a prescription.
>
> (c) A person who possesses ephedrine or pseudoephedrine for retail sale pursuant to a license issued under the general sales tax act, 1933 PA 167, MCL 205.51 to [MCL] 205.78.
>
> (d) A person who possesses ephedrine or pseudoephedrine in the course of his or her business of selling or transporting ephedrine or pseudoephedrine to a person described in subdivision (a) or (c).
>
> (e) A person who, in the course of his or her business, stores ephedrine or pseudoephedrine for sale or distribution to a person described in subdivision (a), (c), or (d).
>
> (f) Any product that the state board of pharmacy, upon application of a manufacturer, exempts from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine.
>
> (g) Possession of any pediatric product primarily intended for administration to children under 12 years of age according to label instructions." MCL 333.17766c(3).

B. Relevant Jury Instructions

- M Crim JI 12.5 addresses the unlawful possession of a controlled substance.
- M Crim JI 12.7 addresses the meaning of possession.

C. Penalties

Violation of MCL 333.17766c(1)(a) or MCL 333.17766c(1)(b) is a misdemeanor punishable by:

- imprisonment for not more than 93 days; or
- a fine of not more than $500; or
- both. MCL 333.17766c(2)(a).

Violation of MCL 333.17766c(1)(c) is a felony punishable by:

- imprisonment for not more than two years; or
- a fine of not more than $2,000;
- or both. MCL 333.17766c(2)(b).

Violation of MCL 333.17766c(1)(d) is a felony punishable by:

- imprisonment for not more than five years; or
- a fine of not more than $5,000; or
- both. MCL 333.17766c(2)(c).

MCL 333.17766c(2)(c) "does not prohibit the person from being charged with, convicted of, and sentenced for any other violation of law arising out of the violation of subsection (1)(d)." MCL 333.17766c(2)(c).

D. Issues

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions when the department is notified by a court[139] that an individual has been convicted of a methamphetamine-related offense. Violation of MCL 333.17766c constitutes a methamphetamine-related offense. MCL 28.122(b)(*ii*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

[139] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

5.15 Unauthorized Retail Practices Involving a Product Containing Ephedrine or Pseudoephedrine

A. Statutory Authority

1. Generally

"(1) Except as otherwise provided under this section, a person who possesses ephedrine or pseudoephedrine for retail sale pursuant to a license issued under the general sales tax act, 1933 PA 167, MCL 205.51 to [MCL] 205.78, shall maintain all products that contain any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer of ephedrine or pseudoephedrine in accordance with 1 of the following:

> (a) Behind a counter where the public is not permitted.
>
> (b) Within a locked case so that a customer wanting access to the product must ask a store employee for assistance.

(2) A person who sells a product described in subsection (1) shall do each of the following:

> (a) Require the purchaser of a product described under subsection (1) to produce a valid government-issued photo identification that includes the individual's name and date of birth.
>
> (b) Maintain a log or some type of record detailing the sale of a product described under subsection (1), including the date of the sale and the time of purchase, the name, address, and date of birth of the buyer, the amount and description of the product sold, and a description of the identification used to make the purchase, such as the state in which a driver license used for identification was issued and number of that license. The seller shall also require the purchaser to sign the log at the time of sale. Information entered into the national precursor log exchange (NPLEX) satisfies the requirement to maintain a log or some type of record detailing the sale under this subdivision. The log or other means of recording the sale as required under this

> subdivision shall be maintained for a minimum of 6 months and made available to only a law enforcement agency upon request. The log or other means of recording the sale is not a public record and is not subject to the freedom of information act, 1976 PA 442, MCL 15.231 to [MCL] 15.246. A person shall not sell or provide a copy of the log or other means of recording the sale to another for the purpose of surveys, marketing, or solicitations." MCL 333.17766e(1)-(2).

2. Exceptions

MCL 333.17766e "does not apply to the following:

> (a) A pediatric product primarily intended for administration to children under 12 years of age according to label instructions.
>
> (b) A product containing pseudoephedrine that is in a liquid form if pseudoephedrine is not the only active ingredient.
>
> (c) A product that the state board of pharmacy, upon application of a manufacturer or certification by the United States drug enforcement administration as inconvertible, exempts from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine.
>
> (d) A product that is dispensed pursuant to a prescription." MCL 333.17766e(3).

B. Civil Fine

Violation of MCL 333.17766e is a civil infraction punishable by a civil fine of not more than $500 for each violation. MCL 333.17766e(4).

5.16 Unauthorized Sale Involving a Product Containing Ephedrine or Pseudoephedrine

A. Statutory Authority

1. Generally

"A person who possesses products that contain any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer of ephedrine or pseudoephedrine for retail sale under a license issued under the general sales tax act, 1933 PA 167, MCL 205.51 to [MCL] 205.78, shall not knowingly do any of the following:

> (a) Sell any product described under this subsection to an individual under 18 years of age.
>
> (b) Sell more than 3.6 grams of ephedrine or pseudoephedrine alone or in a mixture to any individual on any single calendar day.
>
> (c) Sell more than 9 grams of ephedrine or pseudoephedrine alone or in a mixture to any individual within a 30-day period.
>
> (d) Sell in a single over-the-counter sale more than 2 personal convenience packages containing 2 tablets or capsules each of any product described under this subsection to any individual.
>
> (e) Sell any product described under this subsection to an individual during the period in which a stop sale alert is generated for that individual based upon criminal history record information provided under the methamphetamine abuse reporting act. The NPLEx system shall contain an override function that may be used by a dispenser of ephedrine or pseudoephedrine who has a reasonable fear of imminent bodily harm if the dispenser does not complete a sale. Each instance in which the override function is utilized shall be logged by the system." MCL 333.17766f(1).

2. Exceptions

MCL 333.17766f "does not apply to the following:

> (a) A pediatric product primarily intended for administration to children under 12 years of age according to label instructions.
>
> (b) A product containing pseudoephedrine that is in a liquid form if pseudoephedrine is not the only active ingredient.
>
> (c) A product that the state board of pharmacy, upon application of a manufacturer or certification by the United States drug enforcement administration as inconvertible, exempts from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine.
>
> (d) A product that is dispensed pursuant to a prescription." MCL 333.17766f(2).

3. Affirmative Defense

"It is an affirmative defense to a citation issued under [MCL 333.17766f(1)(a)] that the defendant had in force at the time of the citation and continues to have in force a written policy for employees to prevent the sale of products that contain any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer of ephedrine or pseudoephedrine to persons under 18 years of age and that the defendant enforced and continues to enforce the policy. A defendant who proposes to offer evidence of the affirmative defense described in this subsection shall file and serve notice of the defense, in writing, upon the court and the prosecuting attorney. The notice shall be served not less than 14 days before the hearing date." MCL 333.17766f(4).

"A prosecuting attorney who proposes to offer testimony to rebut the affirmative defense described in subsection (4) shall file and serve a notice of rebuttal, in writing, upon the court and the defendant. The notice shall be served not less than 7 days before the hearing date and shall contain the name and address of each rebuttal witness." MCL 333.17766f(5).

B. Civil Fine

Violation of MCL 333.17766f is a civil infraction punishable by a civil fine of not more than $500 for each violation. MCL 333.17766f(3).

C. Issues

Under the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, the department must notify NADDI of convictions when the department is notified by a court[140] that an individual has been convicted of a methamphetamine-related offense. Violation of MCL 333.17766f constitutes a methamphetamine-related offense. MCL 28.122(b)(*ii*). For more information on the Methamphetamine Abuse Reporting Act, see Section 1.6.

Part IV: Offenses Codified in Other Acts

5.17 Bringing, Selling, Furnishing, or Otherwise Providing Access to a Controlled Substance in a Jail, Appurtenant Building, or Jail Grounds

A. Statutory Authority

1. Generally

"(1) Except as provided in [MCL 801.264], a person shall not bring into a jail, a building appurtenant to a jail, or the grounds used for jail purposes; sell or furnish to a prisoner; or dispose of in a manner that allows a prisoner access to an alcoholic liquor or controlled substance, any alcoholic liquor or controlled substance.

(2) Except as provided in [MCL 801.264], a prisoner shall not possess or have under his or her control any alcoholic liquor or controlled substance." MCL 801.263.[141]

[140] See e.g., MCL 333.7340c(3), as added by 2014 PA 217, effective January 1, 2015, which requires the court to report to the state police when a person is convicted under MCL 333.7340c (soliciting another person to purchase/obtain ephedrine or pseudoephedrine knowing that it is to be used in the illegal manufacture of methamphetamine).

[141] This statute applies to jails. For provisions that apply to the Department of Corrections facilities, see Section 5.18.

2. Exception

"An alcoholic liquor or controlled substance may be brought into a jail or a building appurtenant to a jail, or onto the grounds used for jail purposes; furnished to a prisoner or employee of the jail; and possessed by the prisoner or employee, if a licensed physician certifies in writing that the alcoholic liquor or controlled substance is necessary for the health of the prisoner or employee. The certificate shall contain and specify the quantity of the alcoholic liquor or controlled substance that is to be furnished the prisoner or employee; the name of the prisoner or employee; the time when the alcoholic liquor or controlled substance is to be furnished; and the reason needed. The licensed physician or his or her agent shall deliver the certificate to the chief administrator for his or her approval before furnishing a prisoner or employee of the jail any alcoholic liquor or controlled substance." MCL 801.264(1).

B. Penalties

1. Generally

Violation of MCL 801.263 is a felony punishable by:

- imprisonment for not more than five years; or
- a fine of not more than $1,000; or
- both. MCL 801.265(1).

2. Exceptions

"If a violation of [MCL 801.263] involving a controlled substance constitutes the delivery, possession with intent to deliver, or possession of or other action involving a controlled substance that is punishable by imprisonment for more than 5 years under . . . MCL 333.7401 to [MCL] 333.7461, the person shall not be prosecuted under this act for that violation." MCL 801.265(2).

5.18 Bringing, Selling, Giving, Furnishing, or Otherwise Providing Access to a Prescription Drug or Controlled Substance in a Correctional Facility

A. Statutory Authority

1. Generally

"(1) Except as provided in [MCL 800.282[142]], a person shall not sell, give, or furnish, either directly or indirectly, any alcoholic liquor, prescription drug, poison, or controlled substance to a prisoner who is in or on a correctional facility or dispose of that liquor, drug, poison, or controlled substance in any manner that allows a prisoner or employee of the correctional facility who is in or on a correctional facility access to it.

(2) Except as provided in [MCL 800.282], a person who knows or has reason to know that another person is a prisoner shall not sell, give, or furnish, either directly or indirectly, any alcoholic liquor, prescription drug, poison, or controlled substance to that prisoner anywhere outside of a correctional facility.

(3) Except as provided in [MCL 800.282], a person shall not bring any alcoholic liquor, prescription drug, poison, or controlled substance into or onto a correctional facility.

(4) Except as provided in [MCL 800.282], a prisoner shall not possess any alcoholic liquor, prescription drug, poison, or controlled substance." MCL 800.281.[143]

2. Exceptions

"(1) A person is not in violation of [MCL 800.281] if all of the following occur:

> (a) A licensed physician certifies in writing that the alcoholic liquor, prescription drug, or controlled substance is necessary for the health of the prisoner or employee.
>
> (b) The certificate contains the following information:

[142] MCL 800.282 is discussed in Section 5.18(B)

[143] This statute applies to the Department of Corrections facilities. For provisions that apply to jails, see Section 5.17.

> (*i*) The quantity of the alcoholic liquor, prescription drug, or controlled substance which is to be furnished to the prisoner or employee.
>
> (*ii*) The name of the prisoner or employee.
>
> (*iii*) The time when the alcoholic liquor, prescription drug, or controlled substance is to be furnished.
>
> (*iv*) The reason why the alcoholic liquor, prescription drug, or controlled substance is needed.
>
> (c) The certificate has been delivered to the chief administrator of the correctional facility to which the prisoner is assigned or at which the employee works.
>
> (d) The chief administrator of the correctional facility or the designee of the chief administrator approves in advance the sale, giving, furnishing, bringing, or possession of the alcoholic liquor, prescription drug, or controlled substance.
>
> (e) The sale, giving, furnishing, bringing, or possession of the alcoholic liquor, prescription drug, or controlled substance is in compliance with the certificate.
>
> * * *
>
> (3) [MCL 800.281(3)] shall not apply to the bringing of alcoholic liquor, prescription drugs, or controlled substances into or onto a correctional facility for the ordinary hospital supply of the correctional facility.
>
> (4) [MCL 800.281(3)] shall not apply to the bringing of any alcoholic liquor, prescription drug, poison, or controlled substance into or onto a privately operated community corrections center or resident home which houses prisoners for the use of the owner, operator, or nonprisoner resident of that center or home if the owner or operator lives in the center or home, or for the use of a nonprisoner guest of the owner, operator, or nonprisoner resident." MCL 800.282.

B. Penalties

Violation of MCL 800.281 is a felony punishable by:

- imprisonment for not more than five years; or
- a fine of not more than $1,000; or
- both. MCL 800.285(1).

"If the delivery of a controlled substance is a felony punishable by imprisonment for more than 5 years under [Article 7 of the PHC], a person who gives, sells, or furnishes a controlled substance in violation of [MCL 800.281] shall not be prosecuted under this section for that giving, selling, or furnishing. If the possession of a controlled substance is a felony punishable by imprisonment for more than 5 years under [Article 7 of the PHC], a person who possesses, or brings into a correctional facility, a controlled substance in violation of [MCL 800.281] shall not be prosecuted under this section for that possession." MCL 800.285(2).

C. Issues

1. Conduct Punishable Under MCL 800.281(1)

A prisoner can be convicted under MCL 800.281(1) without ever leaving the prison if he or she is responsible for bringing the contraband into the prison. *People v Lewis (On Remand)*, 97 Mich App 650, 652 (1980) (holding the defendant's conviction under MCL 800.281(1) was proper because the defendant was directly responsible for bringing the contraband into the prison where the defendant, a prison inmate, employed agents to pick up whiskey and marijuana outside of the prison and smuggle it inside where others would unload it, repackage it and deliver it to the defendant.)

2. Definition of *Prisoner*

"[T]he term 'prisoner' as defined in MCL 800.281a(g) . . . include[s] all parolees who have not yet been released." *People v Armisted*, 295 Mich App 32, 39, 41 (2011) (holding that a parolee who was an inmate at a community residential center had not yet "been released from confinement or sent into the community at large[]" and had therefore not been "released on parole" within the meaning of MCL 800.281a(g)).

3. Searches

"The chief administrator of a correctional facility may search, or have searched, any person coming to the correctional facility as a visitor, or in any other capacity, who is suspected of having any weapon or other implement which may be used to

injure a prisoner or other person or in assisting a prisoner to escape from imprisonment, or any alcoholic liquor, prescription drug, poison, or controlled substance upon his or her person." MCL 800.284.

4. MCL 800.281(4) is a Strict-Liability Offense

The elements of MCL 800.281(4) (prisoner in possession of a controlled substance (PPCS)), are: (1) that the defendant is a prisoner, and (2) that the defendant possessed a controlled substance or other item proscribed by MCL 800.281(4), "'i.e., that the defendant had actual physical control of the controlled substance.'" *People v Tadgerson*, 346 Mich App 104, 113 (2023), quoting *People v Ramsdell*, 230 Mich App 386, 392 (1998). In contrast to MCL 800.281(2)—which requires a person to act knowingly—MCL 800.281(4) does not include any *mens rea* requirement. *Tadgerson*, 346 Mich App at 115, 116. The explicit inclusion of a *mens rea* requirement in subsection (2) paired with its omission in subsection (4) demonstrates "that the Legislature intended MCL 800.281(4) to be a strict-liability offense." *Tadgerson*, 346 Mich App at 116. Further, as observed in *Ramsdell*, the general drug possession statute, MCL 333.7403, explicitly proscribes only "knowing or intentional" possession; the fact that the Legislature specified the required intent in this instance but did not include similar language in MCL 800.281(4) also supports the conclusion that "no 'knowledge' element should be 'read into' MCL 800.281(4)." *Tadgerson*, 346 Mich App at 115 (quotation marks and citation omitted).

Consideration of MCL 8.9, "which reflects the Legislature's decision to set the criteria regarding the analysis of whether an offense includes a scienter requirement or *mens rea* element," does not alter the conclusion that PPCS (MCL 800.281(4)) is a strict-liability offense. *Tadgerson*, 346 Mich App at 118. Specifically, "MCL 8.9(1)(b) cannot serve as a basis to incorporate a *mens rea* element into the offense of PPCS" because "MCL 800.281(4) does not specify a culpable mental state[.]" *Tadgerson*, 346 Mich App at 118. Further, because "MCL 800.281(4) *plainly* imposes strict liability," it falls within MCL 8.9(2), which "indicates that culpability is not required when the relevant statutory language 'does not specify any degree of culpability and plainly imposes strict criminal liability,'" and MCL 8.9(3) is not implicated for the same reason. *Tadgerson*, 346 Mich App at 118-119. Finally, where consideration of the statutory language in the general drug possession statute and MCL 800.281(2) additionally support the conclusion that PPCS is a strict-liability offense, the holding that PPCS is a strict-liability offense is not based on the "mere

absence of a specified state of mind" as prohibited by MCL 8.9(9). *Tadgerson*, 346 Mich App at 118.

5.19 Inhalation or Consumption of a Chemical Agent

A. Statutory Authority

1. Generally

"No person shall, for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction or dulling of the senses or nervous system, intentionally smell or inhale[144] the fumes of any chemical agent or intentionally drink, eat or otherwise introduce any chemical agent into his [or her] respiratory or circulatory system." MCL 752.272.

2. Exceptions

MCL 752.272 does not prohibit the inhalation of any anesthesia for medical or dental purposes. MCL 752.272.

B. Penalties

Violation of MCL 752.272 is a misdemeanor punishable by:

- imprisonment for not more than 93 days; or
- a fine of not more than $100; or
- both. MCL 752.273.

5.20 Operating a Marihuana Facility Without a Valid License

A. Statutory Authority

"Beginning June 1, 2019, a person shall not hold itself out as operating a marihuana facility if the person does not hold a license to operate that marihuana facility or if the person's license to operate that marihuana facility is suspended, revoked, lapsed, or void, or was fraudulently obtained or transferred to the person other than pursuant to [MCL 333.27406]." MCL 333.27407a.

[144] Commonly known as "huffing."

B. Penalties

A first violation of MCL 333.27407a is a misdemeanor punishable by:

- imprisonment for not more than 93 days;
- a fine of not less than $10,000 or more than $25,000; or
- both. MCL 333.27407a(a).

A second or subsequent violation of MCL 333.27407a is a misdemeanor punishable by:

- imprisonment for not more than 1 year;
- a fine of not less than $10,000 or more than $25,000; or
- both. MCL 333.27407a(b).

A violation of MCL 333.27407a that causes death or serious injury is a felony punishable by:

- imprisonment for not more than 4 years;
- a fine of not less than $10,000 or more than $25,000; or
- both. MCL 333.27407a(c).

5.21 Sale or Distribution of a Device Containing or Dispensing Nitrous Oxide

A. Statutory Authority

1. Generally

"A person shall not sell or otherwise distribute to another person any device that contains any quantity of nitrous oxide or sell or otherwise distribute a device to dispense nitrous oxide for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system." MCL 752.272a(1).

2. Exceptions

MCL 752.272a(1) "does not apply to nitrous oxide that has been denatured or otherwise rendered unfit for human consumption or to any of the following:

> (a) A person licensed under the food processing act of 1977, 1978 PA 328 . . .[145] or chapter VII of the food law of 2000, 2000 PA 92, MCL 289.7101 to [MCL] 289.7137, who sells or otherwise distributes the device as a grocery product.
>
> (b) A person engaged in the business of selling or distributing catering supplies only or food processing equipment only, or selling or distributing compressed gases for industrial or medical use who sells or otherwise distributes the device in the course of that business.
>
> (c) A pharmacist, pharmacist intern, or pharmacy as defined in . . . MCL 333.17707, who dispenses the device in the course of his or her duties as a pharmacist or pharmacist intern or as a pharmacy.
>
> (d) A health care professional." MCL 752.272a(1).

B. Penalties

1. No Prior Convictions

Violation of MCL 752.272a is a misdemeanor punishable by:

- imprisonment for not more than 93 days; or
- a fine of not more than $100; or
- both. MCL 752.272a(2)(a).

2. Prior Convictions

If the person has **one** prior conviction, violation of MCL 752.272a is a misdemeanor punishable by:

- imprisonment for not more than one year; or
- a fine of not more than $500; or
- both. MCL 752.272a(2)(b).

If the person has **two or more prior convictions**, violation of MCL 752.272a is a felony punishable by:

[145] The statutes pertaining to the food processing act referenced in MCL 752.272a are obsolete statutory citations.

- imprisonment for not more than four years; or
- a fine of not more than $2,000; or
- both. MCL 752.272a(2)(c).

Chapter 6: Sentencing

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6.1 Scope Note

This chapter discusses sentencing issues specific to controlled substance offenses. A comprehensive discussion of sentencing is beyond the scope of this chapter, but may be found in the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*.

6.2 Penalty Cumulative

"A penalty imposed for violation of [Article 7 of the PHC] is in addition to, and not in lieu of, a civil or administrative penalty or sanction otherwise authorized by law." MCL 333.7408.

6.3 Rule of Lenity

"'The "rule of lenity" provides that courts should mitigate punishment when the punishment in a criminal statute is unclear[]'" but "does not apply when construing the Public Health Code because the Legislature mandated in MCL 333.1111(2) that the code's provisions are to be 'liberally construed for the protection of the health, safety, and welfare of the people of this state.'" *People v Johnson (Barbara)*, 302 Mich App 450, 462 (2013), quoting *People v Denio*, 454 Mich 691, 699 (1997).

6.4 Sentencing Principles

When sentencing a defendant, the trial court's objective is to tailor a penalty that is appropriate to the seriousness of the offense and the criminal history of the offender. *People v Rice (On Remand)*, 235 Mich App 429, 445 (1999). The "framework" of an appropriate sentence consists of four basic considerations:

- the likelihood or potential that the offender could be reformed;
- the need to protect society;
- the penalty or consequence appropriate to the offender's conduct; and
- the goal of deterring others from similar conduct. *Rice*, 235 Mich App at 446, citing *People v Snow*, 386 Mich 586, 592 (1972).

A. Misdemeanor Sentencing

"There is a rebuttable presumption that the court shall sentence an individual convicted of a misdemeanor, other than a serious

misdemeanor, with a fine, community service, or other nonjail or nonprobation sentence." MCL 769.5(3).

"The court may depart from the presumption under [MCL 769.5(3)] if the court finds reasonable grounds for the departure and states on the record the grounds for the departure." MCL 769.5(4).

"Subject to MCL 769.5(3), if a statute provides that an offense is punishable by imprisonment and a fine, the court may impose imprisonment without the fine or the fine without imprisonment." MCL 769.5(1). "Subject to MCL 769.5(3), if a statute provides that an offense is punishable by fine or imprisonment, the court may impose both the fine and imprisonment in its discretion." MCL 769.5(2).

"[U]nder MCL 769.5(4), a court imposing a sentence for an ordinary misdemeanor conviction remains free to depart from the presumption in MCL 769.5(4) 'if the court finds reasonable grounds for the departure and states on the record the grounds for the departure.'" *People of the City of Auburn Hills v Mason*, ___ Mich App ___, ___ (2024), quoting MCL 769.5(4). "When reviewing a sentence that constitutes a departure from the recommended minimum guidelines range, the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Mason*, ___ Mich App at ___ (cleaned up)."The pertinent question is not whether defendant's sentence departed from the rebuttable presumption that a non-jail or non-probation sentence is a proportionate sentence for an ordinary misdemeanor." *Id*. at ___. "Instead, the question is whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. at ___ (quotation marks and citation omitted). Here, "the [district] court did not adequately justify the imposed sentence," because it "did not consider the circumstances of the offense and did not explain how its departure sentence was more proportionate than a different sentence would have been." *Id*. at ___.

B. Felony Sentencing[146]

"[T]he minimum sentence imposed by a court . . . for a felony [to which the statutory sentencing guidelines apply, enumerated in part 2 of Chapter XVII of the Code of Criminal Procedure, MCL 777.11 *et seq*.,] committed on or after January 1, 1999 may be within the appropriate sentence range under the version of those sentencing

[146]A comprehensive discussion of felony sentencing is outside the scope of this benchbook. For more information on felony sentencing, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*.

guidelines in effect on the date the crime was committed." MCL 769.34(2).

"[S]entencing courts [are no longer] bound by the applicable sentencing guidelines range[.]" *People v Lockridge*, 498 Mich 358, 392 (2015). "Sentencing courts must, however, continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Id*. (citation omitted).

1. Calculating the Minimum Sentence Range

The recommended minimum sentence range for an offense to which the sentencing guidelines apply is determined by scoring the appropriate offense variables (OVs) and prior record variables (PRVs) for a specific conviction. MCL 777.21. All felony offenses to which the sentencing guidelines apply fall into one of six offense categories[147] and each offense category is further organized into an offense class[148] that indicates the severity of the offense. See MCL 777.5 and MCL 777.21(1)(c). An offense's crime class determines which sentencing grid must be used when determining an offender's recommended minimum sentence range. See MCL 777.61 to MCL 777.69. The crime group an offense falls into dictates which OVs must be scored for that offense and how those variables must be scored.[149] *People v Bonilla-Machado*, 489 Mich 412, 422 (2011). The offenses discussed in this benchbook are found primarily in the controlled substance crime group, but some offenses that involve controlled substance offenses are placed in the public safety, public trust, and person crime groups.[150]

a. Scoring Offense Variables (OVs): Controlled Substance Crime Group

"For all crimes involving a controlled substance, score [OVs] 1, 2, 3, 12, 13, 14, 15, 19, and 20." MCL 777.22(3).

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[147]There are six offense categories: crimes against a person, crimes against property, crimes involving a controlled substance, crimes against public order, crimes against public trust, and crimes against public safety. MCL 777.5(a)-(f).

[148]An offense's crime class is designated by the letters A through H and M2 (second-degree murder). The crime class determines which sentencing grid applies to the sentencing offense. MCL 777.21(1)(c).

[149]In contrast to OVs, PRVs are scored based on the severity of prior convictions, and are scored for every offense regardless of the offense's crime group or class. *People v Peltola*, 489 Mich 174, 187 (2011). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2* for detailed information about PRVs.

[150]See the Michigan Judicial Institute's table that includes all the controlled substance offenses discussed in this benchbook, including their crime group designations.

Of the OVs scored for controlled substance crimes, OV 15 is the only offense variable that is uniquely scored only for controlled substance offenses. OV 15 covers aggravated controlled substance offenses, and assigns points on the basis of the grams of a substance involved in the particular crime and on other aggravating circumstances such as the involvement of a minor, the location of the offense, and trafficking. MCL 777.45.[151]

b. Scoring Offense Variables (OVs): Other Crime Groups[152]

Person. "For all crimes against a person, score [OVs] 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20."[153] MCL 777.22(1).

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

Public Safety. "For all crimes against public safety, score [OVs] 1, 3, 4, 9, 10, 12, 13, 14, 16, 19, and 20." MCL 777.22(5).

c. Scoring Prior Record Variables

The rule of *Apprendi*, 530 US at 490 ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"), does not apply to prior convictions and therefore presumably does not implicate the scoring of *prior record* variables under Michigan's sentencing guidelines. See *Alleyne*, 570 US at 111 n 1 (noting that "[i]n *Almendarez–Torres v United States*, [523 US 224 (1998)], [the United States Supreme Court] recognized a narrow exception to [the] general rule [of *Apprendi*] for the fact of a prior conviction[;]" the *Alleyne* Court declined to revisit *Almendarez-Torres* "[b]ecause the parties [did] not contest that decision's vitality"); see also, generally, *Lockridge*, 498 Mich at 370 n 12.

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[151] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 2, for detailed information about OV 15.

[152] The property and public order crime groups are outside the scope of this benchbook and are not mentioned below.

[153] Other OVs are scored for specific offenses such as homicide, assault with intent to commit murder, and certain motor vehicle or recreational vehicle operating offenses. A discussion of this particular part of the statute is outside the scope of this benchbook.

2. Departures

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the departure is reasonable and the court states on the record the reasons for departure." MCL 769.34(3). "A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness[, and] . . . [r]esentencing will be required when a sentence is determined to be unreasonable." *Lockridge*, 498 Mich at 392, citing *United States v Booker*, 543 US 220, 261 (2005). "[S]entencing courts must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392. Appellate courts review the reasonableness of a sentence for an abuse of discretion "informed by the 'principle of proportionality' standard" set forth in *People v Milbourn*, 435 Mich 630, 636 (1990). *People v Steanhouse*, 500 Mich 453, 476 (2017). The principle of proportionality requires "'sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.'" *Id.*, quoting *Milbourn*, 435 Mich at 636. See also *Steanhouse*, 500 Mich at 474-475, quoting *Milbourn*, 435 Mich at 661 ("'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range'").

6.5 Contempt for Noncompliance with Sentence

"If the court finds that the sentenced person has not complied with his or her sentence, including a nonjail or nonprobation sentence, the court may issue an order for the person to show cause why he or she should not be held in contempt of court for not complying with the sentence. If the court finds the person in contempt, it may impose an additional sentence, including jail or probation if appropriate." MCL 769.5(5).

"If the finding of contempt of court under [MCL 769.5(5)] is for nonpayment of fines, costs, or other legal financial obligations, the court must find on the record that the person is able to comply with the payments without manifest hardship, and that the person has not made a good-faith effort to do so, before imposing an additional sentence." MCL 769.5(6).

For a detailed discussion of contempt proceedings, see the Michigan Judicial Institute's *Contempt of Court Benchbook*.

6.6 Mandatory Sentences

The legislative sentencing guidelines do not apply if a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment. MCL 769.34(5).

A. Mandatory Determinate Minimum Sentences

Where a statute requires a court to impose a mandatory minimum sentence, the court must impose that sentence without regard to the recommended minimum sentence under the sentencing guidelines. MCL 769.34(2)(a). Imposing a minimum sentence not within the range recommended by the guidelines is not a departure when the sentence is mandated by the statute governing the sentencing offense. *Id*.

The following controlled substances offense statutes provide mandatory minimum sentences:

- **MCL 333.7410(2)** – mandatory two-year minimum sentence[154] and a maximum sentence not to exceed 60 years, see MCL 333.7401(2)(a)(*iv*) and MCL 333.7410(2), for an individual over 18 year of age who violates MCL 333.7401(2)(a)(*iv*) by delivering certain schedule 1 or 2 controlled substances in an amount less than 50 grams to another person on or within 1,000 feet of school property or a library.

- **MCL 333.7410(3)** – mandatory two-year minimum sentence[155] and a maximum sentence not to exceed 40 years, see MCL 333.7401(2)(a)(*iv*) and MCL 333.7410(3), for an individual over 18 year of age who violates MCL 333.7401(2)(a)(*iv*) by possessing with intent to deliver certain schedule 1 or 2 controlled substances in an amount less than 50 grams to another person on or within 1,000 feet of school property or a library.

- **MCL 333.7413(2)**[156] – mandatory five-year minimum sentence[157] and a maximum sentence not to exceed twice the sentence authorized under MCL 333.7410(2) or MCL 333.7410(3) (i.e., 120 years and 80 year, respectively), for a

[154] "The court may depart from [this] minimum term of imprisonment . . . if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7410(5).

[155] "The court may depart from [this] minimum term of imprisonment . . . if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7410(5).

[156] See Section 6.9 for more information on MCL 333.7413.

[157] "The court may depart from [this] minimum term of imprisonment . . . if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7413(3).

person convicted of two or more offenses described in MCL 333.7410(2) or MCL 333.7410(3).

- **MCL 333.7416(1)(a)** – mandatory sentence of not less than half of the maximum term of imprisonment authorized for an adult who commits such an act and not more than the maximum term of imprisonment authorized for an adult who commits such an act.[158]

B. Mandatory Life Imprisonment Without Parole (LWOP)

1. Statutes Authorizing Mandatory LWOP

The following controlled substance offenses are punishable by mandatory LWOP:

- **MCL 333.17764(7)**—conviction of MCL 333.17764(2) resulting in death where the offender had intent to kill or seriously impair two or more persons.[159]
- **MCL 750.16(5)**—conviction of MCL 750.16(1) resulting in death where the offender had intent to kill or seriously impair two or more persons.[160]
- **MCL 750.18(7)**—conviction of MCL 750.18(1) or MCL 750.18(2) resulting in death where the offender had intent to kill or seriously impair two or more persons.[161]

2. *Miller*[162] and its Progeny

A mandatory sentence of LWOP may not, consistently with the Eighth Amendment, be imposed upon an individual who was under the age of 18 at the time of the sentencing offense. See *Miller v Alabama*, 567 US 460, 465 (2012) (homicide offender under the age of 18 may not be sentenced to LWOP unless a judge or jury first has the opportunity to consider mitigating circumstances); *Graham v Florida*, 560 US 48, 75 (2010) (sentence of LWOP may not be imposed upon a defendant under the age of 18 for a nonhomicide offense). Further, the Court agreed that "no meaningful neurological bright line exists between

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[158] "The court may depart from [this] minimum term of imprisonment . . . if the court finds on the record that there are substantial and compelling reasons to do so." MCL 333.7416(3).

[159] See Section 5.10 for more information on MCL 333.17764.

[160] See Section 5.8 for more information on MCL 750.16.

[161] See Section 5.6 for more information on MCL 750.18.

[162] *Miller v Alabama*, 567 US 460 (2012).

age 17 and 18," and "to treat those two classes of defendants differently in [Michigan's] sentencing scheme is disproportionate to the point of being cruel under [Michigan's] Constitution." *People v Parks*, 510 Mich 225, 266 (2022) (quotation marks and citation omitted). The *Parks* Court considered an 18-year-old defendant convicted of first-degree murder, and did not discuss the mandatory imposition of life without parole sentences for 18-year-old defendants convicted of other offenses. *Id.* at 268 (concluding that "mandatorily subjecting 18-year-old defendants convicted of first-degree murder to a sentence of life without parole violates the principle of proportionality derived from the Michigan Constitution, . . . and thus constitutes unconstitutionally cruel punishment under Const 1963, art 1, § 16"). Accordingly, it is unclear to what extent *Parks* applies to the controlled substance offenses punishable by mandatory LWOP.

Extending the holding in *People v Parks*, 510 Mich 225, 268 (2022), the Michigan Supreme Court held that "as applied to defendants who were 19 or 20 years old at the time of their crime, a *mandatory* LWOP sentence that does not allow for consideration of the mitigating factors of youth or the potential for rehabilitation is a grossly disproportionate punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023). In *Taylor*, one defendant was 19 years old at the time of his offense, and the other defendant (in a separate and unrelated case) was 20 years old when he committed his offense. *Taylor*, ___ Mich at ___. "Each defendant was sentenced to a legislatively mandated punishment of life in prison without the possibility of parole (LWOP)." *Id*. at ___. "Defendants argue[d] that the mandatory nature of their sentences violate[d] Michigan's prohibition against 'cruel or unusual punishment' . . . ." *Taylor*, ___ Mich at ___. See Const 1963, art 1, § 16. "Determining what constitutes cruel or unusual punishment is guided by evolving standards of decency that mark the progress of a maturing society." *Id*. at ___ (quotation marks and citation omitted). "Inherent in this standard is the understanding that as society progresses, punishments that were once acceptable can later be considered cruel or unusual." *Id*. at ___. Additionally, "to evaluate the proportionality of a punishment under Michigan's Cruel or Unusual Punishment Clause, courts must consider: (1) the severity of the punishment relative to the gravity of the offense, (2) punishments imposed in the same jurisdiction for other offenses, (3) punishments imposed in other jurisdictions for the same offense, and (4) Michigan's traditional goal of and preference for rehabilitation." *Id*. at ___ (citations omitted).

Applying the standards from *People v Lorentzen*, 387 Mich 167, 176-181 (1972) and *People v Bullock*, 440 Mich 15, 33-34 (1992), the *Taylor* Court found that "[l]ate adolescents who are 19 or 20 years old, as a class, share with 18-year-olds the same mitigating characteristics of late-adolescent brain development." *Taylor*, ___ Mich at ___. As such, "[t]he same considerations that were discussed at length in *Parks* apply equally to this class of late adolescents." *Taylor*, ___ Mich at ___. "Mandatorily condemning such offenders to die in prison, without first considering the attributes of youth that late adolescents and juveniles share, no longer comports with the 'evolving standards of decency that mark the progress of a maturing society.'" *Id*. at ___, quoting *Lorentzen*, 387 Mich at 179. "Accordingly, as applied to defendants who were 19 or 20 years old at the time of their crime, a *mandatory* LWOP sentence that does not allow for consideration of the mitigating factors of youth or the potential for rehabilitation is a grossly disproportionate punishment in violation of Const 1963, art 1, § 16." *Taylor*, ___ Mich at ___ (further holding that "[t]his decision also applies retroactively to all relevant criminal cases on collateral review").

To comply with *Miller*, the Legislature enacted MCL 769.25 and MCL 769.25a,[163] which establish sentencing and resentencing procedures applicable to certain offenders under the age of 18 who are convicted of certain offenses carrying mandatory life-without-parole sentences, including a violation of MCL 333.17764(7). If the prosecuting attorney files a motion to sentence a defendant to LWOP, the court is required to conduct a hearing where it considers the *Miller* factors[164] and any other relevant criteria and specifies on the record the aggravating and mitigating circumstances it considered and its reasons for the sentence imposed. MCL 769.25(6)-(7); MCL 769.25a(4)(b). At a sentencing hearing held under MCL 769.25, the prosecutor bears the burden "to rebut a presumption that the particular juvenile defendant is not deserving of LWOP," and "[i]f the prosecutor cannot should this burden by clear and convincing evidence, the trial court must sentence the defendant to a term of years." *People v Taylor*, 510 Mich 112, 138-139 (2022). Further, even if the defendant is sentenced to a term of years, the court "must consider youth as a mitigating factor at sentencing hearings conducted under MCL 769.25 or MCL 769.25a," but "the court's consideration of youth need not

[163]See 2014 PA 23, effective March 4, 2014.

[164]*Miller* lists five broad mitigating factors relevant to juvenile offenders. See *Miller*, 567 US at 477-478. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19, for a detailed discussion of *Miller* and related cases and statutes.

be articulated on the record." *People v Boykin*, 510 Mich 171, 196 (2022).

"[T]he decision to sentence a juvenile to life without parole is to be made by a judge and . . . this decision is to be reviewed under the traditional abuse-of-discretion standard" because "[t]he trial court remains in the best position to determine whether each particular defendant is deserving of life without parole." *People v Skinner (Skinner II)*, 502 Mich 89, 137, (2018) (holding that "MCL 769.25 does not violate the Sixth Amendment because neither the statute nor the Eighth Amendment requires a judge to find any particular fact before imposing life without parole; instead, life without parole is authorized by the jury's verdict alone"), rev'g *People v Skinner (Skinner I)*, 312 Mich App 15 (2015) and aff'g in part and rev'g in part *People v Hyatt*, 316 Mich App 368 (2016). "[A]ll *Miller* requires sentencing courts to do is to consider how children are different before imposing life without parole on a juvenile." *Skinner II*, 502 Mich at 130 (explaining that trial courts are not required to "explicitly find that a defendant is 'rare' or 'uncommon' before it can impose life without parole").

For additional discussion of sentencing juvenile and 18-year-old offenders to life without parole, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19. For a table summarizing the application of MCL 769.25 and MCL 769.25a to juvenile offenders, see the Michigan Judicial Institute's Juvenile Life-Without-Parole Quick Reference Guide.

6.7 Controlled Substance Offenses Predicated on an Underlying Felony[165]

Special scoring instructions apply to offenses listed in MCL 777.18, which are guidelines offenses predicated on the offender's commission of an underlying offense. Several offenses discussed in this benchbook are listed in MCL 777.18:

- Delivery of a schedule 1 or 2 narcotic drug or cocaine to a minor—MCL 333.7410(1). See Section 2.7(D).
- Delivery of GBL or certain other controlled substances to a minor—MCL 333.7410(1). See Section 2.7(D).

[165]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 3, for detailed information about offenses predicated on an underlying felony.

- Delivery of a schedule 1 or 2 narcotic drug or cocaine within 1,000 feet of school property or a library—MCL 333.7410(2). See Section 2.7(D).

- Possession with intent to deliver a schedule 1 or 2 narcotic drug or cocaine within 1,000 feet of school property or a library—MCL 333.7410(3). See Section 2.7(D).

- Possession of GBL or other controlled substances on school property or library property—MCL 333.7410(4). See Section 2.11.

- Manufacture of methamphetamine on or within 1,000 feet of school property or a library—MCL 333.7410(6). See Section 2.7(D).

- Subsequent controlled substance violations—MCL 333.7413(1) or MCL 333.7413(2). See Sections 6.9 and 6.10.

- Recruiting or inducing a minor to commit a controlled substance felony—MCL 333.7416(1)(a). See Section 3.10.

- Conspiracy—MCL 750.157a(a). See Section 5.3.

When calculating the minimum sentence range for an offense listed in MCL 777.18, both of the following apply:

> "(a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in section 18 of this chapter.[166]
>
> (b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G." MCL 777.21(4).
>
> The general rule of MCL 777.21(1)(b), requiring the scoring of prior record variables (PRVs) for all offenses enumerated in MCL 777.11 to MCL 777.19, applies to "*all* cases . . . unless the language in

[166]Note that MCL 333.7413(1) and MCL 333.7413(2) (subsequent controlled substance violations) are offenses listed in MCL 777.18, and when scoring those offenses, the OVs for both the public trust category and the controlled substances category must be scored because MCL 333.7413 is categorized as a public trust crime by MCL 777.18, but the conduct underlying the offense is a controlled substance violation. See MCL 777.18; MCL 777.21(4). See also *People v Peltola*, 489 Mich 174, 185-186 (2011).

another subsection of the statute directs otherwise." *People v Peltola*, 489 Mich 174, 182 (2011). Thus, PRVs must be scored against offenders falling within the purview of MCL 777.21(4) for offenses listed in MCL 777.18, notwithstanding the absence of a reference to PRVs in MCL 777.21(4). *Peltola*, 489 Mich at 188.

6.8 Sentencing Habitual Offenders[167]

Michigan's sentencing law is designed so that the potential punishment for conviction of a crime may be increased in proportion to the offender's number of previous felony convictions. MCL 769.10, MCL 769.11, and MCL 769.12 comprise the general habitual offender statutes. MCL 777.21(3) authorizes sentence enhancement under the statutory sentencing guidelines for habitual offenders. The general habitual offender statutes enhance the defendant's maximum sentence.[168] In contrast, MCL 777.21(3) sets out how to calculate a habitual offender's enhanced recommended minimum sentence range. Further, Article 7 of the Public Health Code, MCL 333.7101 *et seq.*, (PHC) specifically permits, and in some cases requires, sentence enhancements for habitual offenders in the context of controlled substance offenses. See MCL 333.7413.

A. Application of the General Habitual Offender Statutes to Controlled Substance Offenses

The general habitual offender statutes, MCL 769.10(1)(c), MCL 769.11(1)(c), and MCL 769.12(1)(d), all require the court to enhance a person's sentence under Article 7 of the PHC "[i]f the subsequent felony is a major controlled substance offense[.]" See e.g., MCL 333.7413(2). However, sentence enhancement under either the general habitual offender statutes or Article 7 of the PHC's offender sentencing scheme is permissible where a defendant with prior felony *nondrug* convictions is subsequently convicted of a major controlled substance offense. *People v Wyrick*, 474 Mich 947 (2005). "[T]he prosecutor may seek a greater sentence under the habitual offender statute even when a defendant is sentenced under [Article 7 of the PHC]." *Wyrick*, 474 Mich at 947, citing *People v Primer*, 444 Mich 269, 271-272 (1993) (holding that "the legislative purpose [of

[167] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 4, for detailed information about sentencing habitual offenders.

[168] Additionally, MCL 769.12, governing fourth habitual offender status, provides for a *mandatory minimum* sentence of 25 years' imprisonment for an offender who has been convicted of three or more prior felonies or felony attempts, including at least one "[l]isted prior felony" as defined in MCL 769.12(6)(a), and who commits or conspires to commit a subsequent "[s]erious crime" as defined in MCL 769.12(6)(c). MCL 769.12(1)(a). The 25-year mandatory minimum sentence imposed by MCL 769.12(1)(a) does not constitute cruel or unusual punishment. *People v Burkett*, 337 Mich App 631, 638, 642 (2021) (rejecting what it characterized as a facial challenge to MCL 769.12(1)(a)).

the provisions of the Code of Criminal Procedure providing that if a subsequent felony is a major controlled substance offense, the person shall be punished as provided in Article 7 of the PHC,] was to assure that the mandatory sentences for the commission of a first or subsequent major controlled substance offense would not be ameliorated as the result of the exercise of discretion regarding the length of sentence provided in the habitual offender provisions in the Code of Criminal Procedure, and not to preclude enhancement of a sentence under the habitual offender provisions that might be imposed on a person who has a record of prior felony conviction, albeit not for a major controlled substance offense"). See also *People v Edmonds*, 93 Mich App 129, 135 n 1 (1979), which stated:

> "It must be noted that application of the controlled substances act [now Article 7 of the PHC] penalty augmentation is proper when the defendant is being sentenced on a drug conviction. If the defendant commits a nondrug felony after one or more drug convictions then the habitual offender act applies upon conviction of that nondrug felony."

Michigan courts have consistently held that a defendant's sentence cannot be doubly enhanced by application of the habitual offender statutes *and* any enhancement provisions contained in the statutory language prohibiting the conduct for which the defendant was convicted. *People v Elmore*, 94 Mich App 304, 305-306 (1979); *Edmonds*, 93 Mich App at 135. See also *People v Fetterley*, 229 Mich App 511, 525, 540-541 (1998) (holding that double enhancement was improper where a defendant was convicted of offenses that were not major controlled substance offenses and his sentences were quadrupled when the trial court applied the enhancement provisions of Article 7 of the PHC *and* the habitual offender statutes to the defendant's underlying offenses).

B. Notice Requirements

In contrast to the notice requirements that apply to general habitual offender sentence enhancements,[169] no notice is required for enhancement under MCL 333.7413:

> "[A] defendant charged under a statute which provides for imposition of an enhanced sentence on an individual previously convicted of an offense under the same statute is not entitled to notice within fourteen days of arraignment of the prosecutor's intent to seek sentence enhancement or to a separate proceeding on the

[169] See, e.g., MCR 6.112(F); MCL 769.13(1).

> question whether he has previously been convicted of a narcotics offense." *People v Eason*, 435 Mich 228, 231 (1990).

6.9 Mandatory Sentence Enhancement Under Article 7 of the PHC

MCL 333.7413(2) contains a mandatory sentence enhancement provision for offenders with second or subsequent convictions of specific major controlled substance offenses.[170] MCL 333.7413(2) states:

> "An individual convicted of a second or subsequent offense under [MCL 333.7410(2) or MCL 333.7410(3)] must be punished, subject to [MCL 333.7410(3)[171]], by a term of imprisonment of not less than 5 years nor more than twice that authorized under [MCL 333.7410(2)[172] or MCL 333.7410(3)[173]] and, in addition, may be punished by a fine of not more than 3 times that authorized by [MCL 333.7410(2) or MCL 333.7410(3)]; and is not eligible for probation or suspension of sentence during the term of imprisonment."

Note that not all of the major controlled substance offenses are included within the mandatory enhancement provision of MCL 333.7413(2).

6.10 Discretionary Sentence Enhancement Under Article 7 of the PHC

Unlike the provision in MCL 333.7413(2), MCL 333.7413(1) *permits*, but does *not require*, a sentencing court to double the term of imprisonment authorized by the applicable statute for a first conviction of the offense.

MCL 333.7413(1) states:

> "Except as otherwise provided in [MCL 333.7413(2)], an individual convicted of a second or subsequent offense under

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[170] Though Article 7 of the PHC does not refer to "major controlled substance offenses," the offenses listed in MCL 333.7413 meet the definition set out in MCL 761.2. See Section 1.4 for more information on major controlled substance offenses.

[171] MCL 333.7413(3) addresses a court's departure from the minimum term of imprisonment.

[172] An individual over 18 years old who delivers a schedule 1 or 2 controlled substance that is either a narcotic drug or described in MCL 333.7214(a)(*iv*) to someone within 1,000 feet of school property or a library.

[173] An individual over 18 years old who possesses and intends to deliver a schedule 1 or 2 controlled substance that is either a narcotic drug or described in MCL 333.7214(a)(*iv*) to someone within 1,000 feet of school property or a library.

[Article 7 of the PHC] may be imprisoned for a term not more than twice the term authorized or fined an amount not more than twice that otherwise authorized, or both."

A. Aiding and Abetting

A person who aids and abets in the commission of an offense is subject to the same penalties as if he or she directly committed the offense.[174] MCL 767.39. Because MCL 767.39 mandates prosecution, trial, conviction, and punishment as if an offender directly committed the offense charged, aiding and abetting a controlled substance offense falls within Article 7 of the PHC and is classified as an "offense under this article" for purposes of the sentence enhancements authorized by MCL 333.7413(1).

B. Conspiracy

Conspiracy offenses prosecuted under MCL 750.157a do not qualify as "a second or subsequent offense under [Article 7 of the PHC]." *People v Briseno*, 211 Mich App 11, 18 (1995). Therefore, the provisions of MCL 333.7413(1)[175] applicable to repeat offenders do not apply to subsequent conspiracy convictions prosecuted under MCL 750.157a. *Briseno*, 211 Mich App at 18. See also *People v Anderson*, 202 Mich App 732, 735 (1993) (holding that enhancement of the defendant's sentence under MCL 333.7413 was improper because the defendant's conviction of attempted conspiracy to deliver cocaine was a separate offense from delivery of cocaine and was thus not an offense under Article 7 of the PHC).

C. Calculation of Minimum Sentence

"[W]hen calculating a defendant's recommended minimum sentence range under the sentencing guidelines when the defendant's minimum and maximum sentences may be enhanced pursuant to [MCL 333.7413(1)[176]], a trial court should score the PRVs." *People v Peltola*, 489 Mich 174, 190 (2011). "Post-*Lockridge*,[177] the minimum allowed sentence is no longer limited to twice the sentencing guidelines range." *People v Hines*, ___ Mich App ___, ___

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[174] See Section 5.2 for more information on aiding and abetting.

[175] *Briseno* references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when *Briseno* was decided is now subsection (1).

[176] *Peltola* references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when *Peltola* was decided is now subsection (1).

[177] *People v Lockridge*, 498 Mich 358, 365 (2015) (holding that "MCL 333.7413 no longer permits a trial court to double the sentencing guidelines," effectively overturning *People v Williams*, 268 Mich App 416 (2005)).

(2025). Under MCL 769.34(2)(b), "the enhanced minimum could be up to 2/3 of the new statutory maximum." *Hines*, ___ Mich App at ___ (holding that post-*Lockridge*, MCL 333.7413 "has no effect on the advisory sentencing guidelines," but does "potentially increase the statutory minimum").

D. Enhancements Post-*Lockridge*

MCL 333.7413(1) provides that "an individual convicted of a second or subsequent offense . . . may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both." *People v Hines*, ___ Mich App ___, ___ (2025). However, "the portion of the [*People v Williams*, 268 Mich App 416, 429 (2005)] opinion that permitted doubling the guidelines range under MCL 333.7413 has been overruled by [*People v Lockridge*, 498 Mich 358, 365 (2015)] and subsequent laws." *Hines*, ___ Mich App at ___. "Post-*Lockridge*, the minimum allowed sentence is no longer limited to twice the sentencing guidelines range." *Id*. at ___. Rather, under MCL 769.34(2)(b), "the enhanced minimum could be up to 2/3 of the new statutory maximum." *Hines*, ___ Mich App at ___. "The trial court would just be required to articulate its reasoning for increasing the statutory maximum, its reasoning for departing from the guidelines, and its reasoning supporting the extent of the departure." *Id*. at ___.

E. Temporal Requirements

Although an offender's *convictions* for purposes of MCL 333.7413(1) must *follow* one another, there is no statutory requirement regarding the temporal sequence of the *commission dates* of the offenses on which the offender's convictions are based. *People v Roseburgh*, 215 Mich App 237, 239 (1996).[178]

6.11 Subsequent Attempted Controlled Substance Offenses and Offenses Involving Solicitation, Inducement, or Intimidation

Except as provided in MCL 333.7416,[179] a person who attempts to violate Article 7 of the PHC or who knowingly or intentionally solicits, induces, or intimidates another person to violate Article 7 of the PHC is subject to

[178] *Roseburgh* references MCL 333.7413(2); however, effective March 28, 2018, 2017 PA 266 amended MCL 333.7413 and what was subsection (2) when *Roseburgh* was decided is now subsection (1).

[179] MCL 333.7416 governs penalties for recruiting, inducing, soliciting, or coercing a minor under 17 years of age to commit a felony under Article 7 of the PHC.

the same penalties applicable to the crime he or she attempted to commit or the crime he or she solicited, induced, or intimidated another person to commit.[180] MCL 333.7407a(1)-(3). Where a defendant convicted under MCL 333.7407a is subject to the same penalties that apply to the crime attempted, solicited, induced, or committed through intimidation, the defendant is subject to any mandatory sentences and consecutive sentencing provisions indicated for that crime. *People v Gonzalez*, 256 Mich App 212, 229-230 (2003).

6.12 Consecutive Sentencing[181]

Sentences run concurrently unless otherwise indicated; consecutive sentences may not be imposed unless expressly authorized by law. *Gonzalez*, 256 Mich App at 229. A trial court's decision to impose a discretionary consecutive sentence is reviewed for an abuse of discretion. *People v Norfleet*, 317 Mich App 649, 654 (2016). A trial court abuses its discretion when its decision is "outside the range of reasonable and principled outcomes. *Id.* "[T]rial courts imposing one or more discretionary consecutive sentences are required to articulate on the record reasons for each consecutive sentence imposed." *Id.*

"To allow for meaningful appellate review, the trial court is required to state on the record its reasoning for each consecutive sentence it imposes." *People v Wisniewski*, ___ Mich App ___, ___ (2025). "Under MCL 750.520b(3), the trial court is authorized to impose a consecutive sentence for defendant's conviction of CSC-I." *Wisniewski*, ___ Mich App at ___. However, "[t]he trial court is obligated to identify 'particularized reasons,' referring to the specific offenses and the defendant, for imposing a sentence under MCL 750.520b(3) consecutively to another sentence." *Wisniewski*, ___ Mich App at ___, quoting *Norfleet*, 317 Mich App at 666. In *Wisniewski*, "[d]uring sentencing, the trial court referred to the specific offenses and defendant, and set forth particularized reasons for its decision." *Wisniewski*, ___ Mich App at ___. "For example, the trial court noted that [two of the victims] considered defendant to be 'a second father,' and to all of the complainants, he was close enough to be considered a member of the family." *Id.* at ___. "The trial court characterized this case as evidencing an 'extraordinary breach of trust,' in which defendant repeatedly manipulated very young children to satisfy his own sexual needs." *Id.* at ___. "Additionally, defendant's actions 'deeply impacted' the complainants on an emotional and psychological level, which put them at risk for the rest of their lives." *Id.* at ___. "The trial court . . . also described defendant's actions as placing each

[180] See Sections 3.2 and 3.15 respectively for more information on attempts and solicitation, inducement, and intimidation.

[181] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7, for detailed information about consecutive sentencing.

complainant in a prison for the rest of their lives because of the harm caused by the sexual abuse." *Id*. at ___. "Given the trial court's thorough and detailed reasoning with respect to the imposition of the consecutive sentences for Counts 1 and 2, defendant's claim that the trial court abused its discretion [was] unavailing." *Id*. at ___. Further, "the effective 50-year minimum term that defendant received for Counts 1 and 2 resulting from the consecutive sentencing was reasonable and proportionate and therefore did not constitute an abuse of discretion." *Id*. at ___. "[B]ecause the aggregate of defendant's consecutive sentences [did] not exceed the maximum punishment for CSC-I, defendant's contention that he received a disproportionate sentence [was] not persuasive." *Id*. at ___.

A. Aiding and Abetting

Under MCL 767.39, a person convicted of aiding and abetting a controlled substance offense must be punished as if he or she directly committed the offense charged; thus, aiding and abetting a controlled substance offense is subject to the same consecutive sentencing provisions prescribed for conviction of the underlying offense.[182]

B. Conspiracy

An offender convicted of conspiracy to commit an offense punishable by more than one year imprisonment under MCL 750.157a(a) must be "punished by a penalty equal to that" authorized for conviction of the offense the offender conspired to commit.[183] Because a consecutive sentencing provision is a penalty, any consecutive sentencing provisions regarding the conspired offense also apply to a conspiracy conviction. *People v Denio*, 454 Mich 691, 703 (1997) (the defendant's sentence for conspiracy to violate MCL 333.7401(2)(a)(*iv*) was properly made consecutive to his sentence for conspiracy to deliver marijuana).

C. Major Controlled Substance Offenses

If a defendant commits a major controlled substance offense[184] while the disposition of another felony offense is pending, consecutive sentencing is mandatory "upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense[.]" MCL 768.7b(2)(b). A felony is *pending disposition* for purposes of

[182]See Section 5.2 for more information on aiding and abetting.

[183]See Section 5.3 for more information on the crime of conspiracy.

[184]See Section 1.4 for more information on major controlled substance offenses.

consecutive sentencing "if the second offense is committed at a time when a warrant has been issued in the original offense and the defendant has notice that the authorities are seeking him [or her] with regard to that specific criminal episode." *People v Waterman*, 140 Mich App 652, 654-655 (1985) (the defendant left Michigan after he was told that the police were looking for him and a warrant had issued by the time of his arrest for the subsequent offense). See also *People v Henry*, 107 Mich App 632, 637 (1981) (a felony charge was not *pending disposition* where a warrant had been issued for the defendant's first offense, but the defendant was unaware that his conduct was the subject of a criminal prosecution).

"A charge remains 'pending' for the purposes of [MCL 768.7b] 'until a defendant is sentenced on the conviction arising out of the first offense and until the original charge arising out of the first offense is dismissed.'" *People v Morris*, 450 Mich 316, 330-331 (1995), quoting *People v Smith (Timothy)*, 423 Mich 427, 452 (1985). Accordingly, consecutive sentencing is required "where a defendant commits a major controlled substance offense after being charged, but before being sentenced for a prior felony." *Morris*, 450 Mich at 331. A felony charge is no longer pending if probation is imposed following conviction of the charge. *People v Malone*, 177 Mich App 393, 401 (1989). See also *People v Hardy (Eddie)*, 212 Mich App 318, 322 (1995).

The nature of the offense for which an offender is ultimately convicted has no effect on the nature of the offense when it is pending disposition. *People v Ackels*, 190 Mich App 30, 32-34 (1991). For purposes of MCL 768.7b, consecutive sentencing is mandatory when an offender commits a felony while another felony charge is pending. *Ackels*, 190 Mich App at 34. That the pending felony is ultimately disposed of as a misdemeanor or lesser offense of the original felony charge has no effect on the consecutive sentencing mandate of MCL 768.7b. *Ackels*, 190 Mich App at 33-34.

A sentence imposed for a controlled substance offense under MCL 333.7401(2)(a), a major controlled substance offense under MCL 761.2(a), may be made consecutive to any sentence imposed for the commission of another felony. MCL 333.7401(3).[185] "[T]he term 'another felony' as used in [MCL 333.7401(3)] includes any felony for which the defendant has been sentenced either before or simultaneously with the controlled substance felony enumerated in [MCL 333.7401(3)] for which a defendant is currently being sentenced. The phrase applies to felonies violative of any provision of the controlled substances act [now Article 7 of the PHC], including additional violations of the same controlled substance provision as that for which the defendant is being sentenced, or any

[185]See Section 2.7 for more information on MCL 333.7401.

other felony. Further, sentences imposed in the same sentencing proceeding are assumed, for the purposes of [MCL 333.7401(3)], to be imposed simultaneously. Therefore, where any of the felonies for which a defendant is being sentenced in the same proceeding are covered by the mandatory consecutive sentencing provision of [MCL 333.7401(3)], the sentence for that felony must be imposed to run consecutively with the term of imprisonment imposed for other felonies." *People v Morris*, 450 Mich 316, 320 (1995).

"[T]he trial court abused its discretion by failing to adequately explain its decision to impose discretionary consecutive sentences for [defendant's] fentanyl conviction (Count 1) and [defendant's] imitation-controlled-substance conviction (Count 2) under MCL 768.7b(2). *People v Hines*, ___ Mich App ___, ___ (2025). "'In Michigan concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute.'" *Id*. at ___, quoting *People v Baskerville*, 333 Mich App 276, 289 (2020). "At the time of the instant offenses, [defendant] was on bond in connection with additional drug charges arising from his criminal activities in early 2020." *Hines*, ___ Mich App at ___. Defendant "acknowledge[d] that his . . . convictions were subject to discretionary consecutive sentences pursuant to MCL 768.7b(2)(a) because he committed those felonies while the 2020 felony charges were pending." *Hines*, ___ Mich App at ___. However, defendant argued that "he should be resentenced because the trial court did not adequately explain its reasons for ordering that [his current] convictions be served consecutive to his sentences for the 2020 convictions." *Id*. at ___. The *Hines* Court applied *People v Norfleet*, 317 Mich App 649, 665 (2016), noting that "the trial court was required to articulate its reasons for ordering each consecutive sentence." *Hines*, ___ Mich App at ___. Here, "[t]he trial court's reference to [defendant's] criminal history and parole status were mentioned in the context of its discretion to double [defendant's] authorized terms of imprisonment under MCL 333.7413, and there [was] no indication that it applied the same reasoning to the discretionary consecutive sentences imposed under MCL 768.7b(2)(a)." *Hines*, ___ Mich App at ___. "The failure to state its reasoning for imposing a discretionary consecutive sentence amounted to an abuse of discretion." *Id*. at ___. Therefore, the *Hines* Court remanded the matter "to allow the trial court to articulate its rationale for imposing consecutive sentences . . . ." *Id*. at ___.

D. Manufacture, Creation, Delivery, or Possession with Intent to Manufacture, Create, or Deliver Offenses

"A term of imprisonment imposed under [MCL 333.7401(2)(a)] may be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." MCL 333.7401(3).

"[A]lthough the combined term [resulting from the imposition of consecutive sentences] is not itself subject to a proportionality review," "[t]he decision as to each consecutive sentence is its own discretionary act and must be separately justified on the record[;] . . . [w]hile imposition of more than one consecutive sentence may be justified in an extraordinary case, trial courts must nevertheless articulate their rationale for the imposition of each such sentence so as to allow appellate review." *Norfleet*, 317 Mich App at 664-666. Where "the trial court spoke only in general terms[,] stating that it took into account defendant's 'background, his history, [and] the nature of the offenses involved[,]'" and failed to give particularized reasons for imposing five consecutive sentences for drug offenses under MCL 333.7401(2)(a)(*iv*), it was necessary to remand the case "so that the trial court [could] fully articulate its rationale for each consecutive sentence imposed[,]" "with reference to the specific offenses and the defendant." *Norfleet*, 317 Mich App at 666 (third alteration in original).

After remand "to properly articulate its rationale for imposing [multiple] consecutive sentences[]" for five drug convictions under MCL 333.7401, the trial court properly ordered one of the sentences to be served consecutively and ordered the remaining sentences to be served concurrently; "[t]he trial court properly recognized that it could not impose multiple consecutive sentences as a single act of discretion" and appropriately concluded that the single consecutive sentence was justified on grounds including "defendant's extensive violent criminal history, multiple failures to rehabilitate, and the manipulation of several less culpable individuals in his ongoing criminal operation." *People v Norfleet (After Remand)*, 321 Mich App 68, 73 (2017). See also *People v Hines*, ___ Mich App ___, ___ (2025) (holding that "[t]he trial court abused its discretion by failing to adequately explain its decision to impose discretionary consecutive sentences for [defendant's] fentanyl conviction (Count 1) and [defendant's] imitation-controlled-substance conviction (Count 2) under MCL 768.7b(2)).

For purposes of consecutive sentencing, a "term of imprisonment," as that term is used in MCL 333.7401(3), includes a defendant's jail sentence. *People v Spann*, 250 Mich App 527, 532-533 (2002) *(Spann I)*, aff'd 469 Mich 904, 905 (2003) *(Spann II)*. In affirming, the Court noted the Legislature uses the term "imprisonment" to refer to both confinement in prison and confinement in jail. *Spann II*, 469 Mich at 904, citing MCL 769.28, MCL 35.403, MCL 66.8, and MCL 430.55 (noting that the term "imprisonment" is not ambiguous). add to CSBB

MCL 333.7401(3) does not draw any distinction "between an original sentence and a sentence imposed on resentencing," and

"[t]he only relevant inquiry under the statute is whether, at the time of sentencing for the enumerated offense, the defendant has already been sentenced for another felony." *People v Lee*, 233 Mich App 403, 406-407 (1999).

E. Other Offenses Committed While Prior Felony is Pending

If a defendant commits an offense that is not a major controlled substance offense while the disposition of another felony offense is pending, consecutive sentencing is discretionary "upon conviction of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense[.]" MCL 768.7b(2)(b). The discretionary authority to impose consecutive sentences granted by MCL 768.7b(2)(a) applies only to the "last in time" sentencing court. *People v Chambers*, 430 Mich 217, 230-231 (1988).

[LP: COPIED AND PASTED FROM CHAPTER 2.]"[T]he trial court abused its discretion by failing to adequately explain its decision to impose discretionary consecutive sentences for [defendant's] fentanyl conviction (Count 1) and [defendant's] imitation-controlled-substance conviction (Count 2) under MCL 768.7b(2). *People v Hines*, ___ Mich App ___, ___ (2025). "'In Michigan concurrent sentencing is the norm, and a consecutive sentence may be imposed only if specifically authorized by statute.'" *Id*. at ___, quoting *People v Baskerville*, 333 Mich App 276, 289 (2020). "At the time of the instant offenses, [defendant] was on bond in connection with additional drug charges arising from his criminal activities in early 2020." *Hines*, ___ Mich App at ___. Defendant "acknowledge[d] that his . . . convictions were subject to discretionary consecutive sentences pursuant to MCL 768.7b(2)(a) because he committed those felonies while the 2020 felony charges were pending." *Hines*, ___ Mich App at ___. However, defendant argued that "he should be resentenced because the trial court did not adequately explain its reasons for ordering that [his current] convictions be served consecutive to his sentences for the 2020 convictions." *Id*. at ___. The *Hines* Court applied *People v Norfleet*, 317 Mich App 649, 665 (2016), noting that "the trial court was required to articulate its reasons for ordering each consecutive sentence." *Hines*, ___ Mich App at ___. Here, "[t]he trial court's reference to [defendant's] criminal history and parole status were mentioned in the context of its discretion to double [defendant's] authorized terms of imprisonment under MCL 333.7413, and there [was] no indication that it applied the same reasoning to the discretionary consecutive sentences imposed under MCL 768.7b(2)(a)." *Hines*, ___ Mich App at ___. "The failure to state its reasoning for imposing a discretionary consecutive sentence amounted to an abuse of discretion." *Id*. at ___. Therefore, the *Hines*

Court remanded the matter "to allow the trial court to articulate its rationale for imposing consecutive sentences . . . ." *Id*. at ___.

F. Public Health Code Misdemeanors

For purposes of the Code of Criminal Procedure, misdemeanors punishable by more than one year ("two-year misdemeanors") are felonies for purposes of consecutive sentencing. *People v Smith (Timothy)*, 423 Mich 427, 434 (1985). See also *People v Washington*, 501 Mich 342, 347 (2018) (stating, in the context of determining whether a prior misdemeanor conviction under the Public Health Code constituted a *felony* for purposes of serving as a predicate felony for the defendant's felony-firearm conviction under the Penal Code, that "[a]lthough the Legislature intended the offense of keeping or maintaining a drug house to be a misdemeanor for purposes of the Public Health Code, that offense is punishable by imprisonment in a state prison, and, therefore, it unquestionably satisfies the definition of 'felony' in the Penal Code"; "an offense expressly labeled a misdemeanor in one code does not necessarily mean the same offense is a misdemeanor for purposes of interpreting and applying a different code").

However, for purposes of the PHC, offenses "expressly designated" as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. *People v Wyrick*, 474 Mich 947 (2005) (even though punishable by not more than 2 years of imprisonment, misdemeanor possession of marijuana, second offense, does *not* constitute a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)). This case is distinguishable from *Washington* in that *Wyrick* "involved a sentence-enhancement statute and an underlying offense that were both located in the Public Health Code." *Washington*, 501 Mich at 361 n 47.

G. Violations Arising Out of the Same Transaction As The Sentencing Offense

A court is authorized to order that a sentence of imprisonment imposed for a conviction under MCL 333.7401c be consecutive to a sentence imposed for any other offense arising out of the same transaction as the sentencing offense. MCL 333.7401c(5).[186]

[186] See Chapter 3 for information on MCL 333.7401c offenses.

6.13 Delayed Sentencing[187]

Under MCL 771.1(2), if a defendant is eligible for a sentence of probation, the court may elect to delay imposing sentence on the defendant for up to one year to allow the defendant to demonstrate that probation, or other leniency compatible with the ends of justice and the defendant's rehabilitation, is an appropriate sentence for his or her conviction. A defendant is not eligible for probation if he or she was convicted of a major controlled substance offense. MCL 771.1(1). During the period of delay, the court may require the defendant to comply with any applicable terms and conditions associated with a sentence of probation. See *People v Saylor (Barry)*, 88 Mich App 270, 274-275 (1979), and MCL 771.1(2).

See Section 6.22 for a chart comparing factors involved in delayed sentencing, deferred adjudications, and assignments to drug court.

6.14 Deferred Adjudication of Guilt Under § 7411[188]

Delayed or deferred sentencing is not the same as a deferred adjudication of guilt. In controlled substances cases involving deferred adjudication, the defendant pleads or is found guilty of the offense charged, but the adjudication is not immediately entered. See MCL 333.7411(1). Instead, the court places the defendant on probation and if the terms and conditions of probation are completed successfully, the court must discharge the defendant and dismiss the proceedings against him or her. *Id.* Having successfully completed the term of probation imposed for the offense, no judgment of guilt is entered against the defendant. *Id.*

Deferred adjudication is also permitted in certain circumstances for offenders admitted to a drug treatment court or a veterans treatment court. See Chapter 9 for discussion of these specialized courts.

A. Procedural Requirements

To qualify for deferral under MCL 333.7411, the defendant must have no previous controlled substances convictions, be guilty of an enumerated offense, and consent to the deferral. See MCL 333.7411(1).

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[187] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about delayed sentencing.

[188] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about deferred adjudication of guilt.

1. No Previous Convictions

A defendant must have no previous convictions for an offense listed under Article 7 of the PHC or an offense under any statute of the United States or any state related to narcotic drugs, coca leaves, marijuana, stimulants, depressants, or hallucinogenic drugs. MCL 333.7411(1).

"For purposes of this section, a person subjected to a civil fine for a first violation of section [MCL 333.7341(4)[189]] shall not be considered to have previously been convicted of an offense under [Article 7 of the PHC]." MCL 333.7411(4).

A conviction entered simultaneously with the charge to which a defendant seeks deferral under MCL 333.7411 is not a "previous conviction" for purposes of MCL 333.7411 and so does not render the defendant ineligible for deferred adjudication status. *People v Ware*, 239 Mich App 437, 442 (2000).

2. Defendant's Guilt Must be Established

A defendant must plead guilty to or be found guilty of an offense listed in MCL 333.7411. These offenses are possession of a controlled substance under MCL 333.7403(2)(a)(*v*), and MCL 333.7403(2)(b)-(d); use of a controlled substance under MCL 333.7404; and possession or use of an imitation controlled substance under MCL 333.7341 for a second time. MCL 333.7411(1).

3. Defendant Must Consent to the Deferral

Deferred adjudication requires the defendant's consent. MCL 333.7411(1).

B. Conditions of Probation

If all the requirements in MCL 333.7411(1) are satisfied, the defendant will be placed on probation, further proceedings are deferred, and no judgment or adjudication of guilt is entered. MCL 333.7411(1).

The court generally has discretion to impose any lawful term or condition on the defendant. MCL 333.7411(1). See MCL 771.3; MCL 771.3c.[190] However, MCL 333.7411(1) *requires* the court to order payment of a probation supervision fee as prescribed in MCL

[189] Possession with intent to use/use of an imitation controlled substance.

771.3c. MCL 333.7411(1). Further, MCL 333.7411(1) specifically states that the terms and conditions of probation may include participation in a drug treatment court.

Except as provided in MCL 333.7411(6), when an individual is convicted of violating Article 7 of the PHC, other than violations of MCL 333.7401(2)(a)(*i*)-(*iv*),[191] MCL 333.7403(2)(a)(*i*)-(*iv*)[192], the court may require the individual to attend a course or a rehabilitation program on the medical, psychological, and social effects of the misuse of drugs. MCL 333.7411(5). The court may order the individual to pay a fee, and failure of the individual to complete the course or program shall be considered a probation violation. *Id.*

"If an individual is convicted of a second violation of [MCL 333.7341(4)], before imposing sentence under [MCL 333.7411(1)], the court shall order the person to undergo screening and assessment by a person or agency designated by the office of substance abuse services, to determine whether the person is likely to benefit from rehabilitative services[.]" MCL 333.7411(6). The court may order an individual to participate in and successfully complete one or more appropriate rehabilitation program. *Id.* The individual must pay for the costs of the screening, assessment, and rehabilitative services, and failure to complete a program is considered a probation violation. *Id.*

C. Outcome of Probation

1. Failure to Successfully Complete the Probationary Period

The court has discretion to enter a judgment of guilt and proceed to sentencing when a defendant violates a term or condition of probation or otherwise fails to successfully complete probation. MCL 333.7411(1). However, adjudication of guilt is not mandatory. See *id.*

In deferral proceedings under MCL 333.7411(1), a defendant has the opportunity to successfully complete a probationary period and have the charge against them dismissed. *People v Tolonen*, ___ Mich App ___, ___ (2024). Ordinarily, "a trial court

[190]See Section 6.19 for a discussion of fines, costs, assessments, and restitution. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information all the lawful terms and conditions of probation.

[191]MCL 333.7401(2)(a)(*i*)-(*iv*) addresses manufacture and delivery violations involving a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a cocaine-related drug.

[192]MCL 333.7403(2)(a)(*i*)-(*iv*) addresses possession violations involving a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a cocaine-related drug.

may modify a term of probation by either extending or discharging the term, but it must do so before the term of probation expires. If a trial court fails to extend the term of probation on or before its expiration date, then probation terminates and the trial court has no continued authority to modify it." *Id*. at ___. In *Tolonen*, the defendant's probationary period expired before the court unsuccessfully discharged her from probation and entered an adjudication of guilt. *Id*. at __. The *Tolonen* Court held that "the trial court maintained jurisdiction over defendant after the probationary period expired and had the authority to unsuccessfully discharge defendant from probation and enter an adjudication of guilt." *Id*. at ___. "MCL 333.7411(1) required the trial court to first determine whether defendant had fulfilled the terms of her probation during the 12-month period before it could either dismiss the charge or enter an adjudication of guilt." *Tolonen*, ___ Mich App at ___. "The trial court determined that defendant had failed to fulfill the terms of her probation and, pursuant to [MCL 333.7411(1)], a guilty plea will automatically result in a conviction and sentencing upon failure by the defendant to successfully complete the program." *Id*. at ___ (quotation marks and citation omitted)**.** "To dismiss the charge despite defendant's failure to comply with the terms of her probation would contradict the clear intent of MCL 333.7411 and grant defendant a significant benefit that she did not actually earn." *Id*. at ___.

2. Successful Completion of the Probationary Period

A court must discharge the individual and dismiss the proceedings against him or her when the individual has fulfilled the terms and conditions of his or her probationary period. MCL 333.7411(1).

D. Terms of Dismissal

1. Discharge and Dismissal Without Entering an Adjudication of Guilt

Except as otherwise provided by law,[193] a discharge and dismissal under MCL 333.7411 is not a conviction for purposes of MCL 333.7411 or for purposes of disqualifications or disabilities imposed by law for criminal convictions. MCL 333.7411(1). Additionally, the discharge and dismissal is not a

[193] See MCL 600.1076(4)(e) (discussing drug treatment programs).

conviction for purposes of the penalties imposed for subsequent convictions under MCL 333.7413. MCL 333.7411.

An individual may obtain only one discharge and dismissal under § 7411. MCL 333.7411(1).

2. Record of Deferred Adjudication

All court proceedings under MCL 333.7411 must be open to the public. MCL 333.7411(2). Generally, "if the record of proceedings . . . is deferred under [MCL 333.7411], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 333.7411(2). However, unless a judgment of guilt is entered, the Department of State Police must retain a nonpublic record of the arrest, court proceedings, and disposition of the charge. MCL 333.7411(3). This nonpublic record is open, for limited purposes as set out in MCL 333.7411(3)(a)-(c), to courts, law enforcement personnel, prosecuting attorneys, the Department of Corrections, and the Department of Human Services. MCL 333.7411(3).

An offender whose adjudication of guilt was deferred under MCL 333.7411 and whose case is dismissed upon successful completion of the terms of probation does not qualify as "not guilty" for purposes of MCL 28.243(10), and is therefore not entitled to the destruction of his or her fingerprints and arrest card. *People v Benjamin*, 283 Mich App 526, 527, 537 (2009).[194]

6.15 Holmes Youthful Trainee Act[195]

The Holmes Youthful Trainee Act, MCL 762.11 *et seq*., provides a mechanism for certain individuals to be excused from having a criminal record. *People v Rahilly*, 247 Mich App 108, 113 (2001).[196] See also MCL 762.14(1) ("[U]pon final release of the individual from the status of youthful trainee, the court shall discharge the individual and dismiss the proceedings.") Specifically, beginning October 1, 2021,[197] MCL 762.11(2) states that in certain circumstances "if an individual pleads guilty to a criminal offense, committed on or after the individual's eighteenth birthday but before his or her twenty-sixth birthday, the court of record

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[194] *Benjamin* refers to MCL 28.243(8); however, effective June 12, 2018, 2018 PA 67 amended MCL 28.243 to renumber MCL 28.243 and the relevant language now appears in MCL 28.243(10).

[195] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about youthful trainee status.

[196] MCL 762.11 was amended by 2020 PA 396, effective March 24, 2021, to extend the age of HYTA eligibility, beginning on October 1, 2021, from 24 years of age to 26 years of age.

[197] Until October 1, 2021, the statute applies to individuals who are 17 to 24 years of age. MCL 762.11(1).

having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee." However, "[i]f the offense was committed on or after the individual's twenty-first birthday but before his or her twenty-sixth birthday, the individual shall not be assigned to youthful trainee status without the consent of the prosecuting attorney." *Id.* Further, the prosecutor is required to consult with the victim about the applicability of youthful trainee status under certain circumstances. *Id.*

Assignment of an individual to youthful trainee status under MCL 762.11 is discretionary. *People v Gow*, 203 Mich App 94, 96 (1993). MCL 762.11 is remedial "and should be construed liberally for the advancement of the remedy."*People v Bobek*, 217 Mich App 524, 529 (1996).

Certain individuals are ineligible for youthful trainee status; specifically, an individual is not eligible if the offense for which he or she seeks deferral is a felony punishable by life imprisonment or a major controlled substance offense. MCL 762.11(3)(a)-(b).[198]

6.16 Conditional Sentences[199]

When a defendant is convicted of an offense punishable by a fine, imprisonment, or both, the court has the discretion to impose a conditional sentence and order him or her to pay a fine (with or without the costs of prosecution), and restitution as indicated in MCL 769.1a or the Crime Victim's Rights Act (MCL 780.751 to MCL 780.834), within a limited time stated in the sentence. MCL 769.3(1). If the defendant defaults on payment, the court may impose a sentence otherwise authorized by law. MCL 769.3(1).

The court may also place the defendant on probation with the condition that he or she pay a fine, costs, damages, restitution, or any combination, in installments within a limited time. MCL 769.3(2).[200] If the defendant defaults on any of the payments, the court may impose a sentence otherwise authorized by law. MCL 769.3(2).

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[198] MCL 762.11(3) lists other offenses, not relevant to this benchbook, that, if convicted, make an individual ineligible for youthful trainee status. Also not relevant to this benchbook, MCL 762.11(4) lists circumstances under which an individual may not be assigned to youthful trainee status. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about HYTA.

[199] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about conditional sentences.

[200] Not applicable to individuals convicted of certain criminal sexual conduct crimes.

6.17 Suspended Sentences[201]

No single statute expressly confers on a sentencing court the general authority to impose and then suspend all or a portion of a defendant's sentence.[202] However, the power to suspend sentences "'has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution.'" *People v Cordell*, 309 Mich 585, 594-595 (1944), quoting *People v Stickle*, 156 Mich 557, 563 (1909) (internal quotation and citation omitted). The power of suspension is an inherent, but not unlimited, judicial function; it is subject to any applicable statutory provisions and circumscribed by the executive branch's exclusive power to commute sentences and grant pardons. *Cordell*, 309 Mich at 594-595; *Oakland Co Prosecutor v 52nd District Judge*, 172 Mich App 557, 560 (1988).

A court may not suspend a defendant's sentence once the defendant has begun serving it; a suspension in that case would be the practical equivalent of a commutation, and only the governor possesses the constitutional authority to commute a criminal sentence. *Oakland Co Prosecutor*, 172 Mich App at 559-560.

A sentence that is suspended indefinitely may infringe on the powers granted to the executive and legislative branches of government. See *People v Morgan*, 205 Mich App 432, 434 (1994). An indefinite suspension is not a valid sentence where a defendant's conviction was punishable by fine, prison, or probation, because the sentence is not within the sentencing alternatives defined by the Legislature in the governing statute. *Id.* at 433. Similarly, an indefinite suspension encroaches on the executive branch's exclusive power to pardon because an indefinite suspension has the practical effect of permitting a defendant to commit a crime and avoid punishment. *Id*. at 434.

6.18 Special Alternative Incarceration Units (SAIs)[203]

When a defendant is convicted of an offense punishable by incarceration in a state prison,[204] a sentencing court may order as a condition of the defendant's probation that he or she satisfactorily complete a program of incarceration in a special alternative incarceration (SAI) unit. MCL

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[201] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about suspended sentences.

[202] MCL 750.165(4) (felony non-support) specifically authorizes a court to suspend a defendant's sentence if the defendant posts a bond and any sureties required by the court.

[203] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about SAIs.

[204] Not applicable to individuals convicted of specific crimes listed in MCL 771.3b(17), not relevant to this benchbook.

771.3b(1). SAI units are established and operated by the Department of Corrections (DOC); among other programming included by the DOC, SAI units are required to demand of the participants "physically strenuous work and exercise, patterned after military basic training[.]" MCL 771.3b; MCL 798.13(1); MCL 798.14(1).

Several circumstances may make a defendant ineligible for placement in an SAI unit, some of which may apply to defendants convicted of a controlled substance offense. See MCL 791.234a(2). However, a detailed discussion of those general provisions is outside the scope of this benchbook. As it specifically relates to a defendant convicted of a controlled substance offense, a defendant convicted of violating MCL 333.7401 or MCL 333.7403 and who has a previous conviction for a violation of MCL 333.7401 or MCL 333.7403(2)(a), MCL 333.7403(2)(b), or MCL 333.7403(2)(e), is not eligible for placement in an SAI unit until he or she has served the equivalent of the mandatory minimum sentence required by statute for that violation. MCL 791.234a(3).

6.19 Fines, Costs, Assessments, and Restitution[205]

MCL 769.1k provides a general statutory basis for a court's authority to impose specified monetary penalties and civil remedies[206] when sentencing a defendant and to collect the amounts owed at any time.

A. Fines

Courts have general authority to impose "any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty." MCL 769.1k(1)(b)(*i*).[207] Specific authority to impose a fine, and the maximum amount of that fine, is often included in the language of the applicable penal statute.

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[205] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 8, for detailed information about fines, costs, and assessments. See the Michigan Judicial Institute's *Crime Victim Rights Benchbook*, Chapter 8, for detailed information about restitution.

[206] See *People v Konopka*, 309 Mich App 345, 373 (2015) (holding that "the [court] costs provision of MCL 769.1k(1)(b)(*iii*) is not so punitive[]" to "negate[] the Legislature's civil intent[]" and is therefore a civil remedy).

[207] Former MCL 769.1k(1)(b)(*i*) provided simply for the imposition of "[a]ny fine." However, in *People v Cunningham (Cunningham II)*, 496 Mich 145, 158 n 10 (2014) (reversing 301 Mich App 218 (2013)), the Michigan Supreme Court held that "interpreting MCL 769.1k(1)(b)(*i*) as providing courts with the independent authority to impose 'any fine' would . . . raise constitutional concerns, as 'the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature.'" (Citation omitted.) Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k(1)(b)(*i*) to require that any fine imposed be "authorized by the [applicable penal] statute[.]"

"Subject to MCL 769.5(3), if a statute provides that an offense is punishable by imprisonment and a fine, the court may impose imprisonment without the fine or the fine without imprisonment." MCL 769.5(1). "Subject to MCL 769.5(3), if a statute provides that an offense is punishable by fine or imprisonment, the court may impose both the fine and imprisonment in its discretion." MCL 769.5(2). MCL 769.5(3) creates a rebuttable presumption in favor of a nonjail or nonprobation sentence for individuals convicted of a misdemeanor (other than a serious misdemeanor).

"[U]nder MCL 769.5(4), a court imposing a sentence for an ordinary misdemeanor conviction remains free to depart from the presumption in MCL 769.5(4) 'if the court finds reasonable grounds for the departure and states on the record the grounds for the departure.'" *People of the City of Auburn Hills v Mason*, ___ Mich App ___, ___ (2024), quoting MCL 769.5(4). "When reviewing a sentence that constitutes a departure from the recommended minimum guidelines range, the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Mason*, ___ Mich App at ___ (cleaned up)."The pertinent question is not whether defendant's sentence departed from the rebuttable presumption that a non-jail or non-probation sentence is a proportionate sentence for an ordinary misdemeanor." *Id*. at ___. "Instead, the question is whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. at ___ (quotation marks and citation omitted). Here, "the [district] court did not adequately justify the imposed sentence," because it "did not consider the circumstances of the offense and did not explain how its departure sentence was more proportionate than a different sentence would have been." *Id*. at ___.

See Section 6.4(A) for a discussion of misdemeanor sentencing.

The court may require a defendant to pay by wage assignment any fine imposed under MCL 769.1k, and the court may provide that any fine imposed under MCL 769.1k be collected at any time. MCL 769.1k(4) and MCL 769.1k(5).

B. Costs

MCL 769.1k(1)(b)(*ii*) provides that, at the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose "[a]ny cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty." Effective October 17, 2014, 2014 PA 352 amended MCL 769.1k to add MCL 769.1k(1)(b)(*iii*), which provides for the imposition of "any cost

reasonably related to the actual costs incurred by the trial court[.]"[208] The amendments effectuated by 2014 PA 352 "appl[y] to all fines, costs, and assessments ordered or assessed under . . . MCL 769.1k[] *before June 18, 2014*, and *after [October 17, 2014]*." 2014 PA 352, enacting section 1 (emphasis supplied). 2014 PA 352 amended MCL 769.1k[209] in response to the Michigan Supreme Court's holding in *People v Cunningham (Cunningham II)*, 496 Mich 145 (2014), rev'g 301 Mich App 218 (2013) and overruling *People v Sanders (Robert) (After Remand)*, 298 Mich App 105 (2012), and *People v Sanders (Robert)*, 296 Mich App 710 (2012).[210] In *Cunningham II*, the Court held that MCL 769.1k(1)(b)— which, at the time, provided for the imposition of "[a]ny cost in addition to the minimum state cost"—did "not provide courts with the independent authority to impose 'any cost[;]'" rather, it "provide[d] courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham II*, 496 Mich at 147, 158 (concluding that "[t]he circuit court erred when it relied on [former] MCL 769.1k(1)(b)(*ii*) as independent authority to impose $1,000 in court costs").

"MCL 769.1k(1)(b)(*iii*)[211] independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense," and "[a] trial court possessed the authority, under MCL 769.1k, as amended by 2014 PA 352, to order defendant to pay court costs[.]" *People v Konopka*, 309 Mich App 345, 350, 358 (2015). "However, although the costs imposed . . . need not be separately calculated, . . . the trial court [must] . . . establish a factual basis[]" demonstrating that "the court costs imposed [are]

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[208] This provision expires on December 31, 2026. See MCL 769.1k(1)(b)(*iii*).

[209] The amended version of MCL 769.1k does not violate a defendant's due process or equal protection rights, nor does it violate the constitutional prohibition on ex post facto punishments or the principle of separation of powers. *People v Konopka*, 309 Mich App 345, 365, 367-70, 376 (2015).

[210] In *Sanders (Robert)*, 296 Mich App at 715, the Court of Appeals held that "a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case," but remanded for a hearing "to establish the factual basis for the [trial court's] use of [a] $1,000 [court costs] figure[.]" After remand, the Court of Appeals held that the trial court "establish[ed] a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(*ii*) [was] a reasonable amount in a felony case conducted in [that court,]" based on financial data demonstrating that "the average cost of handling a felony case was, conservatively, $2,237.55 a case and, potentially, . . . as much as $4,846 each." *Sanders (Robert) (After Remand)*, 298 Mich App at 107-108. Similarly, in *Cunningham (After Remand)*, 301 Mich App at 220, the Court of Appeals affirmed the trial court's imposition of $1,000 in "court costs" under the general authority of MCL 769.1k(1)(b)(*ii*), holding that "a sentencing court may consider overhead costs when determining the reasonableness of a court-costs figure."

However, in *Cunningham II,* 496 Mich at 147, the Michigan Supreme Court held that a sentencing court may not "rel[y] on MCL 769.1k(1)(b)(*ii*) as independent authority to impose . . . court costs[.]" Accordingly, the Court reversed *Cunningham (After Remand)*, 301 Mich App 218, and overruled *Sanders (Robert)*, 296 Mich App 710, and *Sanders (Robert) (After Remand)*, 298 Mich App 105 (as well as any "other decisions of the Court of Appeals [that] are consistent with *Sanders*, and inconsistent with [*Cunningham II*.]" *Cunningham II,* 496 Mich at 159 n 13.

'reasonably related to the actual costs incurred by the trial court[.]'" *Konopka*, 309 Mich App at 359, quoting MCL 769.1k(1)(b)(*iii*). The imposition of court costs under MCL 769.1k(1)(b)(*iii*) is a tax, rather than a governmental fee, and it must therefore comply with the Distinct-Statement Clause and the separation-of-powers doctrine. *People v Cameron*, 319 Mich App 215, 236 (2017). "[A]lthough it imposes a tax, MCL 769.1k(1)(b)(*iii*) is not unconstitutional[.]" *Cameron*, 319 Mich App at 218. In *People v Johnson*, 336 Mich App 688, 691 (2021), the defendant brought a facial challenge to MCL 769.1k(1)(b)(*iii*), arguing that it "deprives criminal defendants of their due-process right to an impartial decision-maker and violates separation-of-powers principles." The Court held that MCL 769.1k(1)(b)(*iii*) is not facially unconstitutional. *Johnson*, 336 Mich App at 691 (leaving "open the question whether a successful as-applied challenge could be made").[212]

MCL 769.34(6) addresses the sentencing guidelines and the duties of the court when sentencing, and it generally authorizes the court to order court costs ("As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments."). However, "as with MCL 769.1k, MCL 769.34(6) allows courts to impose only those costs or fines that the Legislature has separately authorized by statute" and "does not provide courts with the independent authority to impose any fine or cost." *Cunningham II*, 496 Mich at 158 n 11.

Article 7 of the PHC specifically authorizes the imposition of certain costs. See, e.g., MCL 333.7401c(6) (response activity costs) and MCL 333.7403a(6) (costs of screening, assessment, and rehabilitative services). For a more complete listing of statutes specifically authorizing the imposition of costs, see the Michigan Judicial Institute's tables on imposition of costs.

Further, a defendant may be ordered to pay any additional costs incurred to compel his or her attendance. MCL 769.1k(2). Costs under MCL 769.1k(2) can include the cost of a GPS tether device since "it is a device that can be used to compel a defendant's appearance," but in order to require a defendant "to bear the cost of a GPS tether," there must "be evidence demonstrating that the GPS tether was imposed for the purpose of securing a defendant's appearance." *People v Godfrey*, ___ Mich App ___, ___ (2023). In addition, MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL

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[211] This costs provision is a civil remedy. See *People v Konopka*, 309 Mich App 345, 373 (2015).

[212] For a detailed discussion of the categorization of MCL 769.1k(1)(b)(*iii*) as a tax, the application of the Distinct-Statement Clause and separation-of-powers, and the facial challenge to MCL 769.1k(1)(b)(*iii*), see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 8.

769.1k(1). A court may provide for the collection of costs imposed under MCL 769.1k at any time. MCL 769.1k(5).

"A defendant must not be imprisoned, jailed, or incarcerated for the nonpayment of costs ordered under [MCL 769.1k] unless the court determines that the defendant has the resources to pay the ordered costs and has not made a good-faith effort to do so." MCL 769.1k(10).

C. Minimum State Costs

MCL 769.1k(1)(a) expressly requires a court to "impose the minimum state costs as set forth in [MCL 769.1j]." MCL 769.1j conditions the imposition of minimum state costs on whether a defendant is ordered to pay other fines, costs, or assessments. If a defendant is ordered to pay any combination of a fine, costs, or applicable assessments, the court must order the defendant to pay a minimum state cost of $68.00 for each felony conviction, or $50 for each misdemeanor conviction or ordinance violation. MCL 769.1j(1). The costs imposed under MCL 769.1j(1)(a) constitute a tax, and this tax does not violate the separation of powers requirement under Const 1963, art 3, § 2 or the requirement of Const 1963, art 4, § 32 that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." *People v Shenoskey*, 320 Mich App 80, 84 (2017) (applying the analysis of MCL 769.1k(1)(b)(*iii*) in *People v Cameron*, 319 Mich App 215 (2017) to MCL 769.1j(1)(a) because the statutes are "closely related").

Further, MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment the minimum state costs authorized in MCL 769.1k(1). A court may provide for the collection of minimum state costs imposed under MCL 769.1k at any time. See MCL 769.1k(5).

D. Crime Victim Assessment

Whenever an individual is charged with a crime or ordinance violation and the charge "is resolved by conviction, by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal," the court must order the individual to pay a crime victim assessment ($130 for felony offenses; $75 for misdemeanor offenses/ordinance violations), as a condition of probation or parole. MCL 780.905(1)-(2). In contrast to the minimum state cost, which must be ordered for each conviction arising from a single case, only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

MCL 769.1k provides a court with general authority to impose "[a]ny assessment authorized by law" on a defendant at the time a defendant is sentenced, at the time a defendant's sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(b)(*v*). MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment an assessment imposed pursuant to MCL 769.1k(1)(b)(*v*). A court may provide for the collection of any assessment imposed under MCL 769.1k(1) at any time. MCL 769.1k(5).

E. Restitution[213]

Restitution is mandatory for an offender convicted of a felony, misdemeanor, or ordinance violation. MCL 769.1a(2); MCL 780.766(2); MCL 780.794(2); MCL 780.826(2). Restitution is also mandatory "[f]or an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal[.]" MCL 780.766(2); MCL 780.826(2). See also MCL 780.794(2), which also requires the court to order restitution "[f]or an offense that is resolved informally by means of a consent calendar diversion or by another informal method that does not result in a dispositional hearing[.]"

At sentencing, the court is required to "order the dollar amount of restitution that the defendant must pay to make full restitution[.]" MCR 6.425(D)(1)(f); MCR 6.610(G)(1)(e). Disputes over the proper amount or type of restitution must be resolved by the court using a preponderance of the evidence standard; the prosecution bears the burden of proving the amount of the loss. MCR 6.425(D)(2)(b); MCR 6.610(G)(1)(e).

Restitution orders may be amended following the procedure outlined in MCR 6.430.

6.20 Probation[214]

MCL 771.1(1) details the offenses for which a defendant may be sentenced to probation:

> "In all prosecutions for felonies or misdemeanors, or ordinance violations other than murder, treason, criminal

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

[214]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for detailed information about probation.

> sexual conduct in the first or third degree, armed robbery, or major controlled substance offenses, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer."

When a court sentences a defendant to probation, the court must, in a court order entered in the case and made part of the record, set the length of the probationary period, determine the terms on which the probation is conditioned, and the rehabilitation goals. MCL 771.2(11). Mandatory conditions of probation are listed in MCL 771.3(1)(a)-(h). See MCL 771.2(12). Discretionary conditions of probation are found in MCL 771.3(2)(a)-(q) and MCL 771.3(3). Probation conditions "must be individually tailored to the probationer, must specifically address the assessed risks and needs of the probationer, must be designed to reduce recidivism, and must be adjusted if the court determines adjustments are appropriate." MCL 771.3(11). A sentencing court has discretion to alter the form or substance of an order of probation at any time during the probationary term. MCL 771.2(11). "[A] defendant may decline a sentence of probation and instead seek a sentence of incarceration." *People v Bensch*, 328 Mich App 1, 13 (2019). See also MCL 771.4(1) ("the granting of probation is a matter of grace requiring the agreement of the probationer to its granting and continuance").

A. Length of Probation

Except as provided in MCL 771.2a and MCL 768.36, which address probation periods for stalking and child abuse offenses, the term of probation imposed on a defendant convicted of a felony offense must not exceed three years. MCL 771.2(1). A felony probation term may be extended up to two times for not more than one additional year each time "if the court finds that there is a specific rehabilitation goal that has not yet been achieved, or a specific articulable, and ongoing risk of harm to a victim that can be mitigated only with continued probation supervision." *Id.* "Felony" includes two-year misdemeanors. MCL 761.1(f); *People v Smith (Timothy)*, 423 Mich 427, 434 (1985). The term of probation imposed on a defendant convicted of an offense that is not a felony must not exceed two years. MCL 771.2(1).

"Except as provided in [MCL 771.2(10),[215] MCL 771.2a, and MCL 768.36], after the defendant has completed 1/2 of the original felony or misdemeanor probation period, he or she may be eligible for early discharge as provided in this section. The defendant must be

notified at sentencing of his or her eligibility and the requirements for early discharge from probation, and the procedure provided under [MCL 771.2(3)] to notify the court of his or her eligibility." MCL 771.2(2). A probationer's inability to pay required fines, fees, or costs does not render the probationer ineligible for early discharge if he or she has made a good-faith effort to make payments. MCL 771.2(4). However, the probationer is still obligated to make court-ordered payments after discharge from probation. *Id.*

MCL 771.2(3) and MCL 771.2(5) through MCL 771.2(8) set out the procedures for notification of eligibility for early discharge and the court's review and determination of whether to grant early discharge. For a detailed discussion of early discharge from probation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol 2*, Chapter 9.

If the court reduces a defendant's probationary term under MCL 771.2, the reduction must be reported to the Department of Corrections. MCL 771.2(11).

B. Lifetime Probation

The "lifetime probation" provision in former MCL 771.1(4) was eliminated effective March 1, 2003.[216] Prior to the amendment, a trial court could sentence a defendant to lifetime probation for violating or conspiring to violate MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*).

Offenders placed on lifetime probation before March 1, 2003, for offenses committed before March 1, 2003, are subject to the conditions of probation set out in MCL 771.3. MCL 771.2(12). MCL 771.2(12) continues to prohibit any reduction in the probation period imposed under MCL 771.1(4) as it existed before March 1, 2003 "other than by a revocation that results in imprisonment or as otherwise provided by law."

MCL 333.7401 extends a provision relating to the discharge of lifetime probation to a person sentenced to lifetime probation under MCL 333.7401(2)(a)(*iv*) before March 1, 2003. MCL 333.7401(4) states:

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[215] MCL 771.2(10) provides that a defendant convicted of one or more of the following crimes is not eligible for reduced probation under MCL 771.2: a domestic violence related violation of MCL 750.81, MCL 750.81a, an offense involving domestic violence as that term is defined in MCL 400.1501, a violation of MCL 750.84, MCL 750.411h, MCL 750.411i, MCL 750.520c, or MCL 750.520e, a listed offense, an offense for which a defense was asserted under MCL 768.36 (insanity and related defenses), or a violation MCL 750.462a to MCL 750.462h or former section MCL 750.462i or MCL 750.462j.

[216] 2002 PA 666.

> "If an individual was sentenced to lifetime probation under [MCL 333.7401](2)(a)(*iv*) as it existed before March 1, 2003 and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual's probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection."

C. Revoking Probation

"All probation orders are revocable subject to the requirements of [MCL 771.4b], but revocation of probation, and subsequent incarceration, should be imposed only for repeated technical violations, for new criminal behavior, as otherwise allowed in [MCL 771.4b], or upon request of the probationer." MCL 771.4(2).[217] MCL 771.4b addresses incarceration for technical probation violations. Generally, "the court shall not revoke probation on the basis of a technical probation violation unless a probationer has already been sanctioned for 3 or more technical probation violations and commits a new technical probation violation." MCL 771.4b(4).[218]

Where "defendant's probation order [did] not name an 'individual,'" but rather described a class of persons, a "violation of [the no-contact order included in] his probation conditions was a technical one, [and] MCL 771.4b(1)(b)(*i*) limited the sentence for defendant's first and single technical violation of having contact with persons under 17 years old to 15 days in jail." *People v Smith*, ___ Mich App ___, ___ (2024). In *Smith*, "[a]fter defendant pleaded guilty to violating his probation order requiring him to not have physical contact with anyone under the age of 17, the trial court found that defendant committed a 'nontechnical' probation violation and sentenced him to serve 35 to 60 months in prison," effectively revoking his probation. *Smith*, ___ Mich App at ___. The *Smith* Court held that "MCL 771.4b(9)(b)(*i*) unambiguously

[217] The Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, establishes a voluntary, grant-funded "state swift and sure sanctions program" for the supervision of participating offenders who have been placed on probation for committing certain felonies. MCL 771A.3; see also MCL 771A.2(b). See Section 10.25 for further discussion of the swift and sure sanctions probation program.

[218] There is an exception for certain domestic violence and stalking related convictions. MCL 771.4b(4); MCL 771.4b(6).

provides that a violation of a no-contact provision in a probation order is nontechnical only when the no-contact order pertains to a named individual, [and] it was error for the trial court to conclude that the Legislature intended defendant's violation of the probation order prohibiting contact with a broad class of persons to be 'nontechnical.'" *Smith*, ___ Mich App at ___.

A trial court only has jurisdiction to revoke a defendant's probation and sentence him or her to imprisonment during the probationary period; if the probationary period expires, the trial court loses jurisdiction to revoke probation and impose a prison sentence. *People v Glass*, 288 Mich App 399, 408-409 (2010).

For a detailed discussion of probation violations and the procedures involved in probation revocation, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2. See also the Michigan Judicial Institute's checklist describing probation violation sentencing and the Michigan Judicial Institute's flowchart describing the procedures that apply to probation violations, including sentencing.

D. Termination of the Probation Period

The probation officer must report to the court when a probationer's term of probation has ended. MCL 771.5(1).[219] The officer must also inform the court of the probationer's conduct during the probation period. *Id*. After receiving the report, the court may discharge the probationer and enter judgment of a suspended sentence, or the court may extend the probationer's supervision period up to the maximum period of probation permitted. *Id*.

MCL 771.5 "does not apply to a juvenile placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4)] . . . to an institution or agency described in the youth rehabilitations services act, . . . MCL 803.301 to [MCL] 803.309." MCL 771.5(2).

E. Medical Probation and Compassionate Release

Medical Probation. "Subject to [MCL 771.3g(4)[220]], a court may enter an order of probation placing a prisoner on medical probation under the charge and supervision of a probation officer if the court finds that the prisoner requires acute long-term medical treatment or services, or that the prisoner is physically or mentally

[219] The statute does not specify the time in which this report must be made.

[220] MCL 771.3g(4) lists preconditions that must be satisfied before a prisoner can be placed on medical probation.

incapacitated with a medical condition that renders the prisoner unable to perform activities of basic daily living and the prisoner requires 24-hour care." MCL 771.3g(3).

Compassionate Release. "Subject to [MCL 771.3h(3)[221]], a court may grant compassionate release to a prisoner if the court finds that the prisoner has a life expectancy of not more than 6 months and that the release of the prisoner would not reasonably pose a threat to public safety or the prisoner. If a court grants a prisoner compassionate release, the court shall enter an amended judgment of sentence specifying that the prisoner is released from the term of imprisonment imposed for the offense for which the prisoner was originally convicted." MCL 771.3h(2).

For a detailed discussion of medical probation and compassionate release, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

6.21 Parole Provisions Specifically Related to Controlled Substance Offenses

In addition to the specific requirements discussed in this section, "the parole board may grant a medical parole for a prisoner determined to be medically frail." MCL 791.235(10). "The requirements of [MCL 791.233(1)(b), MCL 791.233(1)(c), MCL 791.233(1)(d), and MCL 791.233(1)(f), MCL 791.233b, and MCL 791.234(1), MCL 791.234(2), MCL 791.234(3), MCL 791.234(4), MCL 791.234(7), MCL 791.234(13), MCL 791.234(14), MCL 791.234(15), MCL 791.234(16), and MCL 791.234(17)] do not apply to a parole granted under this subsection." MCL 791.235(10).

A. Prisoners Sentenced to Life Imprisonment for Violating §7401(2)(a)(*i*)

Generally, "[a] prisoner sentenced to imprisonment for life, other than a prisoner described in [MCL 791.234(6)]," is eligible for parole once the prisoner has served ten calendar years of his or her sentence if the offense was committed before October 1, 1992 or 15 calendar years if the offense was committed on or after October 1, 1992. MCL 791.234(7)(a).[222] However, prisoners sentenced for violating, attempting to violate, or conspiring to violate MCL 333.7401(2)(a)(*i*)[223] are subject to additional prerequisites to parole eligibility.

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[221] MCL 771.3h(3) lists preconditions that must be satisfied before a prisoner can be placed on compassionate release.

[222] The prisoner may also be paroled if determined to be medically frail. See MCL 791.235(10). See Section 6.21.

Specifically, a prisoner convicted of violating, attempting, or conspiring to violate MCL 333.7401(2)(a)(*i*) and sentenced to life imprisonment with possibility of parole may be placed on parole pursuant to the conditions in MCL 791.234(8)[224] under the following circumstances:

- If the prisoner has another conviction for a serious crime, parole is possible after he or she has served 20 calendar years of the life sentence. MCL 791.234(7)(b).

- If the prisoner does *not* have another conviction for a serious crime, parole is possible after he or she has served 17 1/2 calendar years of the life sentence. MCL 791.234(7)(c).

If a sentencing judge or his or her successor determines on the record[225] that a prisoner sentenced to life for violating, attempting, or conspiring to violate MCL 333.7401(2)(a)(*i*) "has cooperated with law enforcement," the prisoner is subject to the parole board's jurisdiction and may be eligible for parole 2-1/2 years earlier than otherwise indicated. MCL 791.234(12). "The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide." *Id.* "The court shall not make a determination that the prisoner failed or refused to cooperate with law enforcement on grounds that the defendant exercised his or her constitutional right to trial by jury." *Id.*

B. Prisoners Sentenced to Life Imprisonment for Violating §7401(2)(a)(*i*) Before October 1, 1998

Parole eligibility for offenders sentenced to life imprisonment before October 1, 1998, for violating, or attempting or conspiring to violate MCL 333.7401(2)(a)(*i*)[226] is subject to additional considerations. Under these circumstances, the parole board must consider:

- "Whether the violation was part of a continuing series of violations . . . of MCL 333.7401 [or MCL] 333.7403, by that individual." MCL 791.234(10)(a).

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[223]Manufacture or delivery of certain schedule 1 or 2 substances. See Section 2.7.

[224]MCL 791.234(8) sets forth several conditions for parole that apply to all prisoners granted parole under MCL 791.234(7). A full discussion of these conditions is outside the scope of this benchbook.

[225] "If the court determines at sentencing that the defendant cooperated with law enforcement, the court shall include its determination in the judgment of sentence." MCL 791.234(12).

[226]See Section 2.7 for more information.

- "Whether the violation was committed by the individual in concert with 5 or more other individuals." MCL 791.234(10)(b).

- "Whether the individual was a principal administrator, organizer, or leader of an entity that [he or she] knew or had reason to know was organized, in whole or in part, to commit violations of . . . MCL 333.7401 [or MCL] 333.7403," and whether the violation committed by the individual was for the purpose of furthering the interests of that entity. MCL 791.234(10)(c)(*i*).

- "Whether the individual was a principal administrator, organizer, or leader of an entity that [he or she] knew or had reason to know committed violations of . . . MCL 333.7401 [or MCL] 333.7403," and whether the violation committed by the individual was for the purpose of furthering the interests of that entity. MCL 791.234(10)(c)(*ii*).

- "Whether the violation was committed in a drug-free school zone." MCL 791.234(10)(c)(*iii*).

- Whether the violation involved the delivery of a controlled substance, or possession with the intent to deliver a controlled substance, to an individual under the age of 17. MCL 791.234(10)(c)(*iv*).

C. Prisoners Sentenced to Term of Years or According to Then-Existing Statute for Certain Violations of § 7401(2)(a) or § 7403(2)(a) Committed Before March 1, 2003

Violations of § 7401(2)(a)(*i*) or § 7403(2)(a)(*i*). "Notwithstanding [MCL 791.234(1) and MCL 791.234(2)], a prisoner convicted of violating, or attempting or conspiring to violate, [MCL 333.7401(2)(a)(*i*) or MCL 333.7403(2)(a)(*i*)], whose offense occurred before March 1, 2003, and who was sentenced to a term of years, is eligible for parole after serving 20 years of the sentence imposed for the violation if the individual has another serious crime or 17-1/2 years of the sentence if the individual does not have another conviction for a serious crime, or after serving the minimum sentence imposed for that violation, whichever is less." MCL 791.234(13).[227]

[227] These requirements do not apply to a prisoner granted parole on the basis of being medically frail. MCL 791.234(13); MCL 791.235(10). See Section 6.21.

Violations of § 7401(2)(a)(*ii*) or § 7403(2)(a)(*ii*).[228] "Notwithstanding [MCL 791.234(1) and MCL 791.234(2)], a prisoner who was convicted of violating, or attempting or conspiring to violate, [MCL 333.7401(2)(a)(*ii*) or MCL 333.7403(2)(a)(*ii*)], whose offense occurred before March 1, 2003, and who was sentenced according to those sections as they existed before March 1, 2003, is eligible for parole after serving the minimum of each sentence imposed for that violation or 10 years of each sentence imposed for that violation, whichever is less." MCL 791.234(14).[229]

Violations of § 7401(2)(a)(*iii*) or § 7403(2)(a)(*iii*).[230] "Notwithstanding [MCL 791.234(1) and MCL 791.234(2)], a prisoner who was convicted of violating, or attempting or conspiring to violate, [MCL 333.7401(2)(a)(*iii*) or MCL 333.7403(2)(a)(*iii*)], whose offense occurred before March 1, 2003, and who was sentenced according to those sections as they existed before March 1, 2003, is eligible for parole after serving the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less." MCL 791.234(15).[231]

Violations of § 7401(2)(a)(*iv*) or § 7403(2)(a)(*iv*). "Notwithstanding [MCL 791.234(1) and MCL 791.234(2)], a prisoner who was convicted of violating, or attempting or conspiring to violate, [MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*)], whose offense occurred before March 1, 2003, who was sentenced according to those sections of law as they existed before March 1, 2003 to consecutive terms of imprisonment for 2 or more violations of [MCL 333.7401(2)(a) or MCL 333.7403(2)(a)], is eligible for parole after serving 1/2 of the minimum sentence imposed for each violation of [MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*)]. This subsection applies only to sentences imposed for violations of [MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*)] and does not apply if the sentence was imposed for a conviction for a new offense committed while the individual was on probation or parole." MCL 791.234(16).[232]

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[228] See Section 6.21(D) for a discussion of parole eligibility of prisoners convicted of violating or attempting or conspiring to violate MCL 333.7401(2)(a)(*ii*) or MCL 333.7403(2)(a)(*ii*) who had a prior conviction for violation of either of those sections and was sentenced to life without parole.

[229] These requirements do not apply to a prisoner granted parole on the basis of being medically frail. MCL 791.234(14); MCL 791.235(10). See Section 6.21.

[230] See Section 6.21(D) for a discussion of parole eligibility of prisoners convicted of violating or attempting or conspiring to violate MCL 333.7401(2)(a)(*iii*) or MCL 333.7403(2)(a)(*iii*) who had a prior conviction for violation of either of those sections and was sentenced to life without parole.

[231] These requirements do not apply to a prisoner granted parole on the basis of being medically frail. MCL 791.234(15); MCL 791.235(10). See Section 6.21.

[232] These requirements do not apply to a prisoner granted parole on the basis of being medically frail. MCL 791.234(16); MCL 791.235(10). See Section 6.21.

D. Prisoners Sentenced to Life Without Parole Under § 7413(1) as it Existed Before March 28, 2018, for Prior Convictions of § 7401(2)(a)(*ii*) or (*iii*) or § 7403(2)(a)(*ii*) or (*iii*)

"Notwithstanding [MCL 791.234(1) and MCL 791.234(2)], a prisoner who was convicted of violating, or attempting or conspiring to violate, [MCL 333.7401(2)(a)(*ii*) or MCL 333.7401(2)(a)(*iii*) or MCL 333.7403(2)(a)(*ii*) or MCL 333.7403(2)(a)(*iii*)], who had a prior conviction for a violation of [MCL 333.7401(2)(a)(*ii*) or MCL 333.7401(2)(a)(*iii*) or MCL 333.7403(2)(a)(*ii*) or MCL 333.7403(2)(a)(*iii*)], and who was sentenced to life without parole under [MCL 333.7413(1)], according to [MCL 333.7413] as it existed before [March 28, 2018] is eligible for parole after serving 5 years of each sentence imposed for that violation." MCL 791.234(17).[233]

E. Violations of § 7401(2)(a)-(b) or § 7402(2)(a)-(b)

A prisoner not subject to disciplinary time who is convicted and sentenced for a violation of MCL 333.7401(2)(a), MCL 333.7401(2)(b), MCL 333.7402(2)(a), or MCL 333.7402(2)(b) is not eligible for parole "until the person has served the minimum term imposed by the court[.]"[234] MCL 791.233b(cc). See also MCL 791.233(1)(c).[235]

F. Revocation of Parole

A parole order issued for a prisoner convicted of violating or conspiring to violate MCL 333.7401(2)(a)(*i*), MCL 333.7401(2)(a)(*ii*), MCL 333.7403(2)(a)(*i*), or MCL 333.7403(2)(a)(*ii*) "must contain a notice that if the parolee violates or conspires to violate [Article 7 of the PHC], and that violation or conspiracy to violate is punishable by imprisonment for 4 or more years, or [if the parolee] commits a violent felony during his or her release on parole, parole must be revoked." MCL 791.236(10).

G. Offenders Ineligible for Parole

An offender sentenced to mandatory life imprisonment for violating MCL 333.17764(7), MCL 750.16(5), or MCL 750.18(7)[236] is not eligible for parole, but is subject to the provisions of MCL 791.244 or

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[233]These requirements do not apply to a prisoner granted parole on the basis of being medically frail. MCL 791.234(17); MCL 791.235(10). See Section 6.21.

[234]Less an allowance for disciplinary credits as provided in MCL 800.33(5).

[235]These requirements do not apply to a prisoner granted parole on the basis of being medically frail. MCL 791.233b; MCL 791.235(10). See Section 6.21.

MCL 791.244a. MCL 791.234(6)(b); MCL 791.234(6)(d).[237] According to MCL 791.244(1), one member of the parole board must interview a prisoner sentenced to life imprisonment without the possibility of parole "at the conclusion of 10 calendar years and thereafter as determined appropriate by the parole board[.]" The periodic interviews continue until a prisoner dies or is granted a reprieve, commutation, or pardon. *Id*. MCL 791.244a addresses requests from the governor to expedite the review and hearing process for a reprieve, commutation, or pardon based in part on a prisoner's medical condition.

6.22 Comparison of Factors Involved in Delayed Sentences, Deferred Adjudications, and Assignments to Drug Court

A table comparing the actions taken for cases involving deferred judgments, delayed sentences, and traditional sentences may be found at: https://www.courts.michigan.gov/siteassets/court-administration/resources/deferred_vs_delayed_sentence.pdf.

6.23 Discretionary Sentencing Orders Applicable to Violations of Part 74 of Article 7 of the Public Health Code

Unless the individual is **not** eligible for probation under Chapter XI of the Code of Criminal Procedure, MCL 771.1 to MCL 771.14a,[238] "before imposing sentence or entering a juvenile disposition for an attempt to violate, a conspiracy to violate, or a violation of [Part 74 of Article 7 of the PHC] or of a local ordinance that prohibits conduct prohibited under this part, the court may order the individual to undergo screening and

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[236]These offenses are discussed in Sections 5.10, 5.8, and 5.6, respectively.

[237] Except as provided in MCL 769.25 and MCL 769.25a, concerning defendants less than 18 years of age at the time of the offense. MCL 750.16(5); MCL 750.18(7). MCL 769.25 and MCL 769.25a address criminal defendants who were less than 18 years of age at the time the offense was committed and provide specific procedures and limitations on the ability to sentence a juvenile to life imprisonment without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that "*all* protections afforded by MCL 769.25 fully apply to 18-year-old defendants." *People v Parks*, 510 Mich 225, 267 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, §16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). See Section 6.6(B).

[238]MCL 333.7408a(3) provides that MCL 333.7408a(1)-(2) do not apply to an individual who is not eligible for probation under Chapter XI of the Code of Criminal Procedure.

assessment by a person or agency as designated by a department-designated community mental health entity or a community mental health services program under the mental health code, . . . MCL 330.1001 to [MCL] 330.2106, to determine whether the individual is likely to benefit from rehabilitative services, including alcohol or drug education and alcohol or drug treatment programs. The individual shall pay for the costs of the screening and assessment services." MCL 333.7408a(1).

Unless the individual is not eligible for probation under Chapter XI of the Code of Criminal Procedure, MCL 771.1 to MCL 771.14a,[239] "as part of the sentence or juvenile disposition for an attempt to violate, a conspiracy to violate, or a violation of this part or of a local ordinance that prohibits conduct prohibited under this part, the court may order the individual to do 1 or both of the following:

> (a) Perform service to the community for not more than 90 days. An individual ordered to perform service to the community under this subdivision shall not receive compensation, and shall reimburse the state or appropriate local unit of government for the cost of supervision incurred by the state or local unit of government as a result of the individual's activities in that service.
>
> (b) Participate in and successfully complete 1 or more appropriate rehabilitative programs. The individual shall pay for the costs of the rehabilitative services." MCL 333.7408a(2).

[239] MCL 333.7408a(3) provides that MCL 333.7408a(1)-(2) do not apply to an individual who is not eligible for probation under Chapter XI of the Code of Criminal Procedure.

Chapter 7: Defenses

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7.1 Scope Note

This chapter discusses defenses that are particularly relevant to prosecutions involving controlled substance offenses. Specifically, this chapter addresses authorization as a defense to charges brought under Article 7 of the Public Health Code (PHC), MCL 333.7101 *et seq.*,[240] double jeopardy, entrapment, and intoxication as a defense. The "Good Samaritan law" regarding medical assistance that is applicable to MCL 333.7403 (possession) offenses is discussed in Section 2.3. The immunity and affirmative defenses under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. and the Medical Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101 *et seq.* are discussed in Chapter 8.

7.2 Statutory References to Authorization

Proper authorization is a defense[241] to any charge levied under Article 7 of the PHC, as long as the individual's conduct falls within the scope of the claimed authorization. For example, an individual may be authorized to engage in conduct that is generally prohibited if he or she holds particular licensure or obtained a valid prescription.

A. Statutory Language Recognizing an Authorization Exception for Specified Conduct

Several statutory sections barring conduct related to controlled substances specifically recognize authorization as an exception:

- "*Except as authorized by this article*, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under [Article 7 of the PHC] shall not dispense, prescribe, or administer a controlled substance for *other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice* of the practitioner, licensee, or applicant." MCL 333.7401(1) (emphasis added).

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[240] MCL 333.7101 *et seq*. refers to the beginning of Article 7. The beginning of the entire Public Health Code can be found at MCL 333.1101 *et seq.*

[241] See generally *People v Pegenau*, 447 Mich 278, 289 (1994) (stating that "presence of a prescription is analogous to an affirmative defense"). See also M Crim JI 12.4a (citing *People v Robar*, 321 Mich App 106 (2017) and noting that the instruction "must be used if the defense presents competent evidence that the defendant had a valid prescription for, or was otherwise authorized to manufacture, possess or use, the controlled substance").

- "*Except as authorized by this article*, a person shall not create, manufacture, deliver, or possess with intent to deliver a counterfeit substance or a controlled substance analogue intended for human consumption. *This section does not apply to a person who manufactures or distributes a substance in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of . . . 21 USC 355*. For purposes of this section, [21 USC 355] of the federal food, drug, and cosmetic act shall be applicable to the introduction or delivery for introduction of any new drug into intrastate, interstate, or foreign commerce." MCL 333.7402(1) (emphasis added).

- "A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form *unless* the controlled substance, controlled substance analogue, or prescription form was *obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by [Article 7 of the PHC]*." MCL 333.7403(1) (emphasis added).

- "A person shall not use a controlled substance or controlled substance analogue *unless* the substance was *obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by [Article 7 of the PHC]."* MCL 333.7404(1) (emphasis added).

B. Statutory Provisions Specific to Licensees and Practitioners

Article 7 of the PHC also requires practitioners to follow specific procedures and/or rules in order to use authorization as a defense. For example:

- A person licensed by the administrator under Article 7 of the PHC "shall not distribute, prescribe, or dispense a controlled substance in violation of [MCL 333.7333[242]]." MCL 333.7405(1)(a).

- A person who is a licensee "shall not manufacture a controlled substance not authorized by his or her license or distribute, prescribe, or dispense a controlled substance not authorized by his or her license to another licensee or other

[242] MCL 333.7333 governs the circumstances under which a practitioner may prescribe and dispense controlled substances.

authorized person, except as authorized by rules promulgated by the administrator." MCL 333.7405(1)(b).

- A person who is a practitioner "shall not dispense a controlled substance under a prescription written and signed; written or created in an electronic format, signed, and transmitted by facsimile; or transmitted electronically or by other means of communication by a physician prescriber or dentist prescriber licensed to practice in a state other than Michigan, unless the prescription is issued by a physician prescriber or dentist prescriber who is authorized under the laws of that state to practice dentistry, medicine, or osteopathic medicine and surgery and to prescribe controlled substances." MCL 333.7405(1)(e).

- A person "shall not knowingly or intentionally . . . [d]istribute as a licensee a controlled substance classified in schedule 1 or 2, except pursuant to an order form as required by [MCL 333.7331[243]]." MCL 333.7407(1)(a).

7.3 Establishing Authorization as a Defense

The defendant bears the burden of proving his or her authorization. *People v Pegenau*, 447 Mich 278, 289 (1994). MCL 333.7531 provides:

> "(1) It is not necessary for this state to negate any exemption or exception in [Article 7 of the PHC] in a complaint, information, indictment, or other pleading or in a trial, hearing, or other proceeding under [Article 7 of the PHC]. The burden of proof of an exemption or exception is upon the person claiming it.
>
> (2) In the absence of proof that a person is the authorized holder of an appropriate license or order form issued under [Article 7 of the PHC], the person is presumed not to be the holder of the license or order form. The burden of proof is upon the person to rebut the presumption."

To satisfy the burden of proof, the defendant must present some competent evidence beyond a mere assertion of his or her authorization. *Pegenau*, 447 at 294-296 (holding that the defendant's self-serving assertion that he possessed a controlled substance pursuant to a valid

[243] MCL 333.7331(1) provides that "[o]nly a practitioner who holds a license under [Article 7 of the PHC] to prescribe or dispense controlled substances may purchase from a licensed manufacturer or distributor a schedule 1 or 2 controlled substance. The authority granted under this subsection to purchase a schedule 1 or 2 controlled substance is not assignable or transferable." Purchases must be made pursuant to an order form that is in compliance with federal law. MCL 333.7331(2).

prescription did not satisfy his burden of production). The "defendant bears both the burden of production and the burden of persuasion" to establish any claim of authorization, "and must do so by a preponderance of the evidence." *People v Robar*, 321 Mich App 106, 142 (2017). See also *People v Baham*, 321 Mich App 228, 244-245 (2017) (holding that "if defendant believed he was entitled to a personal-use defense, the burden was on defendant to raise the issue as an affirmative defense and to present some competent evidence of preparation or compounding for personal use").

"[P]ursuant to MCL 333.7531(1), when offering proof of the elements of the offense, the prosecution has no obligation to negate any exemption or exception in Article 7 of the Public Health Code[.]" *Baham*, 321 Mich App at 244 (noting that the personal use exception in MCL 333.7106(3) is one such exception and that it operates as an affirmative defense).[244]

Placing the burden of proof on a defendant who claims he or she was authorized to engage in the conduct at issue does not violate the defendant's constitutional right to due process because lack of authorization is not an element of the crime. *Pegenau*, 447 Mich at 292-293.

M Crim JI 12.4a "must be used if the defense presents competent evidence that the defendant had a valid prescription for, or was otherwise authorized to manufacture, possess or use, the controlled substance." M Crim JI 12.4a, Use Note, citing *Robar*, 321 Mich App 106.

7.4 Conduct Outside the Scope of Authorization

A practitioner is subject to criminal liability where he or she prescribes, dispenses, or administers a controlled substance outside the scope of his or her practice or if he or she prescribes, dispenses or administers a controlled substance for a purpose other than a legitimate and professionally recognized therapeutic or scientific purpose. See, e.g., MCL 333.7401(1) (prohibiting manufacture, creation, delivery, and possession "except as authorized by [Article 7 of the PHC]" and noting that appropriately licensed practitioners "shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant[]") See also *People v Alford*, 405 Mich 570, 589 (1979) ("A physician dispensing controlled substances not in the course of professional practice or research can be prosecuted for unlawful delivery of a controlled substance.")[245]

[244]For a detailed discussion of the personal use exemption, see Section 2.2(B).

A. Good Faith Errors

"The standard required in determining whether [a] physician's actions were in the course of professional practice or research is whether the doctor made an 'honest' or 'good faith' effort to treat and prescribe in compliance with an accepted standard of medical practice." *People v Downes (George)*, 168 Mich App 484, 488 (1987). "Whether a physician . . . is acting in good faith in the course of professional practice or research is a question of fact." *Alford*, 405 Mich at 589.

A defendant's actions may constitute "not good medical practice," but that does not necessarily mean the actions were taken in bad faith. See *People v Orzame*, 224 Mich App 551, 565-567 (1997) (the district court did not abuse its discretion by failing to bind over the defendant despite the fact that the evidence established that the defendant's conduct was not consonant with good medical practice where no proof was presented showing that the defendant acted in bad faith or that he intended to prescribe or dispense controlled substances for nonmedical purposes; the record supported the defendant's contention that he believed the undercover agents' symptoms were genuine, the defendant prescribed the least potent dosage of the medication prescribed, and the defendant counseled a few agents about the addictive nature of the drugs); *Downes (George)*, 168 Mich App at 488-489 (there was no evidence that the physician-defendant acted in bad faith when he prescribed controlled substances to an undercover police officer, and the prosecution's expert witness refused to comment on the defendant's motive, the defendant prescribed less than the requested dosage on one occasion, and the defendant refused the officer's request that he be prescribed a different drug than he had been receiving).

B. Delegation

MCL 333.16215 permits an unlicensed individual with proper delegation to perform tasks which, in the absence of delegation, would constitute criminal conduct. *People v Ham-Ying*, 142 Mich App 831, 835 (1985). Specifically, MCL 333.16215(1) provides in pertinent part:

> "[A] licensee who holds a license other than a health profession subfield license may delegate to a licensed or unlicensed individual who is otherwise qualified by education, training, or experience the performance of selected acts, tasks, or functions where the acts, tasks, or

[245] *Alford* analyzed a former version of MCL 333.7401(1); however, the relevant portion of the old version of the statute analyzed in *Alford* is substantially the same as the current version.

> functions fall within the scope of practice of the licensee's profession and will be performed under the licensee's supervision. A licensee shall not delegate an act, task, or function under [MCL 333.16215] if the act, task, or function, under standards of acceptable and prevailing practice, requires the level of education, skill, and judgment required of the licensee under [Article 15 of the PHC]."

However, a licensee may not delegate the task of filling prescriptions to a physician whose license has been suspended following a conviction for illegally prescribing a controlled substance. *Ham-Ying*, 142 Mich App at 836. "Even though [a physician with a suspended license is] presumably qualified by education, training, or experience to perform the functions of examining patients and dispensing prescriptions," allowing a physician with a suspended license to be a proper delegate of the rights afforded to licensed physicians would "circumvent the terms of and reasons for [the] suspension." *Id.* at 835-836.

7.5 Licensure Requirements

A person who manufactures, distributes, prescribes, or dispenses a controlled substance must be licensed to engage in that activity. MCL 333.7303(1). Proper licensure under MCL 333.7303(1) permits a person to "possess, manufacture, distribute, prescribe, dispense, or conduct research with those substances to the extent authorized by its license and in conformity with the other provisions of [Article 7 of the PHC]." MCL 333.7303(2).[246]

"A license issued under [Article 7 of the PHC] to manufacture, distribute, prescribe, or dispense pharmaceutical-grade cannabis and the conduct of the licensee is subject to the additional requirements of [A]rticle 8[of the PHC]." MCL 333.7303(3).[247]

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[246] The statutory requirements for obtaining and retaining any of the licenses described in Article 7 of the PHC are beyond the scope of this benchbook.

[247] Effective December 30, 2013, 2013 PA 268 created Article 8 of the PHC, which governs the licensed "manufactur[ing], distribut[ing], prescrib[ing], or dispens[ing] of pharmaceutical-grade cannabis[.]" MCL 333.8109(1). However, the rules required to implement Article 8 will likely not be promulgated until "marihuana, including pharmaceutical-grade cannabis, is rescheduled by federal authority." MCL 333.8115(2). In addition, "implementation and enforcement of . . . article [8] shall not occur sooner than 180 days after that federal authority reschedules marihuana." *Id.* Because the federal rescheduling of marihuana has not yet occurred, this benchbook does not discuss the requirements of Article 8.

A. Exceptions to Licensure Requirements

Certain unlicensed persons may lawfully possess controlled substances or prescription forms under specific circumstances:

- An agent or employee of a licensed manufacturer, distributor, prescriber, or dispenser of a controlled substance need not be licensed if the person is acting within the usual course of his or her business or employment. MCL 333.7303(4)(a).

- A common or contract carrier or warehouse, or an employee of the carrier or warehouse, whose possession of a controlled substance or prescription form falls within the usual course of his or her business or employment need not be licensed. MCL 333.7303(4)(b).

- An ultimate user or agent whose possession of a controlled substance or prescription form is pursuant to a practitioner's lawful order or whose possession of a schedule 5 substance is lawful need not be licensed. MCL 333.7303(4)(c).

B. Exemption or Waiver of Licensure Requirements

The licensure requirement is waived for persons in the following circumstances:

> "(a) An officer or employee of the [D]rug [E]nforcement [A]gency [(DEA)] while engaged in the course of official duties.
>
> (b) An officer of the United States [C]ustoms [S]ervice while engaged in the course of official duties.
>
> (c) An officer or employee of the United States [F]ood and [D]rug [A]dministration [(FDA)] while engaged in the course of the person's official duties.
>
> (d) A federal officer who is lawfully engaged in the enforcement of a federal law relating to controlled substances, drugs, or customs and who is authorized to possess controlled substances in the course of that person's official duties.
>
> (e) An officer or employee of this state or a political subdivision or agency of this state who is engaged in the enforcement of a state or local law relating to controlled substances and who is authorized to possess controlled substances in the course of that person's official duties." MCL 333.7304(1).

C. Scope of Exemption or Waiver

An official for whom the licensure requirement is waived is authorized to handle controlled substances in a limited number of situations:

- **An exchange between two exempted officials in the course of each individual's official duties.** An official exempted under MCL 333.7304, when acting in the course of the individual's official duties, may possess and transfer a controlled substance to any other exempted official also acting in the course of that person's official duties. MCL 333.7304(2).

- **When an exempted official acquires the substance during an inspection or investigation.** An official exempted under MCL 333.7304 may acquire a controlled substance during an administrative inspection or investigation or during a criminal investigation involving the individual from whom the official acquired the controlled substance. MCL 333.7304(3).

- **When an exempted official in the course of official duties distributes the substance during an investigation.** A law enforcement officer exempted under MCL 333.7304, when acting in the course of that officer's official duties, may distribute a controlled substance to another person "as a means to detect criminal activity or to conduct a criminal investigation." MCL 333.7304(4).

See also MCL 333.7531(3) (providing that no liability under Article 7 of the PHC attaches to an authorized state, county, or local officer engaged in the lawful performance of that officer's duties).

1. Reverse Buys

The conduct authorized by MCL 333.7304(4) includes providing small samples of a controlled substance to individuals involved in setting up a "reverse buy." *People v Connolly*, 232 Mich App 425, 431-432 (1998) (holding that "a law enforcement officer may distribute controlled substances to another person as a means of detecting criminal activity[]" and citing MCL 333.7304).

2. Who Constitutes an Officer Acting in the Course of Official Duties

In *People v Jones (Alan)*, 203 Mich App 384, 387-388 (1994), the defendant argued that he was authorized to possess and distribute cocaine under MCL 333.7304(1)(e) because he was a

paid confidential police informant and the delivery of cocaine was performed in the course of his official duties. The Court of Appeals found that the defendant failed to contend he was an officer or an employee of the police acting in the course of his official duties, and that his testimony did not support such a claim. *Jones (Alan)*, 203 Mich App at 388. The Court further noted that even assuming the defendant was acting as an informant, a paid confidential informant is "at best, an agent and not entitled to the protection afforded by [MCL 333.7304] to governmental employees performing official duties." *Jones (Alan)*, 203 Mich App at 388.

In his concurring opinion, Judge Connor stated that he "would hold that, as used in MCL 333.7304 . . ., the term 'employee' includes paid police informants." *Jones (Alan)*, 203 Mich App at 391 (Connor, J., concurring). Accordingly, a paid police informant would be authorized by law to transfer a controlled substance when doing so in the course of his or her duties as an informant. *Id.* However, Judge Connor agreed that the record did not support the defendant's claim that he was a police informant. *Id.*

7.6 Double Jeopardy

A. Generally

Both the Michigan Constitution, Const 1963, art 1, § 15, and the United States Constitution, US Const, Am V, prohibit putting a defendant twice in jeopardy for the same offense. *People v Ford*, 262 Mich App 443, 447 (2004) (holding that the Michigan Constitution provides the same double jeopardy protections as the United States Constitution).

"The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574 (2004). Michigan uses the same-elements test to determine whether the prohibition against double jeopardy is violated. *Id.* at 575-596. The same-elements test is commonly referred to as the *Blockburger* test. *Nutt*, 469 Mich at 576; *Blockburger v United States*, 284 US 299, 304 (1932).[248] The *Blockburger* test applies in both "multiple punishments" cases and in "successive prosecutions" cases. *People v Smith (Bobby)*, 478 Mich 292, 315-316 (2007). For a detailed discussion of double jeopardy generally, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1,* Chapter 9.

B. Protection Under Article 7 of the PHC

"If a violation of [Article 7 of the PHC] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state." MCL 333.7409.

MCL 333.7409 precludes successive prosecutions under federal or state law involving the same *act*, not the same *offense*. *People v Zubke*, 469 Mich 80, 85 (2003). For purposes of MCL 333.7409, "it is a defendant's actions that must be compared, not the elements of the crimes." *Zubke,* 469 Mich at 85.

In *Zubke*, the Michigan Supreme Court held that the state's possession with intent to deliver charge was not precluded under MCL 333.7409 by the defendant's federal drug conspiracy conviction because the conduct on which the federal conviction was based was not the "same act" on which the state charge relied. *Zubke*, 469 Mich at 84. Referring to the dictionary definition of "act," the Court reasoned that the state's prosecution would be barred if the "thing done" or "deed" giving rise to the federal conviction was the same "thing done" or "deed" on which the state charge was based. *Id*. The *Zubke* Court concluded that the "thing done" for federal purposes was the conspiracy itself—the defendant's agreement with others to possess and distribute cocaine. *Id*. For state purposes, however, the "thing done" was the defendant's actual physical possession or control of the cocaine. *Id.* Ruling there was no double jeopardy violation, the Court stated simply: "[T]he act of possessing is not subsumed within the act of conspiracy, nor is the act of conspiring subsumed within the act of possessing." *Id*. at 85 n 5.

The *Zubke* Court also overruled *People v Avila (On Remand)*, 229 Mich App 247 (1998), which held that MCL 333.7409 precluded successive prosecutions when the offenses "*arose out of* the same acts." *Zubke,* 469 Mich at 84-85, quoting *Avila,* 229 Mich App at 251 (emphasis added).

[248]The *Blockburger* test "'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Nutt*, 469 Mich at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975).

C. Caselaw Discussing Double Jeopardy in Controlled Substances Cases

1. Attempt

Attempted delivery of controlled substances under Article 7 of the PHC is not prosecuted under the general attempt statute, MCL 750.92, because the definition of delivery for purposes of Article 7 of the PHC includes the "attempted transfer" of a controlled substance from one person to another. See MCL 333.7105(1); MCL 750.92. The general attempt statute, MCL 750.92, applies only "when no express provision is made by law" to adjudicate the attempted criminal conduct at issue. *Id.*

Where a trial court erroneously convicted the defendants of attempted cocaine delivery under the general attempt statute, double jeopardy barred the Court of Appeals from correcting the error by entering guilty verdicts against the defendants for delivery under MCL 333.7401. *Wayne Co Pros v Recorder's Court Judge*, 177 Mich App 762, 765-766 (1989). In convicting the defendants of attempted delivery under MCL 750.92, the trial court "specifically found that there was insufficient evidence of an 'attempt' by the defendants to convict them of delivery of cocaine under [MCL 333.7401,]" effectively acquitting them of that offense. *Wayne Co Pros,* 177 Mich App at 765. "Any action on [the part of the Court of Appeals] which would effectuate a guilty verdict for delivery of cocaine would violate the constitutional prohibition against double jeopardy." *Id.* at 766.

2. Conspiracy

A defendant can be convicted of a substantive offense and conspiracy to commit that offense without violating double jeopardy principles. *People v Carter (Alvin)*, 415 Mich 558, 569 (1982). See also *People v Rodriguez*, 251 Mich App 10, 18-19 (2002) (noting that "conspiracy and the underlying substantive offense are separate and distinct crimes"). Similarly, consecutive sentences for a controlled substance offense and conspiracy to commit that offense do not violate the prohibition against double jeopardy. *People v Denio*, 454 Mich 691, 709-710 (1997). In addition to the Legislature's unambiguous intention to penalize both commission of the substantive offense and conspiracy to commit the offense even when the conduct occurs in the same criminal transaction, the offenses themselves violate different social norms and present to society the threat of differing degrees of danger. *Id*. at 710-711. Conspiracy is an ongoing offense until evidence demonstrates that the offender has abandoned or withdrawn

from the criminal agreement to commit the substantive offense. *Id*. at 710-711. In contrast to the substantive offense committed, conspiracy is an offense intended to *result in commission of the substantive offense* the Legislature intended to prevent. *Id*. See also *Rodriguez*, 251 Mich App at 18-22 (summarizing cases where the Court "found no double jeopardy violation in successive prosecutions for drug offenses where the charges stemmed from multiple drug transactions").

Where multiple conspiracies are charged, a defendant bears the initial burden of establishing a prima facie case in support of a double jeopardy claim by showing that the conspiracy charges at issue were similar and that there was a substantial overlap in the times at which each conspiracy took place. *People v Mezy*, 453 Mich 269, 277 (1996) (holding that the defendant met this burden). Once a defendant has satisfied the initial burden, the burden shifts to the government to show by a preponderance of the evidence why double jeopardy does not bar the prosecution. *Id*. To determine whether there is more than one conspiracy for purposes of double jeopardy, a trial court should consider the following factors:

- overlap in the times during which the conspiracies allegedly occurred;
- the identities of the individuals acting as coconspirators;
- the similarity of the statutory offenses charged in the indictments;
- the overt acts charged by the government; and
- the places where events alleged to be part of the conspiracies took place. *Id*.

3. Manufacturing Methamphetamine and Possession of Methamphetamine

Defendant's conviction and sentencing for both manufacturing methamphetamine and possession of methamphetamine did not violate double jeopardy; applying the abstract legal elements test, "manufacturing methamphetamine requires proof that the defendant manufactured methamphetamine, while a conviction for possession of methamphetamine does not require proof of manufacturing," and "possession of methamphetamine requires proof that the defendant possessed methamphetamine, while the manufacture of

methamphetamine does not require proof of possession." *People v Baham*, 321 Mich App 228, 246, 248, 250 (2017).

4. Operating a Methamphetamine Laboratory

The multiple punishments strand of the Double Jeopardy Clause prohibits multiple punishments for both operating/maintaining a methamphetamine laboratory and operating/maintaining a methamphetamine laboratory within 500 feet of a residence where those activities arise out of the operation of a single methamphetamine laboratory. *People v Meshell*, 265 Mich App 616, 631-632 (2005). Under the "same-elements" test, there exists a presumption that the Legislature did not intend multiple punishments because all the elements of one offense are contained in the elements of the other offense. *Id.* at 631. Further evidence that multiple punishments were not intended is found in the statutory language that provides for more severe punishment when the conduct prohibited under MCL 333.7401c—operating/maintaining a methamphetamine laboratory—occurs in certain locations or under certain circumstances (e.g., in the presence of a minor, involving possession or use of a firearm, etc.). *Meshell*, 265 Mich App at 632.

5. Possession and Possession With Intent to Deliver

The multiple prosecution strand of the Double Jeopardy Clause prohibits prosecution for possession followed by a subsequent prosecution for possession with intent to deliver where both prosecutions are based on the same criminal transaction because "conviction of a lesser charge is an acquittal of higher charges." *People v Head*, 211 Mich App 205, 212 (1995). Accordingly, the defendant's double jeopardy rights were violated where he was convicted of possession of marijuana in an earlier trial that was later reversed on evidentiary grounds, and the prosecution retried the defendant on the greater charge of possession with intent to deliver marijuana at a second trial based on the same criminal transaction. *Id*.

6. Possession of a Controlled Substance and Delivery of a Controlled Substance

"[T]he trial court [did not] violate[] [the defendant's] constitutional right to be free from multiple punishments for the same offense [where] she was separately convicted and punished for both possession and delivery of [the same] heroin." *People v Dickinson*, 321 Mich App 1, 10 (2017).

"The delivery offense required proof of the separate element of delivery of the heroin that the possession offense did not require[, and t]he possession offense required proof of the element of possession of the heroin that the delivery offense did not require." *Dickinson*, 321 Mich App at 14. Accordingly, these two offenses "are separate and distinct." *Id.* at 14 (applying "the abstract legal elements test articulated in [*People v Ream*, 481 Mich 223, 238 (2008)] to discern the legislative intent[,]" and noting the test requires consideration of "the abstract legal elements of the two offenses, rather than the facts of the case, in determining whether the protection against double jeopardy has been violated[]"). The Court acknowledged that "[w]hile this defendant may indeed have possessed the heroin before delivering it, the prosecution was not required to prove possession to convict her of delivery, or vice versa." *Dickinson*, 321 Mich App at 15. "Consequently, defendant's conviction of each offense, and the trial court's sentencing of defendant separately for each offense, did not violate defendant's rights under the Double Jeopardy Clauses of the federal and Michigan Constitutions." *Id.* at 15.

7. Prisoner in Possession and Delivery

Convicting and sentencing a defendant for both being a prisoner in possession of a controlled substance, MCL 801.263(2), and delivery of marijuana, MCL 333.7401(2)(d)*(iii)*, does not violate the multiple punishments strand of the Double Jeopardy Clause because each offense contains an element that the other does not. *People v Williams (Robert)*, 294 Mich App 461, 470 (2011) ("[a]n individual need not be a prisoner to be convicted of delivery [of marijuana][] . . . [and] a person need not deliver a controlled substance to be a prisoner in possession [of a controlled substance][]").

7.7 Entrapment

For a detailed discussion of entrapment, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10.

"The purpose of the entrapment doctrine is to deter unlawful government activities and to preclude the implication of judicial approval of impermissible government conduct." *People v Jade*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). "[T]he entrapment defense is [utilized] to deter the corruptive use of governmental authority by invalidating convictions that result from law enforcement efforts that have as their effect the instigation or

manufacture of a new crime by one who would not otherwise have been so disposed." *People v Juillet*, 439 Mich 34, 52 (1991).

Test for entrapment. "'[A] defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated.'" *People v Jade*, ___ Mich App ___, ___ (2024), quoting *People v Johnson*, 466 Mich 491, 498 (2002). "It is the defendant's burden to establish entrapment by a preponderance of the evidence." *Jade*, ___ Mich App at ___.

"In Michigan, entrapment is defined by a 'modified objective test.'" *Id*. at ___, quoting *Johnson*, 466 Mich at 508. Michigan's test "focuses primarily on the investigative and evidence-gathering procedures used by the governmental agents" in order to "determine whether the police conduct in question has as its 'probable and likely outcome the instigation rather than the detection of criminal activity.'" *Juillet*, 439 Mich at 53, 54 (1991) (citation omitted). The test for determining whether a defendant was entrapped is objective and should "focus[] on the propriety of the government's conduct that resulted in the charges against the defendant rather than on the defendant's predisposition to commit the crime." *People v Hampton*, 237 Mich App 143, 156 (1999). A defendant cannot establish entrapment when the police simply presented the defendant with an opportunity to commit the offense for which he or she was convicted. *Johnson,* 466 Mich at 498.

Inducement. Courts consider the following factors when determining whether governmental activity would impermissibly induce criminal conduct: "'(1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted.'" *People v Jade*, ___ Mich App ___, ___ (2024), quoting *People v Johnson*, 466 Mich 491, 498-499 (2002).

Reprehensible Conduct. "Entrapment may also be found if the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Jade*, ___ Mich App ___, ___ (2024) (quotation marks and citation

omitted). "[T]here is certain conduct by government that a civilized society simply will not tolerate, and the basic fairness that due process requires precludes continuation of the prosecution where the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation." *Id*. at ___ (quotation marks and citation omitted). In this case, "defendant asserts that law enforcement officers were involved in reprehensible conduct that should not be tolerated as they specifically targeted individuals soliciting adult escorts and then 'duped' people like defendant into committing more serious crimes than intended." *Id*. at ___. The trial court found that "[w]hile defendant hesitated somewhat when the officer indicated she was 15 years old, his subsequent texts and behavior demonstrate[d] he was willing to arrange for sex with a minor." *Id*. at ___.The Court of Appeals agreed, noting that "[t]he conduct in question primarily involved presenting defendant with the opportunity to engage in the criminal acts for which [defendant] was convicted, and . . . the mere presentation of the opportunity to commit criminal acts in a non-targeted manner does not constitute reprehensible conduct amounting to entrapment." *Id*. at ___. Accordingly, "[i]dentifying individuals willing to make plans to engage in sex with minors is a legitimate law enforcement goal that justifies the decision to see whether defendant's conduct might expose him to heightened criminal liability." *Id*. at ___ (quotation marks omitted); see also *id*. at ___) (further holding that the "purpose of the challenged police activity was the detection of crime, not its manufacture") (quotation marks and citation omitted).

Reverse buy. Whether a police officer who "plac[es] controlled substances in the societal stream" as part of a reverse buy has engaged in reprehensible conduct for purposes of entrapment depends on the specific circumstances of the criminal investigation. *People v Connolly*, 232 Mich App 425, 430-431 (1998). In *Connolly*, police officers authorized under MCL 333.7304(4) to distribute controlled substances in an effort to detect criminal activity did not engage in reprehensible conduct by providing small samples of a controlled substance to persons who shopped the substance around in order to find a buyer for the substance in bulk. *Connolly*, 232 Mich App at 431-432. However, police conduct under circumstances in another case might constitute intolerably reprehensible conduct. According to the Court:

> "Had the police engaged in the distribution of a substantial quantity of the marijuana intended as bait in the sting operation, we would be inclined to say the police intended 'to commit certain criminal, dangerous, or immoral acts,' which could not be tolerated." *Id*., quoting *People v Jamieson*, 436 Mich 61, 95-96 (1990) (Cavanagh, J., concurring).

However, reverse buys do not constitute entrapment when the situation merely furnishes a defendant with the opportunity to commit a criminal

offense, e.g., when a defendant purchases a controlled substance from a police officer. *People v Butler*, 444 Mich 965, 965-966 (1994).

Undercover at a Dispensary. Following the sale of marijuana to undercover officers in the parking lot of a marijuana dispensary, the defendant was convicted of delivery of marijuana in violation of MCL 333.7401(2)(d)(*iii*). *People v Vansickle*, 303 Mich App 111, 113 (2013). The trial court rejected the defendant's entrapment defense, and the Court of Appeals affirmed. *Id.* at 115-116. The Court explained:

> "The evidence established that defendant was not a target of the undercover investigation of the marijuana dispensary and that the officers were not familiar with defendant. Instead, the officers had contact with defendant by chance inside the marijuana dispensary's waiting room. Defendant admitted that he was there to transfer his excess marijuana and obtain reimbursement for his expenses. Testimony indicated that before arriving at the marijuana dispensary, defendant had packaged the surplus marijuana that was at his home, placed it in his vehicle for transport to the marijuana dispensary, and traveled more than an hour with the specific intent of transferring the marijuana to the marijuana dispensary. While in the front waiting area, however, defendant discussed selling the officers some of his marijuana. When the officers indicated that they did not have enough money to purchase the quantity that defendant offered, he offered them a smaller amount. Although an officer ultimately suggested that they go outside to complete the transaction, defendant admitted that he felt uncomfortable discussing the transaction inside the marijuana dispensary 'out of respect for the business.' Once outside, defendant suggested that the men go to his truck, where defendant produced a digital scale and some marijuana and the transaction was completed." *Id.* at 116.

The Court rejected the defendant's claim that the officers induced him to sell them marijuana by engaging him in "friendly banter," finding that the officers "did not appeal to the defendant's sympathy, offer him any unusually attractive inducements or excessive consideration, or use any other means to pressure defendant to sell them marijuana." *Id.* at 116-117. The Court further rejected the defendant's claim that it was reprehensible for the officers to falsely pose as patients at the dispensary, noting that officials are permitted to use deceptive methods to obtain evidence of a crime and that the officers never showed the defendant their forged registry identification cards. *Id.* at 117.

7.8 Intoxication as a Defense

Generally, "it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound." MCL 768.37(1).[249] See also MCL 8.9(6) ("It is not a defense to a crime that the defendant was, at the time the crime occurred, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound. However, it is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily ingested a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.")

"Intoxication has been defined as a 'disturbance of mental or physical capacities resulting from the introduction of any substance into the body.'" *People v Caulley*, 197 Mich App 177, 187 (1992), quoting *People v Low*, 732 P2d 622, 627 (Colo, 1987). "'Involuntary intoxication is intoxication that is not self-induced and by definition occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant.'" *Caulley*, 197 Mich App at 187 (defendant murdered his wife after ingesting a prescription medication in doses larger than prescribed), quoting *Low*, 732 P2d at 627.

When a defendant asserts that he or she was involuntarily intoxicated at the time of an offense, the defendant has effectively raised an insanity defense, because "involuntary intoxication is a defense included within the ambit of the insanity defense." *People v Wilkins (David)*, 184 Mich App 443, 449 (1990) (defendant who was convicted of vehicular manslaughter claimed he was temporarily insane at the time of the collision as a result of involuntary intoxication caused by the combined effect of alcohol and prescription medication).

"[T]he defense of involuntary intoxication is part of the defense of insanity when the chemical effects of drugs or alcohol render the defendant temporarily insane." *Caulley*, 197 Mich App at 187, citing *Wilkins (David)*, 184 Mich App at 448-449. A defendant claiming involuntary intoxication as a defense must "demonstrate that the involuntary use of drugs created a state of mind equivalent to insanity."

[249] However, "[i]t is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired." MCL 768.37(2).

Caulley, 197 Mich App at 187. Because the involuntary intoxication defense is evaluated in terms of the insanity defense, the same procedural requirements apply, and a defendant must give notice of his or her intention to assert a defense of involuntary intoxication within the statutory time limits prescribed for raising an insanity defense (notice must be provided to the court and to the prosecution not less than 30 days before trial or at such other time directed by the court, MCL 768.20a(1)). *Wilkins (David)*, 184 Mich App at 449-450.

To prove involuntary intoxication in cases involving prescription medication, three things must be established:

- First, the defendant must prove that he or she "[did] not know or have reason to know that the prescribed drug [was] likely to have the intoxicating effect." *Caulley*, 197 Mich App at 188.

- Second, the defendant's intoxication must have been caused by the prescribed drug and not another intoxicant. *Id*.

- Third, the defendant must show that he or she was rendered temporarily insane as a result of his or her intoxicated condition. *Id*.

Where a defendant has successfully established these three things, the jury must be properly instructed on the issue of involuntary intoxication and insanity.[250] See *id.* In general,

> "the trial court must instruct the jury that if it determines that defendant was involuntarily intoxicated as a result of ingesting a prescription drug . . . without knowledge of its side effects, the jury can then assess whether because of this involuntary intoxication defendant lacked the capacity to conform his conduct to the requirements of the law. The court should formulate instructions that will clarify that it is for the jury to decide, on the basis of the evidence, whether defendant was intoxicated, whether the intoxication was voluntary or involuntary, and what effect, if any, the intoxication had on defendant's mental condition. If the jury finds that defendant was involuntarily intoxicated, then it may consider whether that could cause mental illness or legal insanity, as the court [defines] those terms." *Caulley*, 197 Mich App at 189-190.

[250] See M Crim JI 7.10, *Person Under the Influence of Alcohol or Controlled Substances*. See also M Crim JI 7.9, *The Meanings of Mental Illness, Intellectual Disability and Legal Insanity*; M Crim JI 7.11, *Legal Insanity; Mental Illness; Intellectual Disability; Burden of Proof*; M Crim JI 7.13, *Insanity at the Time of the Crime*; and M Crim JI 7.14, *Permanent or Temporary Insanity*.

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8.1 Scope Note

This chapter discusses immunity and affirmative defenses under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. This chapter also discusses the Medical Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101 *et seq*., and the Marihuana Tracking Act, MCL 333.27901 *et seq.* Finally, this chapter addresses recreational marijuana use under the voter-initiated Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*., and the process for setting aside misdemeanor marijuana offense convictions based on conduct that is now legal under the MRTMA.

Part A: Michigan Medical Marihuana Act

8.2 Immunity and Defenses Under the Michigan Medical Marihuana Act (MMMA)

The purpose of the voter-approved Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., which became effective December 4, 2008,[251] "is to allow a limited class of individuals the medical use of marihuana[.]" *People v Kolanek (Kolanek II)*, 491 Mich 382, 393 (2012).[252] "To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA." *Id.* at 394. The *Kolanek* Court provided more information on the scope and purpose of the MMMA:

> "The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law. Rather, the MMMA's protections are limited to individuals suffering from serious

[251] The MMMA does not apply retroactively. *People v Kolanek (Kolanek II)*, 491 Mich 382, 404-406 (2012) (holding that because MCL 333.26428 created "a new substantive right available to some defendants," and because there was no indication that the Legislature intended the MMMA to apply retroactively, it was presumed to operate prospectively; therefore, "[a] physician's statement[] made before its enactment cannot satisfy" the requirement of MCL 333.26428(a)(1) that "[a] physician has stated that . . . the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana"); see also *People v Campbell (Keith)*, 289 Mich App 533, 534, 536-537 (2010) (trial court erroneously dismissed marijuana-related charges against the defendant for conduct occurring before December 4, 2008, on the basis that the MMMA applied retroactively).

[252] *Kolanek II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. Among other changes, the MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

> or debilitating medical conditions or symptoms, to the extent that the individuals' marijuana use 'is carried out in accordance with the provisions of [the MMMA].'" *Id.*, quoting MCL 333.26427(a).[253]

A. Preemption of Inconsistent Laws

"All other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by [the MMMA]. However, if [the MMMA] is inconsistent with any part of chapter 10a, 10b, 10c, or 12 of the revised judicature act of 1961, . . . MCL 600.1060 to [MCL] 600.1088, [MCL] 600.1090 to [MCL] 600.1099a, [MCL] 600.1099b to [MCL] 600.1099m, and [MCL] 600.1200 to [MCL] 600.1212, that part applies." MCL 333.26427(e). Chapters 10a, 10b, 10c, and 12 of the Revised Judicature Act address drug treatment courts, mental health courts, juvenile mental health courts, and veterans treatment courts. "[A] statute or provision of a statute that conflicts with a defendant's right to MMMA-compliant use of marijuana is preempted or superseded by the MMMA." *People v Thue*, 336 Mich App 35, 47 (2021).

The issue of preemption has been addressed in a variety of circumstances such as zoning ordinances, Michigan's driving laws, and probation conditions. A detailed discussion of these issues is in Section 8.7.

B. Medical Use of Marijuana Must be in Accordance with the MMMA

The MMMA allows the medical use of marijuana "to the extent that it complies with [the MMMA]." MCL 333.26427(a). MCL 333.26427(b) "provides a list of places where and situations in which the MMMA prohibits a person from using or possessing marijuana." *Kolanek II*, 491 Mich at 399-400.[254] MCL 333.26427(b) states that the MMMA "does not authorize a person to do any of the following:

> (1) Undertake any task under the influence of marihuana, if doing so would constitute negligence or professional malpractice.

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[253]Effective 7-25-22, 2022 PA 186 amended MCL 333.26427(a) to read: "The medical use of marihuana is allowed under state law to the extent that it complies with [the MMMA]." The MMMA further provides that where it is inconsistent with any part of Chapter 10a, 10b, 10c, or 12 (addressing problem-solving courts) of the Revised Judicature Act (RJA), the RJA applies. MCL 333.26427(e).

[254]*Kolanek II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA.

(2) Possess marihuana, or engage in the medical use of marihuana at any of the following locations:

(A) In a school bus.

(B) On the grounds of any preschool or primary or secondary school.

(C) In any correctional facility.

(3) Smoke marihuana at any of the following locations:

(A) On any form of public transportation.

(B) In any public place.[255]

(4) Operate, navigate, or be in actual physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of marihuana.

(5) Use marihuana if that person does not have a serious or debilitating medical condition.

(6) Separate plant resin from a marihuana plant by butane extraction in any of the following:

(A) A public place.[256]

(B) A motor vehicle.

(C) Inside or within the curtilage of any residential structure.

(7) Separate plant resin from a marihuana plant by butane extraction in a manner that demonstrates a failure to exercise reasonable care or reckless disregard for the safety of others."

The MMMA does **not** require:

- reimbursement for the medical use of marijuana;
- employers to accommodate or permit the use of marijuana while employees are working; or

[255]The term *public place* is not defined by the MMMA, but has been interpreted by the Michigan Court of Appeals, see Section 8.7(G).

[256]The term *public place* is not defined by the MMMA, but has been interpreted by the Michigan Court of Appeals, see Section 8.7(G).

- private property owners to lease residential property to any person who smokes or cultivates marijuana on the premises if the written lease prohibits smoking or cultivating marijuana. MCL 333.26427(c)(1)-(3).

"Fraudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution is punishable by a fine of $500.00, in addition to any other penalties that may apply for making a false statement or for the use of marihuana other than use that complies with [the MMMA]." MCL 333.26427(d).

C. Protections Afforded by the MMMA

There are three sections of the MMMA that provide protection from prosecution for offenses involving marijuana: MCL 333.26424 (§ 4), MCL 333.26424a (§ 4a), and MCL 333.26428 (§ 8). Section 4 and Section 8 were part of the original voter-initiated law; Section 4a was later added by the Legislature. See 2016 PA 283, a "curative [amendatory act that] applies retroactively[257] as to . . . clarifying the quantities and forms of marihuana for which a person is protected from arrest, precluding an interpretation of 'weight' as aggregate weight, and excluding an added inactive substrate component of a preparation in determining an amount of marihuana, medical marihuana, or usable marihuana that constitutes an offense." 2016 PA 283, enacting section 2.

Section 4 "grants 'qualifying patient[s]' who hold 'registry identification card[s]' broad immunity from criminal prosecution, civil penalties, and disciplinary actions," while § 8 "applies to 'patients' generally[and] provides an affirmative defense to charges involving marijuana for its medical use[.]" *Kolanek II*, 491 Mich at 394-396.[258]

> "'[T]he MMMA provides two ways[259] in which to show legal use of marijuana for medical purposes in accordance with the [MMMA]. Individuals may either register and obtain a registry identification card under § 4 or remain unregistered and, if facing criminal

[257] "Retroactive application of [2016 PA 283] does not create a cause of action against a law enforcement officer or any other state or local governmental officer, employee, department, or agency that enforce [the MMMA] under a good-faith interpretation of its provisions at the time of enforcement." 2016 PA 283, enacting section 2.

[258] *Kolanek II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. Among other changes, the MMMA now refers to *medical use of marihuana* rather than simply *medical use*. MCL 333.26423(h).

[259] *Kolanek II* and *Redden* were decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA to add MCL 333.26424a. See Section 8.4 for a discussion of § 4a.

> prosecution, be forced to assert the affirmative defense in § 8.
>
> * * *
>
> [A]dherence to § 4 provides protection that differs from that of § 8. Because of the differing levels of protection in §§ 4 and 8, the plain language of the statute establishes that § 8 is applicable for a patient who does not satisfy § 4.'" *Kolanek II*, 491 Mich at 401 n 41, quoting *People v Redden*, 290 Mich App 65, 81 (2010).

While the affirmative defense under § 8 applies to "[a]ny defendant, regardless of registration status," who can establish the elements of that defense and who is not acting outside the scope of the MMMA, see MCL 333.26427(b), "[t]he stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the [MMMA] in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges." *Kolanek II*, 491 Mich at 403 (noting that "[i]f registered patients choose not to abide by the stricter requirements of § 4, they will not be able to claim th[e] broad immunity [provided under § 4], but will be forced to assert the affirmative defense under § 8, just like unregistered patients[; i]n that instance, registered patients will be entitled to the same lower level of protection provided to unregistered patients under § 8").

A trial court must determine whether a defendant is "specifically entitled to the protections afforded under either [§ 4] or [§ 8]" and make "specific findings about each of the statutory requirements" before dismissing charges. *People v Johnson (Barbara)*, 302 Mich App 450, 460-461 (2013) ("trial court abused its discretion when it dismissed the charges against all seven defendants without determining whether any of the defendants were specifically entitled to the protections afforded under either [§ 4] or [§ 8]").

MCL 333.26424a (§ 4a) provides immunity to registered qualifying patients and registered primary caregivers for activities authorized under the Medical Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101, *et seq*.

8.3 Immunity Under § 4

Section 4 contains several subsections that provide immunity to different groups under different circumstances. "Sections 4(a) and 4(b) [of the MMMA, MCL 333.26424(a) and MCL 333.26424(b),] contain parallel immunity provisions that apply, respectively, to registered qualifying patients and to registered primary caregivers." *People v Bylsma (Bylsma*

II), 493 Mich 17, 28 (2012). Section 4 also provides immunity to physicians, persons who provide marijuana paraphernalia for purposes of a qualifying patient's medical use of marijuana, and persons who are in the presence or vicinity of the medical use of marijuana or who are assisting a registered qualifying patient with using or administering marijuana. Section 4 also provides immunity to registered qualifying patients and primary caregivers for manufacturing marihuana-infused products. MCL 333.26424(m).

A. Procedural Aspects of § 4

"[E]ntitlement to immunity under § 4 is a question of law to be decided by the trial court before trial[.]" *People v Hartwick*, 498 Mich 192, 212 (2015), affirming in part and reversing in part *People v Hartwick*, 303 Mich App 247 (2013), and *People v Tuttle*, 304 Mich App 72 (2014).

"A defendant may claim entitlement to immunity for any or all charged offenses." *Hartwick*, 498 Mich at 217. "Once a claim of immunity is made, the trial court must conduct an evidentiary hearing to factually determine whether, for each claim of immunity, the defendant has proved each element required for immunity." *Id*.

The requirements set forth in *Hartwick*, 498 Mich 192, also apply to civil cases where a plaintiff is seeking immunity under § 4. *Varela v Spanski*, 329 Mich App 58, 75 (2019) (holding "a plaintiff must plead facts showing that they were compliant with the MMMA to avoid summary disposition under MCR 2.116(C)(8)").[260]

Section 4 "provides absolute immunity from prosecution to those individuals who can establish the required elements of the statute," and where entitlement to § 4 immunity is established "the state simply cannot bring charges against the defendant 'for the medical use of marihuana in accordance with' the MMMA." *People v Cook*, 323 Mich App 435, 450 (2018), citing MCL 333.26424(a).[261] "Because Section 4 immunity 'implicate[s] the very authority of the state to bring the defendant to trial,' it is not the type of defense that is waived by an unconditional guilty plea." *Cook*, 323 Mich App at 450, citing *People v New*, 427 Mich 482, 495 (1987) (noting that "[a]n unconditional guilty plea does not waive claims that 'implicate the

[260]See the Michigan Judicial Institute's *Civil Proceedings Benchbook*, Chapter 4 for a detailed discussion of summary disposition.

[261]In *Cook*, 323 Mich App at 450, the Court addressed whether the defendant's unconditional guilty plea waived the affirmative defense under § 8; § 4 immunity was not at issue. However, the Court addressed whether an unconditional guilty plea waives immunity under § 4 to "help[] draw a line between what is waived and what is not waived by an unconditional guilty plea."

very authority of the state to bring the defendant to trial'") (alteration omitted).

If facts demonstrating compliance with the requirements of § 4 are established, the party claiming § 4's protection must also "demonstrate that he or she was 'subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege . . . for the medical use of marihuana[.]'" *Eplee v Lansing*, 327 Mich App 635, 657 (2019), quoting MCL 333.26424(a) (emphasis omitted; first alteration in original). See also *Varela*, 329 Mich App at 75, 76 (noting the two-step analysis requires that the plaintiff first plead facts showing compliance with § 4, and second, that the trial court determine whether the plaintiff was subject to a penalty or the denial of any right or privilege because of the medical use of marijuana). Accordingly, § 4(a) "does not provide an independent *right* protecting the medical use of marijuana in all circumstances, nor does it create a protected class for users of medical marijuana." *Eplee*, 327 Mich App at 657 (holding plaintiff did not have a cause of action under § 4(a) against a public employer who rescinded a conditional offer of at-will employment after plaintiff tested positive for THC as a result of medical marijuana use).

B. Standard of Review

The "specific factual findings made by the trial court in a § 4 immunity hearing are reviewed under the clearly erroneous standard, and questions of law surrounding the grant or denial of § 4 immunity are reviewed de novo. Further, the trial court's ultimate grant or denial of immunity is fact-dependent and is reviewed for clear error." *Hartwick*, 498 Mich at 214-215.

C. Burden of Proof

A defendant who claims § 4 immunity "places himself [or herself] in an offensive position, affirmatively arguing entitlement to § 4 immunity without regard to his or her underlying guilt or innocence of the crime charged." *Hartwick*, 498 Mich at 216-217. Accordingly, the defendant bears the burden of proving § 4 immunity by a preponderance of the evidence. *Hartwick*, 498 Mich at 217.

D. Qualifying Patients

Qualifying patients are provided immunity under MCL 333.26424(a) and MCL 333.26424(m).

MCL 333.26424(a) provides immunity as follows:

> "A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with [the MMMA], provided that the qualifying patient possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana[262] and usable marihuana equivalents,[263] and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient."

The elements required to establish immunity under § 4(a) "consist of whether, at the time of the charged offense, the defendant:

> (1) was issued and possessed a valid registry identification card,
>
> (2) complied with the requisite volume limitations of § 4(a)[, which permits up to 2.5 ounces of usable marijuana and up to 12 marijuana plants,] . . . ,
>
> (3) stored any marijuana plants in an enclosed, locked facility, and
>
> (4) was engaged in the medical use of marijuana." *Hartwick*, 498 Mich at 217-218.

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[262]Note that "what constitutes 'usable marijuana' under the MMMA is irrelevant to what constitutes marijuana for purposes of a punishable crime under MCL 333.7401"; for purposes of MCL 333.7401, marijuana is defined by MCL 333.7106(4). *People v Ventura*, 316 Mich App 671, 679 (2016).

[263]"For purposes of determining usable marihuana equivalency, the following shall be considered equivalent to 1 ounce of usable marihuana: (1) 16 ounces of marihuana-infused product if in a solid form. (2) 7 grams of marihuana-infused product if in a gaseous form. (3) 36 fluid ounces of marihuana-infused product if in a liquid form." MCL 333.26424(c).

Registered qualifying patients are provided immunity for the manufacture of marihuana-infused products as set out in MCL 333.26424(m):

> "A person shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for manufacturing a marihuana-infused product if the person is . . . [a] registered qualifying patient, manufacturing for his or her own personal use."

Patients may not transfer a marihuana-infused product to any individual. MCL 333.26424(n).

A qualifying patient may not transport or possess a marihuana-infused product in or upon a motor vehicle except under specific circumstances. MCL 333.26424b(1). Unauthorized transportation or possession of a marihuana-infused product in or upon a motor vehicle is a civil infraction. See Section 5.13.

E. Primary Caregivers

Primary caregivers are provided immunity under MCL 333.26424(b) and MCL 333.26424(m).

MCL 333.26424(b) provides immunity as follows:

> "A primary caregiver who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the [Cannabis Regulatory Agency's[264]] registration process with the medical use of marihuana in accordance with [the MMMA]. The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or

[264] MCL 333.26424 references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred "all of the authorities, powers, duties, functions, and responsibilities" of LARA under the MMMA to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

> government-issued identification card that bears a photographic image of the primary caregiver. This subsection applies only if the primary caregiver possesses marihuana in forms and amounts that do not exceed any of the following:
>
> > (1) For each qualifying patient to whom he or she is connected through the [Cannabis Regulatory Agency's] registration process, a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents.[265]
> >
> > (2) For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.
> >
> > (3) Any incidental amount of seeds, stalks, and unusable roots."

The elements required to establish immunity under § 4(b) "consist of whether, at the time of the charged offense, the defendant:

> (1) was issued and possessed a valid registry identification card,
>
> (2) complied with the requisite volume limitations of . . . § 4(b)[, which permits up to 2.5 ounces of usable marijuana and up to 12 marijuana plants for each registered qualifying patient who has specified the primary caregiver during the state registration process],
>
> (3) stored any marijuana plants in an enclosed, locked facility, and
>
> (4) was engaged in the medical use of marijuana[(i.e. was assisting connected qualifying patients with the medical use of marijuana)]." *Hartwick*, 498 Mich at 217-218.

Registered primary caregivers are provided immunity for the manufacture of marihuana-infused products as set out in MCL 333.26424(m):

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[265] "For purposes of determining usable marihuana equivalency, the following shall be considered equivalent to 1 ounce of usable marihuana: (1) 16 ounces of marihuana-infused product if in a solid form. (2) 7 grams of marihuana-infused product if in a gaseous form. (3) 36 fluid ounces of marihuana-infused product if in a liquid form." MCL 333.26424(c).

> "A person shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for manufacturing a marihuana-infused product if the person is . . . [a] registered primary caregiver, manufacturing for the use of a patient to whom he or she is connected through the [Cannabis Regulatory Agency's] registration process."

Primary caregivers may not transfer a marihuana-infused product to any individual who is not a qualifying patient to whom he or she is connected through the [Cannabis Regulatory Agency's] registration process. MCL 333.26424(o).

A primary caregiver may not transport or possess a marihuana-infused product in or upon a motor vehicle except under specific circumstances. MCL 333.26424b(1). Unauthorized transportation or possession of a marihuana-infused product in or upon a motor vehicle is a civil infraction. See Section 5.13.

F. Detailed Discussion of the Elements Required to Establish Immunity Under §§ (4)(a) and (4)(b)[266]

The elements required to establish § 4 immunity are nearly identical for §§ 4(a) and 4(b). See *Hartwick*, 498 Mich at 217-219 (discussing the elements to establish immunity under both sections in conjunction). Note that the requirements set forth in *Hartwick* also apply to civil cases where a plaintiff is seeking immunity under § 4. *Varela v Spanski*, 329 Mich App 58, 77, 78 (2019).

1. Element 1: Valid Registry Identification Card

> "The court must examine the first element of immunity—possession of a valid registry identification card—on a charge-by-charge basis." *Hartwick*, 498 Mich at 218. Generally, a defendant will either satisfy the first element by possessing a valid card at all times relevant to the charged offenses or will fail to satisfy the element by lacking possession of a valid card. *Id.* However, "[i]n some cases, there may be a gap between a qualifying patient's or a primary caregiver's earliest conduct underlying the charged offenses and his or her most recent conduct. A court must pay special attention to whether the effective date or expiration date of a registry identification card

[266] See the Michigan Judicial Institute's flowchart depicting the process in response to a defendant's claim of immunity under § 4(a) and § 4(b) of the MMMA as set out in *Hartwick*, 498 Mich at 217-221.

occurred within this gap and determine whether the conduct occurred when the patient or caregiver possessed a valid registry identification card. A qualifying patient or primary caregiver can only satisfy the first element of immunity for any charge if all conduct underlying that charge occurred during a time when the qualifying patient or primary caregiver possessed a valid registry identification card." *Id.*

a. Residency Required

"Michigan residency is a prerequisite to the issuance and valid possession of a registry identification card." *People v Jones (Cynthia)*, 301 Mich App 566, 578-579 (2013). See also MCL 333.26426(a)(6) (specifically requiring proof of Michigan residency before the issuance of a registry identification card).[267]

b. Issuance of Card After Commission of Offense

A defendant is not immune from prosecution under § 4 if he or she has been approved for but not yet issued a registry identification card at the time of the purported offense. *People v Reed (Brian)*, 294 Mich App 78, 86-87 (2011). Section 4(a) "ties the *prior issuance* and possession of a registry identification card to the medical use of marijuana[;[268]]" accordingly, because the defendant had not yet been issued a registry identification card at the time of his offense, he was "not immune from arrest, prosecution, or penalty." *Reed (Brian)*, 294 Mich App at 87 (emphasis in original).

c. Present Possession Required

"[A] defendant [must] presently possess his or her registry identification card in order to qualify for § 4(a)

[267] MCL 333.26424(k) provides that "[a] registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that allows the medical use of marihuana by a visiting qualifying patient, or to allow a person to assist with a visiting qualifying patient's medical use of marihuana, shall have the same force and effect as a registry identification card issued by the department." MCL 333.26424 references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred "all of the authorities, powers, duties, functions, and responsibilities" of LARA under the MMMA to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

[268] *Reed (Brian)* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*, and the definition of *medical use of marihuana* is now located in MCL 333.26423(h).

immunity from arrest[;] . . . someone 'possesses' a registry identification card only when the registry identification card is reasonably accessible at the location of that person's marijuana possession and use." *People v Nicholson (James)*, 297 Mich App 191, 200, 201 (2012) (holding that the defendant was not immune from arrest under § 4(a) because the "paperwork showing that he had been issued the equivalent of a registry identification card at the time [a] police officer found him to be in possession of marijuana was not reasonably accessible at the location where he was requested to produce it because he was in possession of marijuana in another individual's vehicle away from his residence[,] where the paperwork for his card was located").

d. Failure to Qualify for Immunity from Arrest Does Not Automatically Preclude Immunity from Prosecution or Penalty

"[A] person can fail to qualify for immunity from arrest pursuant to § 4(a), but still be entitled to immunity from prosecution or penalty[; t]herefore, courts must inquire whether a person 'possesses a registry identification card' at the time of arrest, prosecution, or penalty separately." *Nicholson (James)*, 297 Mich App at 199 (concluding that, although the defendant was not immune from *arrest* because his registry identification card was not reasonably accessible at the time of his arrest, the "production of his registry identification card in the district court [when he moved to dismiss his prosecution for possession of marijuana] was sufficient[]" to render him immune from prosecution under § 4(a)).

e. Revocation of Card Irrelevant to Validity

The defendants, holders of registry identification cards who had been convicted of felonies prior to searches that revealed marijuana manufacturing operations in their homes, were not eligible for patient immunity under § 4(a) or caregiver immunity under § 4(b) because, as felons, they could not be caregivers under § 4(b), and they each exceeded the volume limitations for patients under § 4(a); the fact that their caregiver cards had not been revoked by the Department of Licensing and Regulatory Affairs[269] was "irrelevant." *People v Tackman*, 319 Mich App 460, 470-471 (2017). The only revocation provision within the MMMA requires the revocation of a caregiver card "if the caregiver 'sells marihuana to someone who is

not allowed to use marihuana for medical purposes under' the MMMA." *Tackman*, 319 Mich App at 471, quoting MCL 333.26424(k). "The definition of 'caregiver' specifically restricts that status to persons who have 'not been convicted of any felony within the past 10 years,' or 'of a felony involving illegal drugs or . . . that is an assaultive crime,' without regard for whether that person happened to possess a caregiver card at the time of the conviction." *Tackman*, 319 Mich App at 471, quoting MCL 333.26423(k) (ellipses in original). "Thus, whether the caregiver card was revoked or not [at the time of the searches was] irrelevant." *Tackman*, 319 Mich App at 471-472 n 4 (noting that if the department issued the defendant another caregiver card after his conviction, the card was issued "in error" because the defendant no longer met the definition of a caregiver after his conviction). The trial court erred by analogizing the "failure to revoke a caregiver card to the failure of the Secretary of State to revoke a driver's license following a driving offense calling for such revocation." *Id.* at 472. "[T]here is no similar scheme within the statutes criminalizing marijuana and the MMMA[;] [r]ather, the manufacture and delivery of marijuana remains a crime in this state[,]" and "the revocation of a MMMA caregiver card has no bearing on the criminality of delivery and manufacture of marijuana." *Id*.

2. Element 2: Volume Limitations

"The second element—the volume limitations of § 4(a) and § 4(b)—requires that the qualifying patient or primary caregiver be in possession of no more than a specified amount of usable marijuana[270] [and usable marijuana equivalents,[271]] and a specified number of marijuana plants." *Hartwick*, 498 Mich at 218. "[I]n evaluating a § 4 immunity claim, consideration must be given not only to the amount of usable marijuana [and any

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[269] *Tackman* references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred "all of the authorities, powers, duties, functions, and responsibilities" of LARA under the MMMA to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

[270] Note that "what constitutes 'usable marijuana' under the MMMA is irrelevant to what constitutes marijuana for purposes of a punishable crime under MCL 333.7401"; for purposes of MCL 333.7401, marijuana is defined by MCL 333.7106(4). *People v Ventura*, 316 Mich App 671, 679 (2016).

[271] *Hartwick* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The "amount of marihuana" volume limitation found in sections 4(a) and 4(b) of the MMMA now includes the combined total weight of "usable marihuana *and usable marihuana equivalents*[.]" (Emphasis added.)

usable marijuana equivalent[272]] that is possessed but, additionally, to the amount of marijuana that is possessed," even if that marijuana is not usable marijuana or a usable marijuana equivalent. *People v Carruthers*, 301 Mich App 590, 609-610 (2013). Accordingly, "the question of whether a possessor of marijuana possesses an allowed quantity of usable marijuana [or usable marijuana equivalent] is only the beginning of the relevant inquiry under § 4"; the second question "is whether that person possesses *any* quantity of marijuana that does *not* constitute usable marijuana [or a usable marijuana equivalent] under the term-of-art definition of the MMMA." *Id.* at 610. A person is not eligible for § 4 immunity if they possess any marijuana that is not usable marijuana or a usable marijuana equivalent because "the language establishing limited immunity in § 4 of the MMMA expressly conditions that immunity on the person possessing *no* amount of marijuana that does not qualify as usable marijuana [or a usable marijuana equivalent] under the applicable definitions." *Id.* at 610-611 (holding that the defendant failed to meet the requirements for § 4 immunity because he possessed marijuana that did not constitute usable marijuana and thus "was in possession of an amount of marijuana that exceeded the amount of usable marijuana he was allowed to possess").[273]

A qualifying patient may possess up to a combined total of 2.5 ounces of usable marijuana and usable marihuana equivalents or, if he or she cultivates his or her own marijuana and is not connected with a caregiver, up to 12 marijuana plants. *Hartwick*, 498 Mich App at 219; MCL 333.26424(a).

A primary caregiver who is connected with one or more qualifying patients may possess a combined total of 2.5 ounces of usable marijuana and usable marihuana equivalents, and 12 marijuana plants for each qualifying patient, including the caregiver if he or she is also a registered qualifying patient

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[272] *Carruthers* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The "amount of marihuana" volume limitation found in sections 4(a) and 4(b) of the MMMA now includes the combined total weight of "usable marihuana *and usable marihuana equivalents*[.]" (Emphasis added.)

[273] The defendant in *Carruthers* possessed usable marijuana and brownies containing THC, which the Court concluded did not constitute *usable marijuana* under the statutory definition of *usable marijuana* but did constitute *marijuana* under the broader statutory definition of that term. *Carruthers*, 301 Mich App at 610-611. After *Carruthers* was decided, 2016 PA 283 amended the MMMA to include *usable marijuana equivalents* as a permissible type of marijuana possession so long as the person does not possess more than a combined total of 2.5 ounces of usable marijuana and usable marijuana equivalents. The brownies containing THC possessed by the defendant in *Carruthers* would qualify as *usable marijuana equivalents* under the new definition. See MCL 333.26423(o).

acting as his or her own caregiver. *Hartwick*, 498 Mich App at 219; MCL 333.26424(b).

"A qualifying patient or primary caregiver in possession of more marijuana than allowed under § 4(a) and § 4(b) at the time of the charged offense cannot satisfy the second element of immunity." *Hartwick*, 498 Mich App at 219.

Collective growing prohibited. Section 4 "[does not] provide[] a registered primary caregiver with immunity when growing marijuana collectively with other registered primary caregivers and registered qualifying patients[;]" rather, "only one of two people may possess marijuana plants pursuant to §§ 4(a) and 4(b): a registered qualifying patient or the primary caregiver with whom the qualifying patient is connected through the registration process[.]" *Bylsma II*, 493 Mich at 21-22 (holding that because collective growing is not permitted, the defendant possessed more plants than § 4 allows and possessed plants on behalf of patients with whom he was not connected).

Marijuana in the process of drying. Usable marijuana is defined to include only "'the *dried* leaves, flowers, plant resin, or extract of the marijuana plant[.]'" *People v Manuel*, 319 Mich App 291, 300 (2017), quoting MCL 333.26423(n). The term "dried" is not defined by the MMMA; however, the term "clearly indicates a completed condition" because it is "the past participle or past tense of the verb 'dry.'" *Manuel*, 319 Mich App at 301-302 (quotation marks and citations omitted). Accordingly, marijuana that is in the process of "drying," rather than already "dried" is "not usable under [MCL 333.26423(n)]." *Manuel*, 319 Mich App at 303 (holding that where there was evidence that the marijuana seized from the defendant "was in various stages of drying" at the time of the seizure, the trial court did not err in finding that the marijuana was not *usable marijuana*, and accordingly, finding that the defendant satisfied the volume limitations despite the fact that the drying marijuana exceeded the legally permitted amount of *usable marijuana* under §§ 4(a) and 4(b)).[274]

However, in *People v Mansour*, 325 Mich App 339, 343 (2018), the Court held that the defendant was not entitled to § 4 immunity where the defendant argued that under the *Manuel*

[274] *Manuel* did not address *Carruthers*, 301 Mich App at 610, which held that a person does not qualify for § 4 immunity if they possess any amount of marijuana — usable or not — exceeding the statutory limit. The Court in *People v Mansour*, 325 Mich App 339, 351 n 8 (2018), noted that there "is no conflict between *Carruthers* and *Manuel* because *Manuel* . . . decided only whether the marijuana in question was 'drying' not 'dried,'" and noted that the *Mansour* panel was "not bound to repeat *Manuel*'s failure to address the second prong of the *Carruthers* analysis."

decision, marijuana that was in the process of drying "must be excluded" from the total volume of marijuana possessed; the Court rejected the defendant's argument and held that the decision in *Carruthers* — that a person cannot possess any quantity of marijuana that does not constitute usable marijuana — controlled. The Court explained that while "the MMMA was amended after *Carruthers* to add certain protections relative to the medical use of usable marijuana equivalents, the statutory language interpreted in *Carruthers* remains today as it was then in all pertinent respects," and "*Carruthers* is therefore binding with respect to that statutory interpretation." *Mansour*, 325 Mich App at 351 (holding that "[t]he trial court was correct to follow *Carruthers* and to deny defendant's motion to dismiss under § 4," and declining defendant's invitation to follow *Manuel*, which did not complete the *Carruthers* analysis).

3. Element 3: Enclosed, Locked Facility

"The third element of § 4 immunity requires all marijuana plants possessed by a qualifying patient or primary caregiver to be kept in an enclosed, locked facility. Thus, a qualifying patient or primary caregiver whose marijuana plants are not kept in an enclosed, locked facility at the time of the charged offense cannot satisfy the third element and cannot receive immunity for the charged offense." *Hartwick*, 498 Mich at 219.

Collective growing. Collective growing with other registered primary caregivers and/or registered qualifying patients is prohibited. *Bylsma II*, 493 Mich at 21-22. Where the defendant leased a warehouse space that was secured by a single lock and divided into three separate booths that were latched but not locked, the defendant failed to keep his marijuana in an enclosed, locked facility because in order to qualify as an "enclosed, locked facility" the facility "must be such that it allows only one person to possess the marijuana plants enclosed therein[]." *Id.* at 23, 35. Accordingly, the locked warehouse did not constitute an enclosed, locked facility because multiple patients and caregivers collectively grew their marijuana in unlocked booths inside the warehouse. *Id.* at 34-35.

Unlocked Padlocks. "[D]efendant kept his . . . marijuana plants in an enclosed, locked facility[]" as required by MCL 333.26424(a) and as defined by MCL 333.26423(d) where his "grow room was protected by two different doors with locks, the first of which also had two padlocks[; a]lthough the padlocks were not locked and there were keys in the door locks

at the time of the search, [MCL 333.26423(d)] only requires that marijuana be kept in an 'enclosed area *equipped with secured locks*[.]'" *Manuel*, 319 Mich App at 304.

Transport or Transportation of Marijuana. The defendant was not in violation of the requirement that marijuana plants be kept in an enclosed, locked facility where the police found "marijuana plants sitting on a freezer in defendant's garage," but "testimony showed that defendant received the plants just minutes before the search and that he was in the active process of relocating the plants to his grow room." *Manuel*, 319 Mich App at 304. The "*transfer*" and "*transportation*" of marijuana is part of the MMMA's definition of medical use of marijuana. Further, the MMMA "includes criteria to allow a motor vehicle to fall within the definition of an 'enclosed, locked facility[;]' accordingly, "the electorate clearly intended the MMMA to allow the movement of marijuana from one place to another. *Id*., quoting MCL 333.26423(h). "[A] window of time must exist in which a primary caregiver or qualifying patient could legally unlock an enclosed area in which marijuana is being stored and move the marijuana to another enclosed, locked facility." *Manuel*, 319 Mich App at 304-305.

4. Element 4: Medical Use of Marihuana

"Unlike elements two and three, the fourth element does not depend on the defendant's aggregate conduct. Instead, this element depends on whether the conduct forming the basis of each particular criminal charge involved 'the acquisition, possession, cultivation, manufacture, [extraction,] use, internal possession, delivery, transfer, or transportation of marijuana[, marihuana-infused products,] or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.'" *Hartwick*, 498 Mich at 219-220, quoting MCL 333.26423(h).[275]

"Whether a qualifying patient or primary caregiver was engaged in the medical use of marijuana must be determined on a charge-by-charge basis." *Hartwick*, 498 Mich at 220.

[275]Formerly MCL 333.26423(f). See 2016 PA 283, effective December 20, 2016. Note that *Hartwick* was decided before 2016 PA 283 amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*, and the definition of *medical use of marihuana* has been amended as indicated in the additions to the quotation above.

The defendant is entitled to a rebuttable presumption of medical use if he or she satisfies the first two elements, see discussion at Section 8.3(G) and Section 8.3(H).

Sale or Transfer of Marijuana.[276] The definition of *medical use of marihuana* includes the sale of marijuana. *Michigan v McQueen (McQueen II)*, 493 Mich 135, 141 (2013), affirming in part and reversing in part *Michigan v McQueen (McQueen I)*, 293 Mich App 644 (2011).[277] This definition is broad and includes the *transfer* of marijuana for the purposes stated in the statute. See *McQueen II*, 493 Mich at 141. "Because a transfer is '[*a*]*ny* mode of disposing or parting with an asset or an interest in an asset, including . . . *the payment of money*,' the word 'transfer,' . . . also includes sales." *Id.*

However, "the MMMA does not contemplate patient-to-patient sales of marijuana for medical use[.]" *McQueen II*, 493 Mich at 141.[278] "Because the MMMA's immunity provision clearly contemplates that a registered qualifying patient's medical use of marijuana only occur for the purpose of alleviating *his [or her] own* debilitating medical condition or symptoms associated with his [or her] debilitating medical condition, and not *another patient's* condition or symptoms, § 4 does not authorize a registered qualifying patient to transfer marijuana to another registered qualifying patient[;]" therefore, "a business that facilitates patient-to-patient sales of marijuana[]" is not entitled to § 4 immunity. *McQueen II*, 493 Mich at 141.

In *McQueen II*, 493 Mich at 142-143, the defendants[279] operated a dispensary whose members, registered qualifying patients and registered primary caregivers, paid a monthly

[276]Note that *McQueen II* was decided before the passage of the Medical Marihuana Facilities Licensing Act (MMFLA), effective December 20, 2016, 2016 PA 281. The MMFLA permits individuals to obtain licenses to sell and transfer marijuana contrary to the holding of *McQueen.* See Part B for a detailed discussion of the MMFLA.

[277]*McQueen II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. Among other changes, the MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h). Further, the Medical Marihuana Facilities Licensing Act (MMFLA), effective December 20, 2016, 2016 PA 281, was enacted after the *McQueen II* decision. See Part B for a detailed discussion of the MMFLA.

[278]*McQueen II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. Among other changes, the MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h). Further, the Medical Marihuana Facilities Licensing Act (MMFLA), effective December 20, 2016, 2016 PA 281, was enacted after the *McQueen II* decision. See Part B for a detailed discussion of the MMFLA.

[279]One defendant was "both a registered qualifying patient and a registered primary caregiver within the meaning of the MMMA," and the other defendant was a registered primary caregiver. *McQueen II*, 493 Mich at 142.

membership fee in order to access the dispensary's services; "[f]or an additional fee, a member [could] rent one or more lockers to store up to 2.5 ounces of marijuana and make that marijuana available to other . . . members to purchase." The defendants or their employees weighed and packaged the marijuana for purchasing members and collected the purchase price, retaining a "service fee." *Id*. at 143. The *McQueen II* Court reversed *McQueen I* to the extent that it defined "'[m]edical use'" as excluding the sale of marijuana, holding that a sale is encompassed within the meaning of the word "'transfer,'" which is one of the activities included within the definition of "'[m]edical use'" of marijuana in § 3(h).[280] *McQueen II*, 493 Mich at 141, 150. However, the *McQueen II* Court stated that "the Court of Appeals [nevertheless] reached the correct conclusion that defendants [were] not entitled to operate a business that facilitate[d] patient-to-patient sales of marijuana[]" because, "[w]hile the sale of marijuana constitutes 'medical use[,]' . . . § 4 . . . does not permit a registered qualifying patient to transfer marijuana for another registered qualifying patient's medical use."[281] *McQueen II*, 493 Mich at 159-160.[282]

Purchase of Marijuana Plants from a Third Party. The defendant's purchase of marijuana plants from a third party, "with whom he was not connected for purposes of the MMMA," did not establish that the defendant "was not engaged in the medical use of marijuana[]" as required under MCL 333.26424(a)-(b) and as defined by MCL 333.26423(h). *Manuel*, 319 Mich App at 306. Although "[t]he MMMA is silent as to how a qualifying patient or primary caregiver is to obtain marijuana plants for cultivation[,]" MCL 333.26424(b) "does not require a primary caregiver to obtain the marijuana to be used 'for assisting a qualifying patient' from the qualifying patient or another caregiver[,]" and MCL 333.26423(h) "define[s] the medical use of marijuana to include 'the *acquisition* . . . of marihuana . . . .'" *Manuel*, 319 Mich App at 306 (ellipses in original). "Therefore, acquiring marijuana plants that do not exceed the statutory limits cannot rebut the

[280] Formerly MCL 333.26423(e).

[281] *McQueen II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h). Further, the Medical Marihuana Facilities Licensing Act (MMFLA), effective December 20, 2016, 2016 PA 281, was enacted after the *McQueen II* decision. See Part B for a detailed discussion of the MMFLA.

[282] "[T]he retroactive application of [*McQueen I*, 293 Mich App at 644] . . . does not present a due process concern because this decision does not operate as an ex post facto law." *People v Johnson (Barbara)*, 302 Mich App 450, 465 (2013) (holding that "[n]either [*McQueen I* nor *McQueen II*] had the effect of criminalizing previously innocent conduct[because] [t]his is not a case in which marijuana dispensaries were authorized by statute and then, by judicial interpretation, deemed illegal."

presumption that defendant was engaged in the medical use of marijuana[]" in the absence of "evidence that defendant did not intend to use the marijuana he acquired from [the third party] 'to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition'" within the meaning of MCL 333.26423(h). *Manuel*, 319 Mich App at 306-307.

G. Presumption of Medical Use of Marijuana

Both qualifying patients and primary caregivers are presumed to be engaging in the medical use of marijuana under the MMMA if certain conditions are met:

> "There is a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with [the MMMA] if the qualifying patient or primary caregiver complies with both of the following:
>
> (1) Is in possession of a registry identification card.
>
> (2) Is in possession of an amount of marihuana that does not exceed the amount allowed under [the MMMA]."MCL 333.26424(e).

While the qualifying patient or primary caregiver retains the burden of proving the medical use of marijuana element of immunity, proof of the first and second elements required to establish immunity gives rise to the presumption of medical use of marijuana. *Hartwick*, 498 Mich at 220. "Therefore, a qualifying patient or primary caregiver is entitled to the presumption of medical use in § 4(d) simply by establishing the first two elements of § 4 immunity [(possession of a valid registry identification card and compliance with the volume limitations)]." *Hartwick*, 498 Mich at 220-221.[283]

H. Rebutting the Presumption of Medical Use

"The presumption [that a qualifying patient or primary caregiver is engaged in the medical use of marijuana in accordance with the MMMA] may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with [the MMMA]." MCL 333.26424(e)(2).

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[283] *Hartwick* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

"[T]he prosecution may rebut the presumption of medical use for each claim of immunity. Improper conduct related to one charged offense may not be imputed to another charged offense unless the prosecution can establish a nexus between the improper conduct and the otherwise MMMA-compliant conduct. The trial court must ultimately determine whether a defendant has established by a preponderance of the evidence that he or she was engaged in the medical use of marijuana." *Hartwick*, 498 Mich at 226.[284]

If the prosecution rebuts the presumption of medical use of marijuana, the defendant may still prove through other evidence that he or she was engaged in the medical use of marijuana in regard to the underlying conduct that resulted in the charged offense or offenses. *Hartwick*, 498 Mich at 226.

1. Courts May Only Consider the Defendant's Conduct

"[O]nly the defendant's conduct may be considered to rebut the presumption of the medical use of marijuana." *Hartwick*, 498 Mich at 222. Accordingly, "the prosecution may not rebut a primary caregiver's presumption of medical use by introducing evidence of conduct unrelated to the primary caregiver, such as evidence that a connected qualifying patient does not actually have a debilitating medical condition or evidence that a connected qualifying patient used marijuana for nonmedical purposes." *Id.* "Similarly, the prosecution may not rebut a qualifying patient's presumption of medical use by introducing evidence that the connected primary caregiver used the qualifying patient's marijuana for nonmedical purposes." *Id.*[285]

Conduct "may be misfeasance as well as nonfeasance[]" and primary caregivers who have actual knowledge that the marijuana provided to a qualifying patient is being used in a manner not permitted under the MMMA may lose the presumption of medical use of marijuana on the basis of their actual knowledge of misuse. *Hartwick*, 498 Mich at 222 n 59.

The right to the medical use of marijuana is personal. See *McQueen II*, 493 Mich at 141, 155, 158, affirming in part and reversing in part *McQueen I*, 293 Mich App 644. "The text of § 4([e])[286] establishes that the MMMA intends to allow 'a

[284] *Hartwick* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

[285] *Hartwick* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

[286] Formerly MCL 333.26424(d). See 2016 PA 283, effective December 20, 2016.

qualifying patient or primary caregiver' to be immune from arrest, prosecution, or penalty *only* if conduct related to marijuana is 'for the purpose of alleviating *the* qualifying patient's debilitating medical condition' or its symptoms. Section 4 creates a *personal* right and protection for a registered qualifying patient's medical use of marijuana, but that right is limited to medical use that has the purpose of alleviating the patient's *own* debilitating medical condition or symptoms. If the medical use of marijuana is for some *other* purpose—even to alleviate the medical condition or symptoms of *a different registered qualifying patient*—then the presumption of immunity attendant to the 'medical use' of marijuana has been rebutted." *McQueen II*, 493 Mich at 141, 155, 158 (holding that § 4 does not authorize a registered qualifying patient to transfer marijuana to another registered qualifying patient).

2. Multiple Transactions

One or more transactions that are outside the scope of the MMMA do not automatically rebut the presumption of medical use for otherwise-compliant conduct. *Hartwick*, 498 Mich at 226. In order for evidence of non-compliant transactions "to rebut the presumption of medical use the prosecution's rebuttal evidence must be relevant, such that the illicit conduct would allow the fact-finder to conclude that the otherwise MMMA-compliant conduct was not for the medical use of marijuana. In other words, the illicit conduct and the otherwise MMMA-compliant conduct must have a nexus to one another in order to rebut the § 4([e])[287] presumption." *Hartwick*, 498 Mich at 225.[288]

For example, in *People v Tuttle*, 304 Mich App 72 (2014), aff'd in part, rev'd in part by *Hartwick*, 498 Mich at 245,[289] the defendant was charged with seven marijuana-related counts. Counts I-III related to transfers of marijuana to an unconnected patient, thus, those transfers were outside the parameters of the MMMA; however, counts IV-VII related to the manufacture of marijuana in the defendant's home. *Tuttle*, 304 Mich App at 77-78. The Court of Appeals held that the noncompliant marijuana transactions negated the defendant's ability to claim § 4 immunity in regard to any of the

[287] Formerly MCL 333.26424(d). See 2016 PA 283, effective December 20, 2016.

[288] *Hartwick* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

[289] The Supreme Court remanded the case in *Tuttle*, 304 Mich App 72, to the trial court for a new § 4 evidentiary hearing to determine whether the defendant was entitled to immunity regarding counts IV-VII. *Hartwick*, 498 Mich at 245.

defendant's marijuana-related conduct. *Tuttle*, 304 Mich App at 82-83. The Supreme Court disagreed, holding that "[o]nly relevant evidence that allows the fact-finder to conclude that the underlying conduct was not for 'medical use' may rebut the § 4([e])[290] presumption. A wholly unrelated transaction—i.e., a transaction with no nexus, and therefore no relevance, to the conduct resulting in the charged offense—does not assist the fact-finder in determining whether the defendant actually was engaged in the medical use of marijuana during the charged offense. Conduct unrelated to the charged offense is irrelevant and does not rebut the presumption of medical use." *Hartwick*, 498 Mich at 225-226.[291]

I. Physicians

Physicians are provided immunity as set out in MCL 333.26424(g):

> "A physician shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau, solely for providing written certifications, in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition, provided that nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions."

[290] Formerly MCL 333.26424(d). See 2016 PA 283, effective December 20, 2016.

[291] *Hartwick* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

1. Failure to Comply with the Requirements of § 4(f)

MCL 333.26424(g)[292] "does not define prohibited conduct and . . . does not authorize punishment for noncompliance." *People v Butler-Jackson*, 307 Mich App 667, 679 (2014), vacated in part on other grounds 499 Mich 965 (2016).[293] Rather than being subject to prosecution, "a physician who fails to comply with [§ 4(g)] is *not* immune from 'arrest, prosecution, or penalty in any manner.'" *Butler-Jackson*, 307 Mich App at 679 (holding that "[§ 4(g)] does not prohibit physicians from issuing written certifications in the absence of a bona fide physician-patient relationship, without conducting a full assessment of medical history, and when a 'professional opinion' cannot be formulated"), quoting MCL 333.26424(g).[294] Accordingly, where a physician and another "were in the business of providing, for a price, physician certifications required to obtain [MMMA] registry identification cards," the physician was improperly charged with conspiracy to commit a legal act in an illegal manner, MCL 750.157a, because failure to comply with § 4(g) is not illegal. *Butler-Jackson*, 307 Mich App at 669, 677.

2. Physician-Patient Relationship

A physician is not entitled to immunity under § 4(g)[295] where there is "no evidence of *any* type of 'physician-patient relationship.'" *Butler-Jackson*, 307 Mich App 667, 674 (2014), vacated in part on other grounds 499 Mich 965 (2016).[296]

J. Providing Marijuana Paraphernalia

Individuals who provide qualifying patients or registered primary caregivers with marijuana paraphernalia are provided immunity as set out in MCL 333.26424(h):

> "A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional

[292]Formerly MCL 333.26424(f). See 2016 PA 283, effective December 20, 2016.

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

[294]Formerly MCL 333.26424(f). See 2016 PA 283, effective December 20, 2016.

[295]Formerly MCL 333.26424(f). See 2016 PA 283, effective December 20, 2016.

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

> licensing board or bureau, for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana."

Marihuana paraphernalia is not defined by the MMMA, and the Michigan Supreme Court specifically held that the definition of *drug paraphernalia*, defined by the PHC at MCL 333.7451, has no bearing on the meaning of *marihuana paraphernalia* as used by the MMMA. *People v Mazur*, 497 Mich 302, 312-313 (2015). Instead, the Court turned to "other conventional means of statutory interpretation[,]" and concluded that "'marihuana paraphernalia' applies both to those items that are specifically designed for the medical use of marijuana as well as those items that are actually employed for the medical use of marijuana." *Id.* at 315. Accordingly, the defendant's provision of sticky notes to her husband, who was both a qualifying patient and a registered caregiver, "for the purpose of detailing the harvest dates of his marijuana plants[]" constituted the provision of marijuana paraphernalia under § 4(h)[297] "because the [sticky notes] were actually used in the cultivation or manufacture of marijuana." *Mazur*, 497 Mich at 318. Because the provision of sticky notes fell within the scope of § 4(h), "the prosecution [was] prohibited from introducing or otherwise relying on the evidence relating to defendant's provision of marihuana paraphernalia—i.e., the sticky notes—as a basis for the criminal charges against defendant." *Mazur*, 497 Mich at 318 (noting that if, on remand, the sticky notes are the only basis for criminal charges, a successful showing under § 4(h) will result in dismissal of charges; but if there is additional evidence supporting criminal charges nothing in § 4(h) prohibits the prosecution from proceeding on the basis of the remaining evidence).

K. Being in the Presence or Vicinity of the Medical Use of Marijuana or Assisting in its Use or Administration

Individuals who are in the presence or vicinity of medical marijuana use or who assist in its use or administration are provided immunity as set out in MCL 333.26424(j):

> "A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for being in the presence or vicinity of the medical use of marihuana in

[297] Formerly MCL 333.26424(g). See 2016 PA 283, effective December 20, 2016.

> accordance with [the MMMA], or for assisting a registered qualifying patient with using or administering marihuana."

MCL 333.26424(j) "offers two distinct types of immunity[.] . . . A person may claim immunity either: (1) 'for being in the presence or vicinity of the medical use of marihuana in accordance with [the MMMA],' or (2) 'for assisting a registered qualifying patient with using or administering marihuana.'" *Mazur*, 497 Mich at 310, quotingMCL 333.26424(j).[298] See also *McQueen II*, 493 Mich at 158 (noting thatMCL 333.26424(j) protects only "two of the . . . activities that encompass medical use[of marihuana]: 'using' and 'administering' marijuana").[299]

The defendant was not entitled to "presence or vicinity" immunity under § 4(j) where she was in the presence and vicinity of her husband's medical use of marijuana, but his "marijuana operation was *not* in accordance with the MMMA." *Mazur*, 497 Mich at 310-311.

Immunity under § 4(j) for assisting in use and administration of marijuana is "limited to conduct involving the actual ingestion of marijuana[; t]hus, by its plain language, § 4(j) permits, for example, the spouse of a registered qualifying patient to assist the patient in ingesting marijuana, regardless of the spouse's status." *McQueen II*, 493 Mich at 158. However, § 4(j) "does not apply . . . to any patient-to-patient transfers of marijuana[]" because "[t]he transfer, delivery, and acquisition of marijuana are three activities that are part of the medical use of marijuana that the drafters of the MMMA chose not to include as protected activities within § 4(j)." *McQueen II*, 493 Mich at 157-158 (holding that the defendants, who, through the operation of their medical marijuana dispensary, "actively facilitat[ed] patient-to-patient sales for pecuniary gain[,]" were not entitled to immunity under § 4(j)) (quotation marks omitted).[300]

The defendant was not entitled to "assisting in the use or administration" immunity under § 4(j) where she was assisting the defendant in the cultivation of marijuana because "assisting in the cultivation of marijuana does not constitute assistance with 'using' or 'administering' marijuana[.]" *Mazur*, 497 Mich at 312.

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[298]Formerly MCL 333.26424(i). See 2016 PA 283, effective December 20, 2016.

[299]Formerly MCL 333.26424(i). See 2016 PA 283, effective December 20, 2016. Additionally, *McQueen II* was decided before 2016 PA 283 amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

[300]*McQueen II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA was relettered and now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

8.4 Immunity Under § 4a

"A registered qualifying patient or registered primary caregiver shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for any of the following:

> (a) Transferring or purchasing marihuana in an amount authorized by [the MMMA] from a provisioning center licensed under the medical marihuana facilities licensing act[(MMFLA)].
>
> (b) Transferring or selling marihuana seeds or seedlings to a grower licensed under the [MMFLA].
>
> (c) Transferring marihuana for testing to and from a safety compliance facility licensed under the [MMFLA]." MCL 333.26424a(2).

8.5 Affirmative Defense Under § 8

"Section 8 [(MCL 333.26428)] of the MMMA provides a limited protection for the use of medical marijuana in criminal prosecutions, which requires dismissal of the charges if all the elements of the defense are established." *People v Kolanek (Kolanek II)*, 491 Mich 382, 415 (2012). "Registered patients who do not qualify for immunity under § 4, as well as unregistered persons, are entitled to assert in a criminal prosecution the affirmative defense of medical use of marijuana under § 8 of the MMMA, MCL 333.26428." *Kolanek II*, 491 Mich at 415; see also *People v Bylsma (Bylsma II)*, 493 Mich 17, 35-36 (2012). "[A]n individual who qualifies as a patient or a primary caregiver may assert a § 8 defense regardless of his or her registration status and the registration status of the patient or primary caregiver, if any, with which he or she is affiliated." *People v Bylsma (On Remand)*, 315 Mich App 363, 379-380 (2016). The affirmative defense under § 8 "is only applicable to criminal prosecutions." *Varela v Spanski*, 329 Mich App 58, 73, 74 (2019) (finding the trial court erred by relying on § 8 in granting a motion for summary disposition).

A. Statutory Authority

"Except as provided in [MCL 333.26427(b)[301]], a patient and a patient's primary caregiver, if any, may assert the medical purpose

[301] MCL 333.26427(b) "provides a list of places where and situations in which the MMMA prohibits a person from using or possessing marijuana." *Kolanek II*, 491 Mich at 399-400. See Section 8.2(B).

for using marihuana as a defense to any prosecution[302] involving marihuana, and this defense shall be presumed valid where the evidence shows that:

> (1) A physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition;
>
> (2) The patient and the patient's primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition; and
>
> (3) The patient and the patient's primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition." MCL 333.26428(a).

B. Procedural Requirements

"A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in [MCL 333.26428(a)]." MCL 333.26428(b).

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[302] "[B]y its own terms, § 8(a) only applies 'as a defense to any *prosecution* involving marihuana[,]' . . . [and t]he text and structure of § 8 establish that . . . 'prosecution' refer[s] only to a criminal proceeding." *McQueen II*, 493 Mich at 159 (holding that the defendants could not raise a § 8 defense in a civil action seeking to enjoin the operation of the defendants' medical marijuana dispensary). See also *Varela v Spanski*, 329 Mich App 58, 73, 74 (2019).

1. Defense Must Be Asserted Before Trial

"[T]he § 8 defense cannot be asserted for the first time at trial"; rather, it must be raised "in a pretrial motion to dismiss and for an evidentiary hearing." *Kolanek II*, 491 Mich at 411, 415. See also *Bylsma II*, 493 Mich at 36-37 (holding that, although the defendant could not prevail on his claim of immunity under § 4, he was entitled, on remand, "to assert [a defense under § 8] in a motion to dismiss" because he had reserved the right to raise such a defense and because his case had not yet proceeded to trial); *People v Anderson (On Remand)*, 298 Mich App 10, 19-20 (2012) (vacating the trial court's order denying the defendant's motion to dismiss under § 8 and remanding for a new evidentiary hearing consistent with *Kolanek II*, 491 Mich 382).

2. Unconditional Guilty Plea Waives § 8 Defense

Section 8 "is an affirmative defense to charges that the prosecution *has* the right to bring against a defendant," and "defendants raising a Section 8 defense must ultimately be able to prove their factual entitlement to that defense *at trial*." *People v Cook*, 323 Mich App 435, 450, 451 (2018). "Thus, a Section 8 defense does not implicate the right of a prosecutor to bring a defendant to trial in the first instance, as the defense specifically contemplates the matter potentially proceeding to a trial, where the defense will be weighed by the jury." *Cook*, 323 Mich App at 451. Accordingly, an unconditional guilty plea waives the § 8 defense because guilty pleas waive "'all the rights and challenges associated with [a] trial.'" *Cook*, 323 Mich App at 451, citing *People v New*, 427 Mich 482, 492 (1986). Therefore, a defendant cannot appeal a trial court's denial of a motion to dismiss and a motion for an evidentiary hearing under § 8 after tendering an unconditional guilty plea. *Cook*, 323 Mich App at 451.

3. Burden of Proof

A defendant raising the § 8 affirmative defense bears the burden of proof and must prove the affirmative defense by a preponderance of the evidence. *Hartwick*, 498 Mich at 228 n 69.

4. Possible Outcomes Following Evidentiary Hearing

The trial court must deny the defendant's motion to dismiss if the defendant fails to present evidence from which a reasonable jury could conclude that the defendant satisfied the elements of the § 8 affirmative defense. *Hartwick*, 498 Mich at

227; *Kolanek II*, 491 Mich at 416. The defendant is not permitted to present the § 8 defense to the jury when his or her motion to dismiss under § 8 is denied. *Hartwick*, 498 Mich at 227. The defendant may apply for interlocutory leave to appeal. *Kolanek II*, 491 Mich at 416. See also MCR 6.126 (addressing interlocutory applications for leave to appeal decisions on admissibility of evidence).

However, "[i]f a defendant moves for dismissal of criminal charges under § 8 and at the evidentiary hearing establishes prima facie evidence of all the elements of the § 8 affirmative defense, but material questions of fact exist, then dismissal of the charges is not appropriate and the defense must be submitted to the jury." *Kolanek II*, 491 Mich at 416.

The defendant is entitled to dismissal where he or she proves the elements of § 8 by a preponderance of the evidence and no questions of fact exist. MCL 333.26428(b).

C. Requirement that Defendant Qualify as a Patient or Primary Caregiver

"[A] defendant who possessed, cultivated, manufactured, sold, transferred or delivered marijuana to someone with whom he or she was not formally connected through the MMMA registration process may be entitled to raise an affirmative defense under § 8. "*People v Bylsma (On Remand)*, 315 Mich App 363, 380 (2016). However, "in order for such a defendant to be entitled to raise a defense under § 8, he or she must qualify as a 'patient' or 'primary caregiver' *as those terms are defined and limited under the MMMA*." *Bylsma (On Remand)*, 315 Mich App at 380 (citation omitted). Accordingly, "a defendant may not raise a § 8 defense in a prosecution for patient-to-patient transactions involving marijuana, caregiver-to-caregiver transactions involving marijuana, transactions that do not involve a patient for whom the defendant serves as a *primary* caregiver, and transactions involving marijuana that do not involve the defendant's own *primary* caregiver, as "patient" and "primary caregiver" are defined and expressly limited under the [MMMA]. Only conduct directly arising from the traditional patient and primary-caregiver relationship is subject to an affirmative defense under § 8." *Bylsma (On Remand)*, 315 Mich App at 384.

"The plain language of the MMMA indicates that a patient can only have one 'primary caregiver,' and an individual may only serve as a 'primary caregiver' for no more than five patients." *Bylsma (On Remand)*, 315 Mich App at 386 (citation omitted). "Thus, even though the plain language of § 8 does not specifically require a

'primary caregiver' to be connected to a 'patient' through the registration process under the MMMA, the defense available under § 8 is limited by other provisions in the act, which restrict the number of primary caregivers that a patient can have and restrict the number of patients that a primary caregiver can serve." *Bylsma (On Remand)*, 315 Mich App at 386 (citations omitted). Accordingly, "to be eligible to raise a defense under § 8 in a prosecution for marijuana-related conduct, . . . an individual must either be a 'patient' himself [or herself] or the 'primary caregiver' of no more than five qualifying patients, as those terms are defined and understood under the MMMA." *Bylsma (On Remand)*, 315 Mich App at 382, 387 (holding, in two consolidated cases, that the trial courts properly denied the defendants' motions to dismiss and held that they could not raise § 8 as an affirmative defense, because "no reasonable juror could have concluded that [either defendant was] entitled to an affirmative defense under § 8, as the undisputed facts of each case demonstrate[d] that neither of them served as a 'primary caregiver' or 'patient,' as those terms are defined and limited under the MMMA and used in § 8, when they operated the cooperative growing operation and medical marijuana dispensary that resulted in the charges brought against them") (citation omitted).

D. Elements of a § 8 Defense[303]

"A defendant is entitled to the dismissal of criminal charges under § 8 if, at the evidentiary hearing, the defendant establishes all the elements of the § 8 affirmative defense, which are[:] (1) '[a] physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana[;]' (2) the defendant did not possess an amount of marijuana that was more than 'reasonably necessary for this purpose[;]' and (3) the defendant's use was 'to treat or alleviate the patient's serious or debilitating medical condition or symptoms . . . .'" *Kolanek II*, 491 Mich at 415-416, quoting MCL 333.26428(a). "As long as a defendant can establish these elements, no question of fact exists regarding these elements, and none of the circumstances in § 7(b), MCL 333.26427(b), exists,[304] then the defendant is entitled to dismissal of the criminal charges." *Kolanek II*, 491 Mich at 416.

[303] See the Michigan Judicial Institute's flowchart depicting the process in response to a motion for dismissal under § 8 of the MMMA as set out in *Hartwick*, 498 Mich at 227-237.

To facilitate appellate review, the trial court must make findings on the elements. See generally *People v Bryan*, 504 Mich 978, 978 (2019) (remanding to the trial court to make findings on the second element because failure to do so resulted in a premature conclusion by the Court of Appeals on that element).

1. Element 1: Physician's Statement

"Section 8(a)(1) requires a physician to determine the patient's suitability for the medical use of marijuana." *Hartwick*, 498 Mich at 228. This first element may be reduced to three sub-elements:

> "(1) The existence of a bona fide physician-patient relationship,
>
> (2) in which the physician completes a full assessment of the patient's medical history and current medical condition, and
>
> (3) from which results the physician's professional opinion that the patient has a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition." *Hartwick*, 498 Mich at 229.

"Each of these elements must be proved in order to establish the imprimatur of the physician-patient relationship required under § 8(a)(1) of the MMMA." *Hartwick*, 498 Mich at 229. Mere possession of a valid registry identification card does *not* establish all three elements. *Id.*

a. Bona Fide Physician-Patient Relationship

To satisfy this element, "there must be proof of an actual and ongoing physician-patient relationship at the time the written certification was issued." *Hartwick*, 498 Mich at 231.

"[A] defendant may present patient testimony or other evidence to satisfy his or her burden of presenting prima facie evidence of the elements of § 8(a). A defendant who submits proper evidence would not likely need his or her

[304] "[E]ven if a defendant can establish the elements of the affirmative defense under § 8, the defendant will not be entitled to dismissal under § 8 if the possession or medical use of marijuana at issue was in a manner or place prohibited under § 7(b) [(MCL 333.26427(b))]," which "provides a list of places where and situations in which the MMMA prohibits a person from using or possessing marijuana." *Kolanek II*, 491 Mich at 399-400. See Section 8.2(B).

physician to testify to establish prima facie evidence of any element of § 8(a)." *Hartwick*, 498 Mich at 231-232, n 77.

A registry identification card on its own is not sufficient to prove the existence of a bona fide physician-patient relationship. *Hartwick*, 498 Mich at 230. However, the text of the written certification submitted in order to obtain a registry identification card might suffice to satisfy this element if a statement indicating that the written certification was prepared in the course of a bona fide physician-patient relationship is included in the certification. *Id.* at 231-232, n 77.

Statutory definition. Effective April 1, 2013, "'[b]ona fide physician-patient relationship'" is defined in MCL 333.26423(a). However, this definition "is . . . not applicable to cases . . . that arose before that date." *People v Tuttle*, 304 Mich App 72, 89 (2014), aff'd in part and rev'd in part *Hartwick*, 498 Mich at 246.

Primary caregivers. "A primary caregiver has the burden of establishing the elements of § 8(a)(1) for each patient to whom the primary caregiver is alleged to have unlawfully provided marijuana." *Hartwick*, 498 Mich at 232. Thus, a primary caregiver assumes the risk that his or her patients do not actually meet the elements of § 8(a)(1) or that his or her patients refuse to cooperate in a prosecution of the primary caregiver. *Hartwick*, 498 Mich at 232.

Timing of physician statement. A defendant "must have obtained the physician's statement [required by § 8(a)(1)] after enactment of the MMMA, but before the commission of the offense." *Kolanek II*, 491 Mich at 416. The defendant failed to satisfy the physician statement requirement where the physician's statements that the defendant would receive a therapeutic benefit from using marijuana were made prior to the enactment of the MMMA and six days after the defendant's arrest for marijuana possession. *Id.* at 404-410. With respect to the pre-MMMA statement, the Court held that "[b]ecause the MMMA does not apply retroactively, . . . physician[s'] statements made before its enactment cannot satisfy § 8(a)(1)." *Kolanek II*, 491 Mich at 406. Turning to the postoffense statement, the Court concluded that "[w]hen subdivisions (1) through (3) [of § 8(a)] are read together, it becomes clear that the physician's statement must necessarily have occurred before the commission of the

offense if it is to be used as the basis for a § 8 defense." *Kolanek II*, 491 Mich at 406. The Court explained:

> "[T]he [present-perfect-tense] term 'has stated' [in § 8(a)(1)] indicates that the physician's statement must have been made sometime before a defendant filed the motion to dismiss under § 8 but not necessarily before commission of the offense.
>
> Other language of § 8(a)(1), however, . . . contemplates that a patient will not start using marijuana for medical purposes until after the physician has provided a statement of approval. It necessarily follows that any marijuana use before the physician's statement was not for medical purposes.

The language of § 8(a)(2) and [§ 8(a)](3) supports this conclusion[;] . . . [b]oth provisions presuppose a physician's prior diagnosis of a serious or debilitating medical condition or symptoms before a patient may treat the condition with marijuana. Consequently, reading these provisions together, it is clear that the physician's statement under § 8(a)(1) must have been made before a patient began using marijuana for medical purposes." *Kolanek II*, 491 Mich at 407-408.

b. Full Assessment by a Physician

In cases arising before April 1, 2013, possession of a registry identification card is not sufficient to establish this element. *Hartwick*, 498 Mich at 230. In those cases, this element "must be established through medical records or other evidence submitted to show that the physician actually completed a full assessment of the patient's medical history and current medical condition before concluding that the patient is likely to benefit from the medical use of marijuana and before the patient engages in the medical use of marijuana." *Hartwick*, 498 Mich at 230-231.

However, possession of a valid registry identification card issued on or after April 1, 2013, is sufficient to satisfy this element. Registry identification cards issued on or after April 1, 2013 satisfy this element because the MMMA was amended in 2012 to require the written certification[305] necessary for obtaining a registry identification card to include an additional requirement that a physician

conducted a full, in-person assessment of the patient. *Hartwick*, 498 Mich at 229, 230 n 72, n 74; 2012 PA 512, effective April 1, 2013. A registry identification card may be relied on because MCL 333.26426(c) provides that the Cannabis Regulatory Agency[306] "shall verify the information contained in an application [for a registry identification card]" and "may deny an application . . . only if the applicant did not provide the information required pursuant to this section, or if the marijuana regulatory agency[307] determines that the information provided was falsified." See also *Hartwick*, 498 Mich at 229, n 72.

Note that possession of a registry identification card is not required under § 8; and a defendant without a registry identification card may prove this element by offering other evidence of a full assessment by a physician. See MCL 333.26428.

c. Debilitating Medical Condition

Possession of a valid registry identification card is sufficient to prove that the patient has a debilitating medical condition and will likely benefit from the medical use of marijuana. *Hartwick*, 498 Mich at 230.

2. Element 2: Reasonably Necessary Amount of Marijuana

There is no specific quantity of marijuana that is reasonable in all circumstances; rather, the reasonableness of the amount of marijuana possessed must be evaluated on a case-by-case basis. See *Hartwick*, 498 Mich at 233-235 (rejecting the notion that the specific quantity limits in § 4 apply to § 8 and evaluating reasonableness on a case-by-case basis); *People v Carruthers*, 301 Mich App 590, 616 (2013) (holding that the availability of § 8 defense is not conditioned on possession of a limited quantity of usable marijuana,[308] and that the defense

[305] A written certification prepared by a physician is one of the materials that must be submitted by an applicant in order to obtain a registry identification card. MCL 333.26426(a)(1).

[306] MCL 333.26426(c) references the Marijuana Regulatory Agency; however, the Marijuana Regulatory Agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

[307] MCL 333.26426(c) references the Marijuana Regulatory Agency; however, the Marijuana Regulatory Agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

may be available without regard to the quantity of marijuana possessed).

a. Possession of Registry Identification Card Does Not Prove Reasonableness

"The issuance of a registry identification card . . . does not show that an individual possesses only a 'reasonably necessary' amount of marijuana 'to ensure uninterrupted availability' for the purposes of § 8(a)(2)." *Hartwick*, 498 Mich at 233. "A registry identification card simply qualifies a patient for the medical use of marijuana. It does not guarantee that an individual will always possess only the amount of marijuana allowed under the MMMA." *Id.* at 233-234.

b. Compliance With The Volume Limitations of § 4 Does Not Establish Reasonableness Under § 8

"[C]ompliance with the volume limitations in § 4 does not show that an individual possesses only a 'reasonably necessary' amount of marijuana 'to ensure uninterrupted availability' for the purposes of § 8(a)(2)." *Hartwick*, 498 Mich at 233. "[N]othing in the MMMA supports the notion that the quantity limits found in the immunity provision of § 4 should be judicially imposed on the affirmative defense provision of § 8. Sections 4 and 8 feature contrasting statutory language intended to serve two very different purposes. Section 4 creates a specific volume limitation applicable to those seeking immunity. In contrast, § 8 leaves open the volume limitation to that which is 'reasonably necessary.' The MMMA could have specified a specific volume limitation in § 8, but it did not. In the absence of such an express limitation, we will not judicially assign to § 8 the volume limitation in § 4 to create a presumption of compliance with § 8(a)(2)." *Hartwick*, 498 Mich at 234 (footnote omitted).

c. Patients

"A patient seeking to assert a § 8 affirmative defense may have to testify about whether a specific amount of marijuana alleviated the debilitating medical condition and if not, what adjustments were made to the

[308]Note that "what constitutes 'usable marijuana' under the MMMA is irrelevant to what constitutes marijuana for purposes of a punishable crime under MCL 333.7401"; for purposes of MCL 333.7401, marijuana is defined by MCL 333.7106(4). *People v Ventura*, 316 Mich App 671, 679 (2016).

consumption rate and the amount of marijuana consumed to determine an appropriate quantity. Once the patient establishes the amount of usable marijuana[309] needed to treat the patient's debilitating medical condition, determining whether the patient possessed 'a quantity of marihuana that was not more than was reasonably necessary to ensure [its] uninterrupted availability' also depends on how the patient obtains marijuana and the reliability of this source. This would necessitate some examination of the patient/caregiver relationship." *Hartwick*, 498 Mich at 234-235.

d. Primary Caregivers

"Primary caregivers must establish the amount of usable marijuana[310] needed to treat their patients' debilitating medical conditions and then how many marijuana plants the primary caregiver needs to grow in order ensure "uninterrupted availability" for the caregiver's patients. This likely would include testimony regarding how much usable marijuana each patient required and how many marijuana plants and how much usable marijuana the primary caregiver needed in order to ensure each patient the "uninterrupted availability" of marijuana." *Hartwick*, 498 Mich at 235.

3. Element 3: Use of Marijuana for Medical Purpose

"Section 8(a)(3) requires that both the patient's and the primary caregiver's use of marijuana be for a medical purpose, and that their conduct be described by the language in § 8(a)(3)." *Hartwick*, 498 Mich at 237. Possession of a registry identification card is not sufficient to establish this element. *Id.* "[P]atients must present prima facie evidence regarding their use of marijuana for a medical purpose regardless [of] whether they possess a registry identification card. Primary caregivers . . . also have to present prima facie evidence of their own use of marijuana for a medical purpose and any patients' use of marijuana for a medical purpose." *Id.*

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[309]Note that "what constitutes 'usable marijuana' under the MMMA is irrelevant to what constitutes marijuana for purposes of a punishable crime under MCL 333.7401"; for purposes of MCL 333.7401, marijuana is defined by MCL 333.7106(4). *People v Ventura*, 316 Mich App 671, 679 (2016).

[310]Note that "what constitutes 'usable marijuana' under the MMMA is irrelevant to what constitutes marijuana for purposes of a punishable crime under MCL 333.7401"; for purposes of MCL 333.7401, marijuana is defined by MCL 333.7106(4). *People v Ventura*, 316 Mich App 671, 679 (2016).

"[S]ufficient prima facie evidence to create a question of fact as to the third element" was presented where "the prosecution [did] not dispute that the defendant grew and smoked marijuana to treat his debilitating medical condition, among other reasons." *People v Bryan*, 504 Mich 978, 978 (2019).

E. Questions of Fact for Jury Determination

If there are questions of fact regarding the elements of the § 8 defense, "dismissal of the charges is not appropriate and the defense must be submitted to the jury." *People v Hartwick*, 498 Mich 192, 227 (2015) (quotation marks and citation omitted). Where a question of fact remains for jury determination, the court should instruct the jury using M Crim JI 12.9 (Medical Marijuana Affirmative Defense).

F. Other Protections Afforded by § 8

"If a patient or a patient's primary caregiver demonstrates the patient's medical purpose for using marihuana pursuant to [MCL 333.26428], the patient and the patient's primary caregiver shall not be subject to the following for the patient's medical use of marihuana:

> (1) disciplinary action by a business or occupational or professional licensing board or bureau; or
>
> (2) forfeiture of any interest in or right to property." MCL 333.26428(c).

8.6 Relationship Between § 4 and § 8

"[A] defendant asserting the § 8 affirmative defense is not required to establish the requirements of § 4, . . . which pertains to broader immunity granted by the [MMMA][;]" rather, "[a]ny defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana[311] or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under § 8[, and a]s long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) exists,[312] that defendant is entitled to the dismissal of criminal charges." *Kolanek II*, 491 Mich at 387, 403.

[311]Note that "what constitutes 'usable marijuana' under the MMMA is irrelevant to what constitutes marijuana for purposes of a punishable crime under MCL 333.7401"; for purposes of MCL 333.7401, marijuana is defined by MCL 333.7106(4). *People v Ventura*, 316 Mich App 671, 679 (2016).

"[Sections] 4 and 7(a) have no bearing on the requirements of § 8, and the requirements of § 4 cannot logically be imported into the requirements of § 8 by means of § 7(a)." *Kolanek II*, 491 Mich at 401-402 (explaining that "[b]oth §§ 4 and 7(a) refer to the 'medical use' of marijuana, ...[while] § 8 refers . . . to the 'medical purpose' of marijuana and refers only to 'patients,' not 'registered qualifying patient[s]'").[313] The Court rejected the prosecution's argument that this reading of § 8 "affords unregistered patients more protection under the MMMA than registered patients," and explained:

> "The stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the [MMMA] in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges. If registered patients choose not to abide by the stricter requirements of § 4, they will not be able to claim this broad immunity, but will be forced to assert the affirmative defense under § 8, just like unregistered patients. In that instance, registered patients will be entitled to the same lower level of protection provided to unregistered patients under § 8. This result is not absurd, but is the consequence of the incentives created by the wider protections of § 4." *Kolanek II*, 491 Mich at 403.

See also *Anderson*, 298 Mich App at 18-19 (holding that "the trial court erred when it determined that the provisions of § 4 [regarding the permissible amounts of marijuana and plants and the requirement that plants be kept in an 'enclosed, locked facility'] applied to the affirmative defense stated under § 8" and "by assessing the weight and credibility to be given [the defendant's] evidence and by resolving any factual disputes[,]" and holding that "[t]he trial court's sole function at the [evidentiary] hearing was to assess the evidence to determine whether, as a matter of law, [the defendant] presented sufficient evidence to establish a prima facie defense under § 8 and, if he did, whether there were any material factual disputes on the elements of that defense that must be resolved by the jury").[314]

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[312]"[E]ven if a defendant can establish the elements of the affirmative defense under § 8, the defendant will not be entitled to dismissal under § 8 if the possession or medical use of marijuana at issue was in a manner or place prohibited under § 7(b) [(MCL 333.26427(b))][,]" which "provides a list of places where and situations in which the MMMA prohibits a person from using or possessing marijuana." *Kolanek II*, 491 Mich at 399-400. See Section 8.2(B).

[313]*Kolanek II* was decided before 2016 PA 283 (effective December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

8.7 Other Issues Arising Under the MMMA

A. Agency

Where police found a third defendant, who "was neither a qualifying patient nor a caregiver under the MMMA[,]" watering marihuana plants during the search of one of the other defendant's homes, the third defendant could not claim immunity as an agent of a cardholder; "[b]ecause [the homeowner defendant] did not qualify for immunity, no agent of his [could] claim immunity derived from [him]." *People v Tackman*, 319 Mich App 460, 473, 475 (2017).

B. Ordinances

"Generally, local governments may control and regulate matters of local concern when such power is conferred by the state," but state law "may preempt a local regulation either expressly or by implication." *DeRuiter v Byron Twp*, 505 Mich 130, 140 (2020). "In the context of conflict preemption,[315] a direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id.* (quotation marks and citation omitted). "An examination of whether the MMMA directly conflicts with [a] zoning ordinance must necessarily begin with an examination of both the relevant provisions of the MMMA and of the ordinance." *Id.* at 140-141. Local law cannot "wholly prohibit[] an activity . . . that the MMMA allows. But that does not mean that local law cannot add to the conditions in the MMMA." *Id.* at 144-145 (quotation marks and citation omitted). "[T]he MMMA does not nullify a municipality's inherent authority to regulate land use under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, so long as the municipality does not prohibit or penalize all medical marijuana cultivation, . . . and so long as the municipality does not impose regulations that are unreasonable and inconsistent with regulations established by state law." *DeRuiter*, 505 Mich at 147-148 (quotation marks and citation omitted). Accordingly, "a local regulation that limits *where* medical marijuana must be

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[314]The *Anderson* Court "decline[d] to review de novo the evidence presented at the hearing to determine whether [the defendant] established his defense[,]" and instead "remand[ed the] matter to the trial court to conduct a new § 8 evidentiary hearing consistent with [*Anderson*, 298 Mich App 10,] and . . . [*Kolanek II*, 491 Mich 382]." *Anderson*, 298 Mich App at 19-20. Additionally, the *Anderson* Court declined to address whether "the trial court improperly required [the defendant] to prove through expert testimony that the amount of marijuana plants and plant material that he had possessed was reasonably necessary[,]" noting that the trial court "did not directly rule on . . . whether it was necessary for either party to support or contest a particular element with expert testimony." *Id.* at 14, 19.

[315]Conflict preemption occurs "when a local regulation directly conflicts with state law[.]" *DeRuiter*, 505 Mich at 140.

cultivated" by imposing a "locational restriction" allowing medical marijuana cultivation as "a home occupation" only, does not conflict with the "'enclosed locked facility' requirement in the MMMA," which "concerns what type of structure marijuana plants must be kept and grown in for a patient or caregiver to be entitled to the protections offered by MCL 333.26424(a) and [MCL 333.26424](b)," but "does not speak to *where* marijuana may be grown." *DeRuiter*, 505 Mich at 143-144 (noting that an "enclosed, locked facility could be found in various locations on various types of property").[316] The Court explained that there was no contradiction between the local ordinance and state law because "[t]he geographical restriction imposed by [the township's] zoning ordinance adds to and complements the limitations imposed by the MMMA," and "the local ordinance goes further in its regulation but not in a way that is counter to the MMMA's conditional allowance on the medical use of marijuana." *Id.* at 147. See also *York Twp v Miller (On Remand)*, 335 Mich App 539, 544 (2021) (applying *DeRuiter* to conclude that the township's zoning ordinance did not directly conflict with the MMMA where it "allowed for the cultivation of medical marijuana by primary caregivers as a 'home occupation' and required that the caregiver cultivate the marijuana inside a residence").

A city ordinance prohibiting "'[u]ses that are contrary to federal law,'" which was adopted for the purpose of "'regulat[ing] the growth, cultivation and distribution of medical marihuana in the [city] by reference to the federal prohibitions[317] regarding manufacturing and distribution of marijuana,'" was in "direct conflict with the MMMA," and was therefore void and unenforceable. *Ter Beek v City of Wyoming*, 297 Mich App 446, 450, 453, 456-457 (2012), aff'd 495 Mich 1 (2014). Noting that "[a] city ordinance that purports to prohibit what a state statute permits is void," the *Ter Beek* Court held that "because the ordinance . . . provides for punishment of qualified and registered medical-marijuana users in the form of fines and injunctive relief, which constitute penalties that the MMMA expressly prohibits," the ordinance was preempted by MCL 333.26424(a) and could not be enforced. *Ter Beek*, 297 Mich App at 453, 456-457.[318] Additionally, the Court concluded that federal law prohibiting the use of marijuana did not preempt the MMMA. *Id*. at 457-464. Noting that,

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[316]The Court similarly held that the township's permit requirement did not directly contradict with the MMMA because it did not "effectively prohibit the medical use of marijuana" by requiring primary caregivers "to obtain a permit and pay a fee before they use a building or structure within the township for the cultivation of medical marijuana." *DeRuiter*, 505 Mich at 149. The Court noted that it expressed "no opinion on whether the requirements for obtaining a permit from the township are so unreasonable as to create a conflict with the MMMA because that argument has not been presented," and further noted that it was not considering any field preemption arguments because the lower courts decided the case on the basis of conflict preemption and did not reach the issue of field preemption. *Id.*

[317] See 21 USC 841(a)(1); 21 USC 812(c)(10).

as acknowledged in MCL 333.26422(c), "the immunity [provided for in § 4(a)] was not intended to exempt qualified medical-marijuana users from federal prosecutions," and that "Congress cannot require the states to enforce federal law," the Court held that "MCL 333.26424(a) is not preempted by the [federal Controlled Substances Act (CSA), 21 USC 801 *et seq*.,] because the limited grant of immunity from a 'penalty in any manner' pertains only to state action and does not purport to interfere with federal enforcement of the CSA." *Ter Beek*, 297 Mich App at 462-464.

C. Employment Issues

Termination from employment. Section 4(a) does not "restrict[] the ability of a private employer to discipline an employee for drug use where the employee's use of marijuana is authorized by the state." *Casias v Wal-Mart Stores, Inc*, 695 F3d 428, 436 (CA 6, 2012).[319] In *Casias*, 695 F3d at 431-432, the plaintiff, who had been issued a registry identification card under the MMMA, was terminated from his employment with the defendant when he failed a drug test that was administered in accordance with the defendant's policy after the plaintiff suffered a workplace injury. The district court dismissed the plaintiff's lawsuit claiming wrongful discharge and violation of the MMMA, and the Sixth Circuit Court of Appeals affirmed, holding that "the MMMA [does not] protect[] patients against disciplinary action in a private employment setting for using marijuana in accordance with Michigan law." *Id.* at 432, 434. The *Casias* Court rejected the plaintiff's assertion that the word "business" in § 4(a)[320] refers to private employers, holding that "it is clear that [§ 4(a)] uses the word 'business' to refer to a 'business' licensing board or bureau, just as it refers to an 'occupational' or 'professional' licensing board or bureau[, and t]he statute is simply asserting that a 'qualifying patient' is not to be penalized or disciplined by a 'business or occupational or professional licensing board or bureau' for his [or her] medical use of marijuana." *Casias*, 695 F3d at 435-436.

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[318] In *DeRuiter*, the Court clarified that a conflict existed in *Ter Beek* because the local ordinance "had the effect of wholly prohibiting an activity (the medical use of marijuana) that the MMMA allows," and the reason that the sanction imposed for violating the ordinance in *Ter Beek* was in direct conflict with the MMMA's immunity language was because "the ordinance left no room whatsoever for the medical use of marijuana." *DeRuiter*, 505 Mich at 144-145.

[319] Though persuasive, Michigan state courts "are not . . . bound by the decisions of the lower federal courts[.]" *People v Gillam*, 479 Mich 253, 261 (2007).

[320] Section 4(a) provides, in part, that "[a] qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with [the MMMA][.]" MCL 333.26424(a).

Eligibility for unemployment. The MMMA's immunity clause applies to individuals who are terminated by private employers on the basis of their medical marijuana use in regard to their eligibility for unemployment benefits. *Braska v Challenge Mfg Co*, 307 Mich App 340, 343 (2014). In *Braska*, the Court held that the *Casias* decision was "not binding precedent," and further distinguished *Casias* because it involved action solely by private employers. *Braska*, 306 Mich App at 362. In contrast, the issue in *Braska* was whether the Michigan Compensation Appellate Commission (MCAC), a state actor, "imposed a penalty upon claimants that ran afoul of the MMMA's broad immunity clause." *Id.* at 363. The Court held that "an employee who possesses a registration identification card under the [MMMA] is [not] disqualified from receiving unemployment benefits under the Michigan Employment Security Act, (MESA), MCL 421.1 *et seq*., after the employee has been fired for failing to pass a drug test as a result of marijuana use." *Braska*, 307 Mich App at 343. Where there is "no evidence to suggest that [a] positive drug test[was] caused by anything other than [a] claimant['s] use of medical marijuana in accordance with the terms of the MMMA, the denial of [unemployment] benefits constitute[s] an improper penalty for the medical use of marijuana under the MMMA, MCL 333.26424(a)[,]" even though a positive test for marijuana "would ordinarily . . . disqualif[y the claimant] for unemployment benefits under the MESA, MCL 421.29(1)(m)[.]" *Braska*, 307 Mich App at 365.

Withdrawal of conditional employment offer. Section 4(a) of the MMMA did not prohibit the defendant – a municipal utility – from rescinding a conditional offer of employment to the plaintiff after she tested positive for THC due to the use of medical marijuana because § 4(a) "does not create affirmative rights but instead provides *immunity from* penalties and the denial of rights or privileges based on the medical use of marijuana," and "[i]n this case, plaintiff cannot show that she incurred such a penalty or was denied such a right or privilege because the harm she suffered was the loss of an employment opportunity in which she held absolutely no right or property interest." *Eplee v Lansing*, 327 Mich App 635, 657 (2019) (plaintiff failed to rebut "the presumption that the position offered to her by the [defendant] was terminable at the will of the [defendant]"). Section 4(a) "does not provide an independent *right* protecting the medical use of marijuana in all circumstances, nor does it create a protected class for users of medical marijuana." *Eplee*, 327 Mich App at 655, 657. "Plaintiff in this case has failed to allege facts showing that she suffered the type of harm contemplated under [MCL] 333.26424(a), i.e., as applicable here, a 'penalty,'" and § 4(a) "therefore does not provide plaintiff a cause of action under these circumstances[.]" *Eplee*, 327 Mich App at 657.

D. Illegal Transportation of Marijuana Statute

The "defendant, as a compliant medical marijuana patient, [could not] be prosecuted for violating" MCL 750.474, concerning the illegal transportation of marijuana, because "MCL 750.474 is not part of the MMMA[]" and "unambiguously seeks to *place additional requirements* on the transportation of medical marijuana beyond those imposed by the MMMA[;]" "if another statute is inconsistent with the MMMA such that it punishes the proper use of medical marijuana, the MMMA controls and the person properly using medical marijuana is immune from punishment." *People v Latz*, 318 Mich App 380, 385 (2016).

E. Operating a Motor Vehicle[321]

"The Michigan Medical Marihuana Act (MMMA) prohibits the prosecution of registered patients who internally possess marijuana, but the act does not protect registered patients who operate a vehicle while 'under the influence' of marijuana." *People v Koon*, 494 Mich 1, 3 (2013); see MCL 333.26427(b)(4). Being "'under the influence' [for purposes of the MMMA] . . . contemplates something more than having any amount of marijuana in one's system and requires some effect on the person." *Koon*, 494 Mich at 6. "'Under the influence' as used in MCL 333.26427(b)(4) is not limited in meaning to how that phrase is understood with regard to the OWI statute[.]" *People v Dupre*, 335 Mich App 126, 139-140 (2020). "A person may be considered 'under the influence' of marijuana if it can be shown that consumption of marijuana had some effect on the person such that it weakened or reduced the defendant's ability to drive such that the defendant drove with less ability than would an ordinary, careful, and prudent driver." *Id.* at 140 (quotation marks and citations omitted).[322]

Although "[t]he Michigan Vehicle Code prohibits a person from driving with any amount of a schedule 1 controlled substance, a list that includes marijuana, in his or her system[, see MCL 257.625(8),]" the zero-tolerance provision "does not apply to the medical use of marijuana" because "the MMMA's protection supersedes the Michigan Vehicle Code's prohibition[.]" *Koon*, 494 Mich at 3, 7. Thus, the MMMA "allows a registered patient to drive when he or she has indications of marijuana in his or her system but is not otherwise under the influence of marijuana." *Id.* at 3. "[A] registered qualifying patient [may] lose[] immunity because of his or her

[321]For a detailed discussion of operating while intoxicated (OWI) and operating while visibly impaired (OWVI) offenses under MCL 257.625, see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

[322]Additionally observing that "a driver operating while visibly impaired appears to do so negligently, in violation of MCL 333.26427(b)(1)." *Dupre*, 335 Mich App at 138.

failure to act in accordance with the MMMA." *Id.* at 9. However, "the MMMA does not supersede the OWVI statute." *Dupre*, 335 Mich App at 139 (noting that in light of marijuana legalization, the Michigan Supreme Court appears to treat marijuana as if the electors intended that marijuana be treated similar to alcohol). See also *People v Perry*, 338 Mich App 363, 378-379 (2021) (discussing *Dupre*, and noting that a person under 21 who drives with marijuana in his or her system should not be treated "more lightly than a person who does so while legally permitted to possess and consume it" under the MMMA or "more lightly than a person under 21 who drives with alcohol in his or her system").[323]

F. Possession Under the MMMA

The term *possession* is not defined by the MMMA. *People v Bylsma (Bylsma II)*, 493 Mich 17, 31 (2012). Possession is "one . . . activit[y] that constitute[s] the [medical use of marihuana under MCL 333.26423(h)[324]]." *Bylsma II*, 493 Mich at 30-31. "[T]he MMMA incorporates . . . settled Michigan law regarding possession: a person possesses marijuana when he [or she] exercises dominion and control over it." *Id.* at 31. Accordingly, "possession" under the MMMA "'may be either actual or constructive[,]'" and "the essential inquiry . . . is whether there is 'a sufficient nexus between the defendant and the contraband,' including whether '"the defendant exercised a dominion and control over the substance."'" *Bylsma II*, 493 Mich at 31-32, quoting *People v Wolfe*, 440 Mich 508, 519-520 (1992) (internal citations omitted).[325] The defendant possessed 88 marijuana plants where he "was actively engaged in growing all the marijuana in the facility and used his horticultural knowledge and expertise to oversee, care for, and cultivate all the marijuana growing there[,]" all the plants were stored in unlocked grow booths, and the defendant "had the ability to remove any or all of the plants[.]" *Bylsma II*, 493 Mich at 33.

See also *People v Nicholson*, 297 Mich App 191, 200, 201 (2012) (A person "'possesses' a registry identification card only when the registry identification card is reasonably accessible at the location of that person's marijuana possession and use.").

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[323]See Section 8.18 for a discussion of MCL 257.625(8) in the context of the Michigan Regulation and Taxation of Marihuana Act (MRTMA).

[324]*Bylsma II* was decided before 2016 PA 283 (effective on December 20, 2016) amended the MMMA. The MMMA now refers to *medical use of marihuana* rather than simply *medical use*. See MCL 333.26423(h).

[325]See Section 2.2(D) for additional discussion of the term *possession*.

G. Public Place

1. Definition

While the MMMA may permit the medical use of marijuana, it does not permit any person to smoke marijuana "in any public place." MCL 333.26427(b)(3)(B). *Public place* is not defined by the MMMA; accordingly, *public place* must be given its "plain and ordinary" meaning. *People v Carlton*, 313 Mich App 339, 347 (2015). "A 'public place' is generally understood to be any place that is open to or may be used by the members of the community, or that is otherwise not restricted to the private use of a defined group of persons." *Id.* at 348. The Court further explained that "in common usage, when persons refer to a public place, the reference typically applies to a location on real property or a building." *Id.* at 348-349 (noting that "[t]he parking lot of a business that is open for the general public's use—even if it is intended for the use of the business' customers alone—is a public place in this ordinary sense").

2. Caselaw

The immunity provided under § 4, MCL 333.26424, and the defense provided under § 8, MCL 333.26428, "[do not] apply to a person who smokes marijuana in his or her own car while that car is parked in the parking lot of a private business that is open to the general public." *Carlton*, 313 Mich App at 342-343 (citations omitted). "[P]ersons who smoke medical marijuana in a parking lot that is open to use by the general public, even when smoking inside a privately owned vehicle, and even if the person's smoking is not directly detectable by the members of the general public who might be using the lot" are smoking medical marijuana in a public place in violation of MCL 333.26427(b)(3)(B). *Carlton*, 313 Mich App at 350-351 (noting that in determining whether a place is public, "[t]he relevant inquiry is whether the place at issue is generally open to use by the public without reference to a patient's efforts or ability to conceal his or her smoking of marijuana") (citations omitted). See also *People v Anthony*, 327 Mich App 24, 45 (2019) (holding the protections of the MMMA do "not apply to a parked vehicle on a public street"), rev'd in part on other grounds by *People v Duff*, __ Mich __, __ (2024).

H. Traffic Stop—Probable Cause Based on Marijuana[326]

"[I]n light of the voters' intent to legalize marijuana usage and possession, the smell of marijuana, standing alone, no longer constitutes probable cause sufficient to support a search for contraband." *People v Armstrong*, ___ Mich ___, ___ (2025), aff'g 344 Mich App 286 (2022). In *People v Kazmierczak*, 461 Mich 411 (2000), the Michigan Supreme Court held "that the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement." *Armstrong*, ___ Mich at ___, quoting *Kazmierczak*, 461 Mich at 413. However, "*Kazmierczak*'s holding is no longer good law in light of the passage of the MRTMA" in 2018.[327] *Armstrong*, ___ Mich at ___. "MCL 333.27955 provides a list of permissible acts for adults who are 21 years of age or older under the MRTMA, including possessing, using, purchasing, transporting, or processing 2.5 to 15 grams of marijuana." *Armstrong*, ___ Mich at ___. "[N]ow that marijuana possession and use is generally legal, the odor of marijuana does not on its own supply a *substantial* basis for inferring a fair probability that contraband or evidence of illegal activity will be found in a particular place." *Id*. at ___, citing *Illinois v Gates*, 462 US 213, 238 (1983). Going forward, "the appropriate rule is that the smell of marijuana is one factor that may play a role in the probable-cause determination." *Armstrong*, ___ Mich at ___. "Other relevant inculpatory facts might include, for example, an officer's observation of evidence suggesting intoxication or the presence of smoke." *Id*. at ___.

In *Armstrong*, a police officer "observed a Jeep Cherokee parked on the side of the street and allegedly smelled the scent of burnt marijuana coming from the vehicle as she drove by." *Id*. at ___. "Defendant denied smoking marijuana in the car, stating that he had just got into the vehicle." *Id*. at ___. The officer ultimately "asked defendant to step out of the vehicle." *Id*. at ___. The officer "patted him down and handcuffed him." *Id*. at ___. Another police officer "recorded that she observed a black handgun under the front passenger seat as . . . [defendant was being removed] from the vehicle." *Id*. at ___. "Based on the body camera footage, however, the trial court determined that the firearm was not visible until [defendant] had already been removed from the vehicle and that

[326]For a detailed discussion of Fourth Amendment search and seizure issues, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11.

[327]Specifically, the Michigan Supreme Court held that "*Kazmierczak*'s rule that the smell of marijuana, standing alone, is sufficient to support a finding of probable cause under the automobile exception to the warrant requirement is no longer viable in light of the enactment of the MRTMA." *People v Armstrong*, ___ Mich ___, ___ (2025), aff'g 344 Mich App 286 (2022).

[the police officer] did not discover the gun until she *searched* the vehicle, and under the front passenger seat." *Id*. at ___ (quotation marks omitted). Defendant was charged with various firearms offenses, and "moved to suppress the introduction of the gun as evidence, arguing that the gun was the fruit of a search that violated the Fourth Amendment of the United States Constitution." *Id*. at ___. "Because the officers in this case lacked probable cause, the automobile exception to the warrant requirement did not apply." *Id*. at ___. "Moreover, even assuming that the police officers possessed reasonable suspicion to detain and investigate defendant based on the smell of marijuana, the trial court did not clearly err when it held that the gun was discovered during a search based on the smell of burnt marijuana, not because it was seized while in plain view." *Id*. at ___. "A warrantless search must be based on probable cause and the smell of marijuana is insufficient to support probable cause." *Id*. at ___.

I. Search Warrant Affidavit

Before the legalization of recreational marijuana in Michigan, effective December 6, 2018, the Court of Appeals held that "a search-warrant affidavit concerning marijuana need not provide specific facts pertaining to the MMMA, i.e., facts from which a magistrate could conclude that the possession, manufacture, use, creation, or delivery is specifically not legal under the MMMA." *People v Brown (Anthony)*, 297 Mich App 670, 674-675 (2012). However, the Court's conclusion was based on the fact that "the possession, manufacture, use, creation, and delivery of marijuana remain illegal in Michigan even after the enactment of the MMMA[.]" *Id.* at 674. No legal authority has considered this conclusion in light of the fact that recreational marijuana is now legal in Michigan. See the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq.* The MRTMA is discussed in Part D: Recreational Marijuana. However, the Court has recently observed that the "analysis of search-and-seizure law is now much more complicated and nuanced than it was when marijuana was unlawful in all circumstances in Michigan." *People v Armstrong*, 344 Mich App 286, 298 (2022) (considering whether the smell of marijuana establishes probable cause to search a vehicle after the passage of the MRTMA). Further, the Court noted that the "[p]assage of the MRTMA decriminalized possession and use of marijuana in Michigan," and concluded "that this action changed the law concerning possession and use of marijuana[.]" *Id.* at 299. While the *Armstrong* Court did not address the *Brown* decision or its holding, the discussion of the MRTMA's effect on the legal landscape calls into question the continuing validity of *Brown's* holding.

In *Brown (Anthony)*, 297 Mich App at 672-673, a police officer obtained a search warrant on the basis of a tip and other evidence indicating that the defendant was growing marijuana in his house; however, the officer did not investigate to determine whether the defendant was a qualifying patient or primary caregiver under the MMMA. The Court of Appeals, affirming the trial court's denial of the defendant's motion to suppress evidence seized during the search, rejected the defendant's argument that "[because] the MMMA made it legal to possess and grow certain amounts of marijuana . . . , the statement in the affidavit that [he] was growing marijuana was insufficient to provide the police officers with probable cause that a crime had been committed." *Id*. at 673, 677-678. Rather, because "the MMMA does not abrogate state criminal prohibitions related to marijuana," but constitutes a limited and restricted exception to those prohibitions, there is no requirement that a search-warrant affidavit set forth facts negating the applicability of the MMMA to a defendant. *Id*. at 677. However, "if the police . . . have clear and uncontroverted evidence that a person is in full compliance with the MMMA, this evidence must be included as part of [a search-warrant] affidavit because such a situation would not justify the issuance of a warrant." *Id*. at 678 n 5.

See also *People v Ventura*, 316 Mich App 671, 677-678 (2016) (rejecting the defendant's challenge to a search warrant that did not reference the defendant's status as a qualifying patient and caregiver under the MMMA and rejecting the defendant's argument that the warrant was unsupported because the observed delivery by the informant establishing probable cause for the search warrant could have been the defendant giving his patient a supply of medical marijuana; the Court concluded that the trial court did not err in refusing to suppress the evidence merely because the affidavit did not establish that the defendant was not entitled to immunity under § 4 of the MMMA), citing *Brown (Anthony)*, 297 Mich App at 677. Note that whether *Ventura* is still good law is unclear for the same reasons as *Brown* following the passage of the MRTMA and the Court's opinion in *Armstrong*, 344 Mich App 286.

J. Child Protective Proceedings

Termination of parental rights. "Drug use alone, in the absence of any connection to abuse or neglect, cannot justify termination solely through operation of the doctrine of anticipatory neglect"; accordingly, where "[t]he condition that led to mother's adjudication was her use of marijuana during her pregnancy," but "by the termination hearing, there was no evidence that mother's use of medical marijuana was having any negative effect on her ability to parent or causing any risk of harm to [the minor child]," "the referee placed far too great an emphasis on the fact that mother

consumed medical marijuana." *In re Richardson*, 329 Mich App 232, 252, 253 (2019) (quotation marks and citation omitted). "The record does not support the conclusion that there was clear and convincing evidence that mother continued to have an issue with substance abuse that presented an actual risk of harm to [the minor child]," and "[t]he concerns expressed in the proceedings . . . were based more on the referee's speculation that mother's use of medical marijuana *might* lead to creating a harmful environment for [the minor child] even though the overwhelming evidence related to mother's current medical marijuana use and parenting skills indicated just the opposite." *Id.* at 254-255. "Without such evidence, there was not clear and convincing evidence to show that mother had not rectified the condition that led to her adjudication [under MCL 712A.19b(3)(c)(*i*)] or that mother could not provide proper care and custody [under MCL 712A.19b(3)(g)], and the trial court therefore committed clear error by terminating mother's parental rights." *Richardson*, 329 Mich App at 255-256. The Court specifically held that the referee's ruling that the mother's use of marijuana was not "medically necessary" was contrary to MCL 333.26424(d)'s requirement that custody or visitation "shall not be denied" because of the medical use of marijuana without proof that "it creates an unreasonable danger to the minor that can be clearly articulated and substantiated," and also that it ignored the presumption of medical use in MCL 333.26424(e). *Richardson*, 329 Mich App at 247-248 (noting there was no dispute that the mother had a medical marijuana card and the referee discounted unrebutted evidence from two doctors and discredited the mother's testimony that medical marijuana helped treat her seizures and epilepsy).

Parenting time. Noting that the Court in *Richardson*, 329 Mich App at 247-248, "recognized the application of MCL 333.26424(d)[328] in the context of child protective proceedings," the Court held that the "automatic suspension of parenting time for a positive drug screen for THC absent any examination of and determination under [various statutory provisions including MCL 333.26424(d)] is invalid." *In re Ott*, 344 Mich App 723, 742 (2022). Specifically, the Court held that "for purposes of the MMMA and the MRTMA, respondent's use of marijuana did not justify the denial of her parenting time with [the minor child] unless the court determined that she did not act in accordance with the MMMA or the MRTMA, or unless the court determined that as a result of her marijuana use, it created an unreasonable danger to [the minor child] that was clearly articulated and substantiated." *Id.* at 743.

[328] MCL 333.26424(d) provides: "A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated."

K. Probation Conditions

While "Michigan's probation act permits a court to impose multiple conditions of probation on a defendant under MCL 771.3 . . . provisions of the probation act that are inconsistent with the MMMA do not apply to the medical use of marijuana." *People v Thue*, 336 Mich App 35, 47 (2021). "[A] condition of probation prohibiting the use of medical marijuana that is otherwise used in accordance with the MMMA is directly in conflict with the MMMA and is impermissible."

Further, "the revocation of probation is a penalty or the denial of a privilege," and MCL 333.26424(a) protects a person "from penalty in any manner, or denial of any right or privilege, for the lawful use of medical marijuana."[329] *Thue*, 336 Mich App at 48. "Therefore, a court cannot revoke probation because of a person's use of medical marijuana that otherwise complies with the terms of the MMMA." *Id.*

However, while not at issue in the case, the Court observed that courts "may still impose probation conditions related to the recreational use of marijuana and revoke probation for such recreational use as well as for marijuana use in violation of the MMMA."[330] *Thue*, 336 Mich App at 48.

A condition of probation that "was rationally related to the underlying offense to which defendant pleaded guilty" is lawful under the Michigan Regulation and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*. *People v Lopez-Hernandez*, ___ Mich App ___, ___ (2024). In *Lopez-Hernandez*, defendant pleaded guilty to operating a vehicle while visibly impaired and "[did] not dispute that the conviction was related to his use of marijuana, and that he was under the influence of marijuana while driving." *Id*. at ___. Under MCL 771.3(11), "[d]iscretionary conditions 'must be individually tailored to the probationer, must specifically address the assessed risks and needs of the probationer, must be designed to reduce recidivism, and must be adjusted if the court determines adjustments are appropriate.'" *Lopez-Hernandez*, ___ Mich App at ___, quoting MCL 771.3(11). Referring to *People v Thue*, 336 Mich App 35 (2021), the *Lopez-Hernandez* Court stated, "Although the MRTMA provides that individuals cannot be directly penalized for recreational marijuana use, the law specifically prohibits the 'operat[ion] . . . of any motor vehicle . . . while under the influence of marihuana[.]'" *Lopez-Hernandez*, ___ Mich App at ___, quoting MCL 333.27954(1)(a) (alterations in original). The defendant in

[329]For a detailed discussion of immunity under § 4 of the MMMA, see Section 8.3.

[330]For a detailed discussion of permissible use under the MMMA, see Section 8.2(B).

Lopez-Hernandez "was not using marijuana recreationally, in compliance with § 4 of the MRTMA, and was instead violating the law prohibiting the operation of a vehicle while visibly impaired." *Lopez-Hernandez*, ___ Mich App at ___. Thus, the defendant was "not entitled to protection from penalty under the MRTMA for violating the terms of his probation, and [the Court] conclude[d] that the condition of his probation prohibiting him from using marijuana [was] lawful." *Id*. at ___. "[T]he probation condition prohibiting defendant's use of marijuana was rationally related to his rehabilitation in this case, as it addresse[d] the underlying substance use issue that led to his violation of MCL 257.625(3)." *Lopez-Hernandez*, ___ Mich App at ___.

Pursuant to MCL 771.3(1)(a), "it is permissible to proscribe the use of marijuana as a condition of probation for nonmarijuana-related crimes." *People v Hess*, ___ Mich App ___, ___ (2024). In this case, defendant pleaded guilty to retail fraud and was sentenced to serve 12 months' probation. *Id*. at ___. "The order of probation prohibited defendant from using or possessing marijuana and required that she submit to drug screening for marijuana." *Id*. at ___. After twice testing positive for marijuana and receiving two violations of probation, "defendant moved . . . to amend the terms of her probation to allow the use and possession of marijuana, . . . arguing that the condition of her probation that prohibited her use of marijuana violated the plain language of the MRTMA." *Id*. at ___. "Defendant [sought] to extend [*People v*] *Thue*'s reasoning . . . raising the same argument as the defendant in [*People v*] *Lopez-Hernandez*," contending "that because the MRTMA prohibits penalizing the use of marijuana in a manner compliant with the statute and it mirrors the language of the MMMA on the same subject, the probation condition prohibiting her use of recreational marijuana is unenforceable." *Id*. at ___, citing *People v Thue*, 336 Mich App 35, 47 (2021); *People v Lopez- Hernandez*, ___ Mich App ___, ___ (2024). However, the *Thue* Court explained in dicta that "the MMMA was inapplicable to the recreational use of marijuana[.]" *Hess*, ___ Mich App at ___. "*Lopez-Hernandez* has turned the dicta of *Thue* into the binding precedent that the MRTMA does not automatically preclude a condition of probation that prohibits the use or possession of marijuana." *Hess*, ___ Mich App at ___. Further, "MCL 771.3(1)(a) states that "[d]uring the term of . . . probation, the probationer shall not violate any criminal law of this state, the *United States*, or another state or any ordinance of any municipality in this state or another state." *Hess*, ___ Mich App at ___. "Using recreational marijuana may be permissible in Michigan but it is still prohibited by federal law." *Id*. at ___. Therefore, defendant "violated her lawfully imposed terms of probation." *Id*. at ___.

Part B: Medical Marihuana Facilities Licensing Act

8.8 Immunity and Protected Activities

The Medical Marihuana Facilities Licensing Act (MMFLA) creates a state licensing system that provides licensees, certified public accountants, and financial institutions with immunity from prosecution for MMFLA-compliant marijuana-related activities. The MMFLA licenses and regulates medical marihuana growers, processors, provisioning centers, secure transporters, and safety compliance facilities. It also allows certain licensees to process, test, or sell industrial hemp.[331]

The MMFLA "does not limit the medical purpose defense provided in . . . MCL 333.26428 . . . to any prosecution involving marihuana." MCL 333.27204.

A. Licensee Immunity

"Except as otherwise provided in [the MMFLA], if a person has been granted a state operating license and is operating within the scope of the license, the licensee and its agents are not subject to any of the following for engaging in activities described in [MCL 333.27201(2)]:

> (a) Criminal penalties under state law or local ordinances regulating marihuana.
>
> (b) State or local criminal prosecution for a marihuana-related offense.
>
> (c) State or local civil prosecution for a marihuana-related offense.
>
> (d) Search or inspection, except for an inspection authorized under this act by law enforcement officers, the municipality, or the [Cannabis Regulatory Agency[332]].
>
> (e) Seizure of marihuana, real property, personal property, or anything of value based on a marihuana-related offense.

[331]Specifically, the MMFLA "does not prohibit a processor from handling, processing, marketing, or brokering, as those terms are defined in . . . MCL 286.842, industrial hemp," MCL 333.27502(6); and "does not prohibit a safety compliance facility from taking or receiving industrial hemp for testing purposes and testing the industrial hemp pursuant to the industrial hemp research and development act," MCL 333.27505(5).

(f) Any sanction, including disciplinary action or denial of a right or privilege, by a business or occupational or professional licensing board or bureau based on a marihuana-related offense." MCL 333.27201(1).

B. Protected Activities

"The following activities are protected under [MCL 333.27201(1)] if performed under a state operating license within the scope of that license and in accord with [the MMFLA], rules, and any ordinance adopted under [MCL 333.27205[333]]:

(a) Growing marihuana.

(b) Purchasing, receiving, selling, transporting, or transferring marihuana from or to a licensee, a licensee's agent, a registered qualifying patient, or a registered primary caregiver.

(c) Possessing marihuana.

(d) Possessing or manufacturing marihuana paraphernalia for medical use.

(e) Processing marihuana.

(f) Transporting marihuana.

(g) Testing, transferring, infusing, extracting, altering, or studying marihuana.

(h) Receiving or providing compensation for products or services." MCL 333.27201(2).

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[332] MCL 333.27201 references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred "all of the authorities, powers, duties, functions, and responsibilities" of LARA under the MMFLA to the MRA. MCL 333.27001. The Marijuana Regulatory Agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

[333] MCL 333.27205(1) prohibits the issuance of "a state operating license to an applicant unless the municipality in which the applicant's proposed marihuana facility will operate has adopted an ordinance that authorizes that type of facility." MCL 333.27205 also allows a municipality to adopt other ordinances relating to marihuana facilities within its jurisdiction, including zoning regulations, and sets forth the information a municipality permitting marihuana facilities must send to the Marijuana Regulatory Agency. MCL 333.27205 references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred "all of the authorities, powers, duties, functions, and responsibilities" of LARA under the MMFLA to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

C. Immunity for Owners and Lessors of Real Property

"Except as otherwise provided in [the MMFLA], a person who owns or leases real property upon which a marihuana facility is located and who has no knowledge that the licensee violated [the MMFLA] is not subject to any of the following for owning, leasing, or permitting the operation of a marihuana facility on the real property:

> (a) Criminal penalties under state law or local ordinances regulating marihuana.
>
> (b) State or local civil prosecution based on a marihuana-related offense.
>
> (c) State or local criminal prosecution based on a marihuana-related offense.
>
> (d) Search or inspection, except for an inspection authorized under this act by law enforcement officers, the municipality, or the [Cannabis Regulatory Agency[334]].
>
> (e) Seizure of any real or personal property or anything of value based on a marihuana-related offense.
>
> (f) Any sanction, including disciplinary action or denial of a right or privilege, by a business or occupational or professional licensing board or bureau." MCL 333.27201(3).

D. Immunity for Certified Public Accountants

"Except as otherwise provided in [the MMFLA], a certified public accountant who is licensed under article 7 of the occupational code, . . . MCL 339.720 to [MCL] 339.736, is not subject to any of the following for engaging in the practice of public accounting as that term is defined in . . . MCL 339.720, for an applicant or licensee who is in compliance with [the MMFLA], rules, and the Michigan medical marihuana act:

> (a) Criminal penalties under state law or local ordinances regulating marihuana.

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[334] MCL 333.27201 references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred "all of the authorities, powers, duties, functions, and responsibilities" of LARA under the MMFLA to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

(b) State or local civil prosecution based on a marihuana-related offense.

(c) State or local criminal prosecution based on a marihuana-related offense.

(d) Seizure of any real or personal property or anything of value based on a marihuana-related offense.

(e) Any sanction, including disciplinary action or denial of a right or privilege, by a business or occupational or professional licensing board or bureau based on a marihuana-related offense." MCL 333.27201(4).

E. Immunity for Financial Institutions

"Except as otherwise provided in [the MMFLA], a financial institution is not subject to any of the following for providing a financial service to a licensee under [the MMFLA]:

(a) Criminal penalties under state law or local ordinances regulating marihuana.

(b) State or local civil prosecution based on a marihuana-related offense.

(c) State or local criminal prosecution based on a marihuana-related offense.

(d) Seizure of any real or personal property or anything of value based on a marihuana-related offense.

(e) Any sanction, including disciplinary action or denial of a right or privilege, by a business or occupational or professional licensing board or bureau based on a marihuana-related offense." MCL 333.27201(5).

F. Immunity for Registered Qualifying Patients and Primary Caregivers

"A registered qualifying patient or registered primary caregiver is not subject to criminal prosecution or sanctions for purchasing marihuana from a provisioning center if the quantity purchased is within the limits established under the [MMMA]. A registered primary caregiver is not subject to criminal prosecution or sanctions for any transfer of 2.5 ounces or less of marihuana to a safety compliance facility for testing." MCL 333.27203.

G. Certain Acts Do Not Apply to Regulation of Commercial Entities Under the MMFLA

"For the purposes of regulating the commercial entities established under [the MMFLA], any provisions of the following acts that are inconsistent with this act do not apply to a grower, processor, secure transporter, provisioning center, or safety compliance facility operating in compliance with [the MMFLA]:

(a) The business corporation act, 1972 PA 284, MCL 450.1101 to [MCL] 450.2098.

(b) The nonprofit corporation act, 1982 PA 162, MCL 450.2101 to [MCL] 450.3192.

(c) 1931 PA 327, MCL 450.98 to [MCL] 450.192.

(d) The Michigan revised uniform limited partnership act, 1982 PA 213, MCL 449.1101 to [MCL] 449.2108.

(e) The Michigan limited liability company act, 1993 PA 23, MCL 450.4101 to [MCL] 450.5200.

(f) 1907 PA 101, MCL 445.1 to [MCL] 445.5.

(g) 1913 PA 164, MCL 449.101 to [MCL] 449.106.

(h) The uniform partnership act, 1917 PA 72, MCL 449.1 to [MCL] 449.48." MCL 333.27201(6).

8.9 Implementation, Administration, and Enforcement of the MMFLA

"The marijuana regulatory agency[335] shall promulgate rules and emergency rules as necessary to implement, administer, and enforce [the MMFLA]. The rules must ensure the safety, security, and integrity of the operation of marihuana facilities[.]" MCL 333.27206. MCL 333.27206 lists several specific rules that must be promulgated. *Id.* A detailed discussion of the Cannabis Regulatory Agency's rules is outside the scope of this benchbook. See the agency's website for more information.

"A marihuana facility and all articles of property in that facility are subject to examination at any time by a local police agency or the department of state police." MCL 333.27208.

[335] MCL 333.27206 refers to the Marijuana Regulatory Agency (MRA); however, the MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

8.10 Licensing

Individuals may apply to the Cannabis Regulatory Agency (CRA) for a state operating license. MCL 333.27401(1).[336]

State operating licenses are specifically granted as a class A, B, or C grower; processor; provisioning center; secure transporter; or safety compliance facility license. MCL 333.27401(1). Applications must be made under oath on a form provided by the CRA, and must contain specific information as required by statute. *Id.*

A detailed discussion of the review process and the eligibility requirements for a license are outside the scope of this benchbook. Information about licensing is discussed in detail in MCL 333.27401—MCL 333.27409. More information is also available on the CRA's website.

Licenses are exclusive to the licensee, and the licensee must apply for and receive the CRA's approval before a license is transferred, sold, or purchased. MCL 333.27406.

The CRA has broad authority to deny, suspend, revoke, or restrict a license and/or impose a fine in compliance with the Administrative Procedures Act, MCL 24.201 *et seq*. See MCL 333.27407. State operating licenses are a revocable privilege granted by Michigan and are not a property right. MCL 333.27409.

8.11 Licensees

A. Grower License

"A grower license authorizes the grower to grow not more than the following number of marihuana plants under the indicated license class for each license the grower holds in that class:

> (a) Class A – 500 marihuana plants.
>
> (b) Class B – 1,000 marihuana plants.
>
> (c) Class C – 1,500 marihuana plants." MCL 333.27501(1).

A grower license authorizes:

[336] MCL 333.27401 refers to the Marijuana Regulatory Agency (MRA); however, the MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

- the sale of marihuana plants to a grower only by means of a secure transporter, MCL 333.27501(2);

- the sale or transfer of seeds, seedlings, or tissue cultures to a grower from a registered primary caregiver or another grower is permitted without using a secure transporter, MCL 333.27501(2);

- a grower to transfer marihuana without using a secure transporter to a processor or provisioning center if "[t]he processor or provisioning center occupies the same location as the grower and the marihuana is transferred using only private real property without accessing public roadways," and "[t]he grower enters each transfer into the statewide monitoring system," MCL 333.27501(3);

- the sale of marihuana, other than seeds, seedlings, tissue cultures, and cuttings, to a processor or provisioning center, MCL 333.27501(4); and

- except as provided in MCL 333.27501(2)-(3) and MCL 333.27505,[337] the grower to transfer marihuana only by means of a secure transporter. MCL 333.27501(5).

"To be eligible for a grower license, the applicant and each investor in the grower must not have an interest in a secure transporter or safety compliance facility." MCL 333.27501(6).

"Until December 31, 2018, for a period of 30 days after the issuance of a grower license and in accord with rules, a grower may transfer [marihuana plants, seeds, and seedlings] that are lawfully possessed by an individual formerly registered as a primary caregiver who is an active employee of the grower[.]" MCL 333.27501(7).

"A grower shall comply with all of the following:

> (a) Until December 31, 2021, have, or have as an active employee an individual who has, a minimum of 2 years' experience as a registered primary caregiver.
>
> (b) While holding a license as a grower, not be a registered primary caregiver and not employ an individual who is simultaneously a registered primary caregiver.
>
> (c) Enter all transactions, current inventory, and other information into the statewide monitoring system as

[337] MCL 333.27505 addresses safety compliance facilities. See Section 8.11(E).

> required in [the MMFLA], rules, and the marihuana tracking act." MCL 333.27501(8).

"A grower license does not authorize the grower to operate in an area unless the area is zoned for industrial or agricultural uses or is unzoned and otherwise meets the requirements established in [MCL 333.27205(1)[338]]." MCL 333.27501(9).

B. Processor License

A processor license authorizes:

- purchase of marihuana only from a grower;
- sale of marihuana-infused products or marihuana only to a provisioning center or another processor;
- except as provided in MCL 333.27502(2) and MCL 333.27505,[339] transfer of marihuana only by means of a secure transporter; and
- transfer of marihuana without using a secure transporter to a grower or provisioning center if "[t]he grower or provisioning center occupies the same location as the processor and the marihuana is transferred using only private real property without accessing public roadways," and "[t]he processor enters each transfer into the statewide monitoring system" MCL 333.27502(1)-(2).

"To be eligible for a processor license, the applicant and each investor in the processor must not have an interest in a secure transporter or safety compliance facility." MCL 333.27502(3).

"Until December 31, 2018, for a period of 30 days after the issuance of a processor license and in accord with rules, a processor may transfer [marihuana plants and usable marihuana] that are lawfully possessed by an individual formerly registered as a primary

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[338] MCL 333.27205(1) prohibits the issuance of "a state operating license to an applicant unless the municipality in which the applicant's proposed marihuana facility will operate has adopted an ordinance that authorizes that type of facility." MCL 333.27205 also allows a municipality to adopt other ordinances relating to marihuana facilities within its jurisdiction, including zoning regulations, and sets forth the information a municipality permitting marihuana facilities must send to the Marijuana Regulatory Agency (MRA). MCL 333.27205 references the Medical Marihuana Licensing Board and the Department of Licensing and Regulatory Affairs (LARA). However, Executive Order No. 2019-07, compiled at MCL 333.27001, abolished the board and created the MRA as a Type I agency within LARA, transferring all of the "authorities, powers, duties, functions, and responsibilities" of the board and LARA under the MMFLA to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

[339] MCL 333.27505 addresses safety compliance facilities. See Section 8.11(E).

caregiver who is an active employee of the processor[.]" MCL 333.27502(4)

"A processor shall comply with all of the following:

> (a) Until December 31, 2021, have, or have as an active employee an individual who has, a minimum of 2 years' experience as a registered primary caregiver.
>
> (b) While holding a license as a processor, not be a registered primary caregiver and not employ an individual who is simultaneously a registered primary caregiver.
>
> (c) Enter all transactions, current inventory, and other information into the statewide monitoring system as required in [the MMFLA], rules, and the marihuana tracking act." MCL 333.27502(5).

C. Secure Transporter License

"A secure transporter license authorizes the licensee to store and transport marihuana and money associated with the purchase or sale of marihuana between marihuana facilities for a fee upon request of a person with legal custody of that marihuana or money." MCL 333.27503(1). A secure transporter license "does not authorize transport to a registered qualifying patient or registered primary caregiver." *Id.* "If a secure transporter has its primary place of business in a municipality that has adopted an ordinance under [MCL 333.27205] authorizing that marihuana facility, the secure transporter may travel through any municipality." MCL 333.27503(1).

"To be eligible for a secure transporter license, the applicant and each investor with an interest in the secure transporter must not have an interest in a grower, processor provisioning center, or safety compliance facility and must not be a registered qualifying patient or a registered primary caregiver." MCL 333.27503(2).

"A secure transporter shall enter all transactions, current inventory, and other information into the statewide monitoring system as required in [the MMFLA], rules, and the marihuana tracking act." MCL 333.27503(3).

"A secure transporter shall comply with all of the following:

> (a) Each driver transporting marihuana must have a chauffeur's license issued by this state.

> (b) Each employee who has custody of marihuana or money that is related to a marihuana transaction shall not have been convicted of or released from incarceration for a felony under the laws of this state, any other state, or the United States within the past 5 years or have been convicted of a misdemeanor involving a controlled substance within the past 5 years.
>
> (c) Each vehicle must be operated with a 2-person crew with at least 1 individual remaining with the vehicle at all times during the transportation of marihuana.
>
> (d) A route plan and manifest must be entered into the statewide monitoring system, and a copy must be carried in the transporting vehicle and presented to a law enforcement officer upon request.
>
> (e) The marihuana must be transported in 1 or more sealed containers and not be accessible while in transit.
>
> (f) A secure transporting vehicle must not bear markings or other indication that it is carrying marihuana or a marihuana-infused product." MCL 333.27503(4).

"A secure transporter is subject to administrative inspection by a law enforcement officer at any point during the transportation of marihuana to determine compliance with [the MMFLA]." MCL 333.27503(5).

D. Provisioning Center License

A provisioning center license authorizes:

- the purchase or transfer of marihuana only from a grower or processor;
- the sale or transfer of marihuana only to a registered qualifying patient or registered primary caregiver; and
- the transfer of marihuana to or from a safety compliance facility for testing by means of a secure transporter or as provided in MCL 333.27505. MCL 333.27504(1)-(2).

"Except as otherwise provided in [MCL 333.27505] and [MCL 333.27504(1)] all transfers of marihuana to a provisioning center from a separate marihuana facility must be by means of a secure transporter." MCL 333.27504(1). "A transfer of marihuana to a provisioning center from a marihuana facility that occupies the same location as the provisioning center does not require a secure

transporter if the marihuana is transferred to the provisioning center using only private real property without accessing public roadways." MCL 333.27504(1).

"To be eligible for a provisioning center license, the applicant and each investor in the provisioning center must not have an interest in a secure transporter or safety compliance facility." MCL 333.27504(3).

"A provisioning center shall comply with all of the following:

> (a) Sell or transfer marihuana to a registered qualifying patient or registered primary caregiver only after it has been tested and bears the label required for retail sale.
>
> (b) Enter all transactions, current inventory, and other information into the statewide monitoring system as required in this act, rules, and the marihuana tracking act.
>
> (c) Before selling or transferring marihuana to a registered qualifying patient or to a registered primary caregiver on behalf of a registered qualifying patient, inquire of the statewide monitoring system to determine whether the patient and, if applicable, the caregiver hold a valid, current, unexpired, and unrevoked registry identification card and that the sale or transfer will not exceed the daily and monthly purchasing limit established by [the Cannabis Regulatory Agency[340]] under [the MMFLA].
>
> (d) Not allow the sale, consumption, or use of alcohol or tobacco products on the premises.
>
> (e) Not allow a physician to conduct a medical examination or issue a medical certification document on the premises for the purpose of obtaining a registry identification card." MCL 333.27504(4).

E. Safety Compliance Facility License

"In addition to transfer and testing authorized in [MCL 333.27203[341]], a safety compliance facility license authorizes the

[340] MCL 333.27504 references the Medical Marihuana Licensing Board. However, Executive Order No. 2019-07, compiled at MCL 333.27001, abolished the board and created the Marijuana Regulatory Agency (MRA), transferring "all of the authorities, powers, duties, functions, and responsibilities" of the board under the Medical Marihuana Facilities Licensing Act to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

safety compliance facility to do all of the following without using a secure transporter:

> (a) Take marihuana from, test marihuana for, and return marihuana to only a marihuana facility.
>
> (b) Collect a random sample of marihuana at the marihuana facility of a grower, processor, or provisioning center for testing." MCL 333.27505(1).

"A safety compliance facility must be accredited by an entity approved by the [Cannabis Regulatory Agency[342]] by 1 year after the date the license is issued or have previously provided drug testing services to this state or this state's court system and be a vendor in good standing in regard to those services." MCL 333.27505(2). "The board may grant a variance from this requirement upon a finding that the variance is necessary to protect and preserve the public health, safety, or welfare." *Id.*

"To be eligible for a safety compliance facility license, the applicant and each investor with any interest in the safety compliance facility must not have an interest in a grower, secure transporter, processor, or provisioning center." MCL 333.27505(3).

"A safety compliance facility shall comply with all of the following:

> (a) Perform tests to certify that marihuana is reasonably free of chemical residues such as fungicides and insecticides.
>
> (b) Use validated test methods to determine tetrahydrocannabinol, tetrahydrocannabinol acid, cannabidiol, and cannabidiol acid levels.
>
> (c) Perform tests that determine whether marihuana complies with the standards the board establishes for microbial and mycotoxin contents.

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[341] "A registered qualifying patient or registered primary caregiver is not subject to criminal prosecution or sanctions for purchasing marihuana from a provisioning center if the quantity purchased is within the limits established under the [MMMA]. A registered primary caregiver is not subject to criminal prosecution or sanctions for any transfer of 2.5 ounces or less of marihuana to a safety compliance facility for testing." MCL 333.27203.

[342] MCL 333.27505 references the Medical Marihuana Licensing Board. However, Executive Order No. 2019-07, compiled at MCL 333.27001, abolished the board and created the Marijuana Regulatory Agency (MRA), transferring "all of the authorities, powers, duties, functions, and responsibilities" of the board under the Medical Marihuana Facilities Licensing Act to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

> (d) Perform other tests necessary to determine compliance with any other good manufacturing practices as prescribed in rules.
>
> (e) Enter all transactions, current inventory, and other information into the statewide monitoring system as required in this act, rules, and the marihuana tracking act.
>
> (f) Have a secured laboratory space that cannot be accessed by the general public.
>
> (g) Retain and employ at least 1 staff member with a relevant advanced degree in a medical or laboratory science." MCL 333.27505(4).

F. Third-Party Inventory Control and Tracking

"Except as otherwise provided in MCL 333.27207(2),[343] a licensee shall adopt and use a third-party inventory control and tracking system that is capable of interfacing with the statewide monitoring system to allow the licensee to enter or access information in the statewide monitoring system as required under [the MMFLA] and rules." MCL 333.27207(1). Several specific capabilities are required by statute for whatever inventory control and tracking system a licensee adopts. *Id.*

Part C: Marihuana Tracking Act

8.12 Statewide Monitoring System

The Marihuana Tracking Act, MCL 333.27901 *et seq.*, establishes a statewide monitoring system to track marijuana and marijuana products in commercial trade, monitor compliance with laws regulating marijuana, and gather information regarding marijuana safety and commercial marijuana trade. Specifically, MCL 333.27903(1) instructs:

> "The [Cannabis Regulatory Agency[344]] shall establish a statewide monitoring system for use as an integrated marihuana tracking, inventory, and verification system. The system must allow for interface with third-party inventory

[343] Use of a third-party inventory control is unnecessary if the statewide monitoring system allows licensees to access or enter information without the use of a third-party inventory control and tracking system. MCL 333.27207(2).

> and tracking systems as described in [MCL 333.27207] to provide for access by this state, licensees, and law enforcement personnel, to the extent that they need and are authorized to receive or submit the information, to comply with, enforce, or administer [the Marihuana Tracking Act]; the [MMMA]; or the [MMFLA]."

"At a minimum, the system must be capable of storing and providing access to information that, in conjunction with 1 or more third-party inventory control and tracking systems under [MCL 333.27207], allows all of the following:

> (a) Verification that a registry identification card is current and valid and has not been suspended, revoked, or denied.
>
> (b) Retention of a record of the date, time, quantity, and price of each sale or transfer of marihuana to a registered qualifying patient or registered primary caregiver.
>
> (c) Determination of whether a particular sale or transfer transaction will exceed the permissible limit established under the [MMMA].
>
> (d) Effective monitoring of marihuana seed-to-sale transfers.
>
> (e) Receipt and integration of information from third-party inventory control and tracking systems under [MCL 333.27207]." MCL 333.27903(2).

8.13 Confidential Information

> "The information in the system is confidential and is exempt from disclosure under [FOIA]. Information in the system may be disclosed for purposes of enforcing the [Marihuana Tracking Act, the MMMA, and the MMFLA]." MCL 333.27904.

Part D: Recreational Marijuana

[344] MCL 333.27903 references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred all of its "authorities, powers, duties, functions, and responsibilities" of LARA under the MMMA, MMFLA, and the Marihuana Tracking Act to the MRA. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

For additional information, see the State Court Administrative Office's memorandum addressing frequently asked questions about the Michigan Regulation and Taxation of Marihuana Act (MRTMA).

8.14 Scope of Michigan Regulation and Taxation of Marihuana Act (MRTMA)

Effective December 6, 2018, Initiated Law 1 of 2018, MCL 333.27951 *et seq.*, created the Michigan Regulation and Taxation of Marihuana Act (MRTMA), the purpose of which "is to make marihuana legal under state and local law for adults 21 years of age or older, to make industrial hemp legal under state and local law, and to control the commercial production and distribution of marihuana under a system that licenses, regulates, and taxes the businesses involved." MCL 333.27952.

Laws inconsistent with the MRTMA do not apply to conduct that is permitted by the MRTMA. MCL 333.27954(5).

A. Conduct Not Authorized

The MRTMA does not authorize:

> "(a) operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of marihuana;
>
> (b) transfer of marihuana or marihuana accessories to a person under the age of 21;
>
> (c) any person under the age of 21 to possess, consume, purchase or otherwise obtain, cultivate, process, transport, or sell marihuana;
>
> (d) separation of plant resin by butane extraction or another method that utilizes a substance with a flashpoint below 100 degrees Fahrenheit in any public place, motor vehicle, or within the curtilage of any residential structure;
>
> (e) consuming marihuana in a public place or smoking marihuana where prohibited by the person who owns, occupies, or manages the property, except for purposes of this subdivision a public place does not include an area designated for consumption within a municipality that has authorized consumption in designated areas that are not accessible to persons under 21 years of age;

> (f) cultivating marihuana plants if the plants are visible from a public place without the use of binoculars, aircraft, or other optical aids or outside of an enclosed area equipped with locks or other functioning security devices that restrict access to the area;
>
> (g) consuming marihuana while operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat, or smoking marihuana within the passenger area of a vehicle upon a public way;
>
> (h) possessing marihuana accessories or possessing or consuming marihuana on the grounds of a public or private school where children attend classes in preschool programs, kindergarten programs, or grades 1 through 12, in a school bus, or on the grounds of any correctional facility; or
>
> (i) Possessing more than 2.5 ounces of marihuana within a person's place of residence unless the excess marihuana is stored in a container or area equipped with locks or other functioning security devices that restrict access to the contents of the container or area." MCL 333.27954(1).

"[W]hile MCL 333.27954(1) identifies certain conduct that the MRTMA expressly 'does not authorize,' it does not follow that the MRTMA *authorizes* any and all conduct that is *not* expressly identified as 'not authorize[d].'" *People v Perry*, 338 Mich App 363, 375 n 7 (2021) (second alteration in original).

"Although the MRTMA provides that individuals cannot be directly penalized for recreational marijuana use, the law specifically prohibits the operat[ion] . . . of any motor vehicle . . . while under the influence of marihuana[.]" *People v Lopez-Hernandez*, ___ Mich App ___, ___ (2024), citing MCL 333.27954(1)(a) (alterations in original). "Nothing in the MRTMA suggests that it was intended to supersede the Michigan Vehicle Code (MVC), MCL 257.1 *et seq.*, particularly not those portions of the MVC designed to protect the health and safety of the public." *Lopez-Hernandez*, ___ Mich App at ___. See also *Perry*, 338 Mich App at 377-379, which discusses the MVC in the context of the MMMA and the MRTMA.

Public Place. Because the MRTMA does not permit "consuming marihuana in a public place," MCL 333.27954(1)(e), the Court noted (in dicta) that the MRTMA would not apply to the defendant, who "used marijuana in his truck on a public street[.]" *People v Anthony*,

327 Mich App 24, 45 n 11 (2019), rev'd in part on other grounds by *People v Duff*, __ Mich __, __ (2024).

Minors and Visibly Intoxicated Individuals. Sale or transfer of marijuana to minors or visibly intoxicated individuals is not authorized. MCL 333.27961a(1). An individual who suffers damage or personal injury by a minor or visibly intoxicated person has a cause of action against the person who sold or transferred the marijuana under certain circumstances. MCL 333.27961a(2). See Section 8.16 for a detailed discussion.

Article 7 of the Public Health Code. "[T]he MRTMA does not prevent a person accused of possession with intent to deliver between 5 and 45 kilograms of marijuana from being prosecuted under MCL 333.7401(2)(d)(*ii*) [Article 7 of the Public Health Code]." *People v Soto*, ___ Mich App ___, ___ (2024). See Section 8.14(E) and Section 8.15(C) for a detailed discussion of the *Kejbou* and *Soto* opinions and the relationship between the MRTMA and the Public Health Code.

B. Conduct Authorized

"Notwithstanding any other law or provision of [the MRTMA], and except as otherwise provided in [MCL 333.27954], the following acts by a person 21 years of age or older are not unlawful, are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection, and are not grounds to deny any other right or privilege:

> (a) except as permitted by subdivision (b), possessing, using or consuming, internally possessing, purchasing, transporting, or processing 2.5 ounces or less of marihuana, except that not more than 15 grams of marihuana may be in the form of marihuana concentrate;
>
> (b) within the person's residence, possessing, storing, and processing not more than 10 ounces of marihuana and any marihuana produced by marihuana plants cultivated on the premises and cultivating not more than 12 marihuana plants for personal use, provided that no more than 12 marihuana plants are possessed, cultivated, or processed on the premises at once;
>
> (c) assisting another person who is 21 years of age or older in any of the acts described in this section; and

> (d) giving away or otherwise transferring without remuneration up to 2.5 ounces of marihuana, except that not more than 15 grams of marihuana may be in the form of marihuana concentrate, to a person 21 years of age or older, as long as the transfer is not advertised or promoted to the public." MCL 333.27955(1).

"Notwithstanding any other law or provision of this act, except as otherwise provided in [MCL 333.27954], the use, manufacture, possession, and purchase of marihuana accessories by a person 21 years of age or older and the distribution or sale of marihuana accessories to a person 21 years of age or older is authorized, is not unlawful, is not an offense, is not grounds for seizing or forfeiting property, is not grounds for arrest, prosecution, or penalty in any manner, and is not grounds to deny any other right or privilege." MCL 333.27955(2).

"A person shall not be denied custody of or visitation with a minor for conduct that is permitted by this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated." MCL 333.27955(3). See also *In re Ott*, 344 Mich App 723, 742 (2022) (holding that the MRTMA applies to child protective proceedings and that the "automatic suspension of parenting time for a positive drug screen for THC absent any examination of and determination under [various statutory provisions including MCL 333.27955(3)] is invalid"). Specifically, the Court held that "for purposes of the MMMA and the MRTMA, respondent's use of marijuana did not justify the denial of her parenting time with [the minor child] unless the court determined that she did not act in accordance with the MMMA or the MRTMA, or unless the court determined that as a result of her marijuana use, it created an unreasonable danger to [the minor child] that was clearly articulated and substantiated." *Id.* at 743.

Further, MCL 333.27960(1) specifies that several specific acts carried out by marihuana growers, processors, transporters, retailers, safety compliance facilities, microbusinesses, and tribal marijuana businesses, or agents of any of these, "are not unlawful, are not an offense, are not grounds for seizing or forfeiting property, are not grounds for arrest, prosecution, or penalty in any manner, are not grounds for search or inspection except as authorized by this act, and are not grounds to deny any other right or privilege[.]"

"A person acting as an agent of a marihuana retailer who sells or otherwise transfers marihuana or marihuana accessories to a person who is younger than 21 years of age is not subject to arrest, prosecution, forfeiture of property, disciplinary action by a professional licensing board, denial of any right or privilege, or

penalty in any manner, if the person reasonably verified that the recipient appeared to be 21 years of age or older by means of government-issued photographic identification containing a date of birth, and the person complied with any rules promulgated pursuant to this act." MCL 333.27960(2).

"It is the public policy of this state that contracts related to the operation of marihuana establishments or tribal marihuana businesses be enforceable." MCL 333.27960(3).

C. Medical Marijuana Not Limited

The MRTMA "does not limit any privileges, rights, immunities, or defenses of a person as provided in the [MMMA], the [MMFLA], or any other law of this state allowing for or regulating marihuana for medical use." MCL 333.27954(2).

D. Limitation of Marijuana Use

1. Employers

Although it is lawful to employ a person "who engages in marihuana-related activities allowed under [the MRTMA]," MCL 333.27960(1)(i), the MRTMA "does not require an employer to permit or accommodate conduct otherwise allowed by [the MRTMA] in any workplace or on the employer's property," MCL 333.27954(3).

The MRTMA "does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of marihuana." MCL 333.27954(3).

The MRTMA "does not prevent an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's violation of a workplace drug policy or because that person was working while under the influence of marihuana." MCL 333.27954(3).

2. Property Owners, Occupiers, and/or Managers

Although it is lawful to "leas[e] or otherwise allow[] the use of property owned, occupied, or managed for activities allowed under [the MRTMA]," MCL 333.27960(1)(h), the MRTMA "allows a person to prohibit or otherwise regulate the consumption, cultivation, distribution, processing, sale, or

display of marihuana and marihuana accessories on property the person owns, occupies, or manages," MCL 333.27954(4). However, "a lease agreement may not prohibit a tenant from lawfully possessing and consuming marihuana by means other than smoking." MCL 333.27954(4).

3. Municipalities

"Except as provided in [MCL 333.27954], a municipality may completely prohibit or limit the number of marihuana establishments within its boundaries." MCL 333.27956(1).

"A municipality may adopt other ordinances that are not unreasonably impracticable and do not conflict with this act or with any rule promulgated pursuant to this act and that:

> (a) establish reasonable restrictions on public signs related to marihuana establishments;
>
> (b) regulate the time, place, and manner of operation of marihuana establishments and of the production, manufacture, sale, or display of marihuana accessories;
>
> (c) authorize the sale of marihuana for consumption in designated areas that are not accessible to persons under 21 years of age, or at special events in limited areas and for a limited time; and
>
> (d) designate a violation of the ordinance and provide for a penalty for that violation by a marihuana establishment, provided that such violation is a civil infraction and such penalty is a civil fine of not more than $500." MCL 333.27956(2).

"A municipality may adopt an ordinance requiring a marihuana establishment with a physical location within the municipality to obtain a municipal license, but may not impose qualifications for licensure that conflict with this act or rules promulgated by the [Cannabis Regulatory Agency[345]]." MCL 333.27956(3). An annual fee of not more than $5,000 may be charged. MCL 333.27956(4).

MCL 333.27956 permits "a municipality to adopt an ordinance so long as it (1) is not unreasonably impracticable, (2) does not directly conflict with the MRTMA or promulgated rules, and (3) regulates the time, place, and manner of operation of a marijuana establishment." *Yellow Tail Ventures, Inc v Berkley*, 344

Mich App 689, 697, 702-703 (2022) (rejecting the plaintiff's argument that the municipality's scoring criteria for evaluating marijuana establishment licenses violated the MRTMA because it considered "factors that were not relevant to the operation of a marijuana establishment"—"including green infrastructure, sustainability, aesthetics, and economic goals"—because these criteria "fit neatly within a reasonable understanding of the MRTMA's 'time, place, and manner' provision," and further, the criteria fall within the process permitted by MCL 333.27959(4)).

"A municipality may not adopt an ordinance that restricts the transportation of marihuana through the municipality or prohibits a marihuana grower, a marihuana processor, and a marihuana retailer from operating within a single facility or from operating at a location shared with a marihuana facility operating pursuant to the [MMFLA]." MCL 333.27956(5).

School-Buffer Requirement. "Conflict preemption applies if [a city] ordinance is in direct conflict with the state statutory scheme." *Exclusive Capital Partners, LLC v City of Royal Oak*, ___ Mich App ___, ___ (2024) (cleaned up). "[T]he MRTMA prohibits any marijuana establishment from being located within 1,000 feet of an existing public or private school providing education for kindergarten through 12th grade, 'unless a municipality adopts an ordinance that reduces this distance requirement[.]'" *Id.* at ___, quoting MCL 333.27959(3)(c) (second alteration in original). In this case, plaintiff (an applicant for a retail license under MRTMA and the city ordinance) argued that defendant (the City of Royal Oak) "violated the MRTMA [when it awarded a retail license to another license applicant] because MCL 333.27956(3) prohibits municipalities from imposing licensure requirements that conflict with the act, MCL 333.27959(3)(c) requires a school-zone buffer of 1,000 feet unless a municipality has adopted an ordinance that reduces this distance, and [defendant] has adopted no such ordinance." *Exclusive Capital Partners*, ___ Mich App at ___. "Reading MCL 333.27956(3) and MCL 333.27959(3)(c) together . . . [reveals] two critical points: (1) the MRTMA does not require a municipality to adopt the

[345] MCL 333.27956 references the Department of Licensing and Regulatory Affairs (LARA); however, Executive Order No. 2019-07, compiled at MCL 333.27001, created the Marijuana Regulatory Agency (MRA) as a Type I agency within LARA, and transferred "all of the authorities, powers, duties, functions, and responsibilities" of LARA under the MRTMA to the MRA, with the exception of the regulation of industrial hemp under MCL 333.27958, which was transferred to the Department of Agriculture and Rural Development. MCL 333.27001. The MRA was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

[1,000-foot] buffer requirement as a qualification for *municipal* licensure because MCL 333.27956(3), by its plain language, requires it for *state*, not municipal, licenses, and (2) an ordinance reducing the buffer zone, as qualification for municipal licensure, would not conflict with the act because MCL 333.27959(3)(c) indicates that a municipality may adopt an ordinance reducing that buffer zone." *Exclusive Capital Partners*, ___ Mich App at ___ (emphases added). Here, defendant adopted an ordinance that provides "'[n]o Marihuana Establishment shall be permitted within a 1,000-foot radius of any school.'" *Exclusive Capital Partners*, ___ Mich App at ___, quoting Royal Oak Ordinances, § 435-5(A)(5)(a) (alteration in original). "[T]his [ordinance] is an operational requirement, not an application or licensing consideration." *Exclusive Capital Partners*, ___ Mich App at ___. "This means that an entity . . . might succeed in applying for a retail license, but be poised to violate the operational provisions of the ordinance" if the proposed site is within 1,000 feet of a school. *Id*. at ___. "Because [defendant] adopted an ordinance allowing reduction of the buffer zone consistent with [MCL 333.27956(3)] and MCL 333.27959(3)[c], [defendant's] ordinances, on their face, do not conflict with the MRTMA." *Exclusive Capital Partners*, ___ Mich App at ___. "A review of [defendant's] licensing and zoning scheme, which allows a reduction of the buffer zone, reveals no inherent incompatibility between the then-existing licensing and zoning provisions and the MRTMA." *Id*. at ___. "Because [defendant's] ordinances do not conflict with MCL 333.27956(3) and MCL 333.27959(3)(c), [plaintiff] has failed to state a claim on which any relief can be granted." *Exclusive Capital Partners*, ___ Mich App at ___.

Competitive-Process Mandate. MCL 333.27959(4) of the MRTMA "mandates that a municipality use a 'competitive process' to select among applicants if there are more applicants than available licenses[.]" *Exclusive Capital Partners*, ___ Mich App at ___. "Nothing in MCL 333.27956, the section authorizing a municipality to impose local regulations on recreational marijuana, restricts or delineates what type of criteria may be used in formulating a 'competitive process.'" *Exclusive Capital Partners*, ___ Mich App at___, quoting MCL 333.27959(4). "The only relevant direction is that any pertinent ordinance must not be 'unreasonably impracticable' or 'conflict' with the MRTMA." *Exclusive Capital Partners*, ___ Mich App at___, quoting MCL 333.27956(2). In this case, plaintiff "argue[d] that the marijuana ordinance conflicts with the MRTMA's competitive-process mandate on its face and that [defendant's] application violated the MRTMA's competitive-

process mandate." *Exclusive Capital Partners*, ___ Mich App at ___. "Regarding the facial challenge, [plaintiff] argue[d] that the ordinance conflicted with MRTMA's competitive-process mandate because the selection process was inherently noncompetitive." *Id*. at ___. However, "[a]lthough [defendant] used [a] series of yes-or-no factors and did not use a numerical scoring system, there were still meaningful ways to distinguish the applicants, thus satisfying the 'competitive' requirement within the meaning of MCL 333.27959(4)." *Exclusive Capital Partners*, ___ Mich App at ___. "MCL 333.27959(4) dictates that the process adopted must evaluate which applicants offer the most favorable terms, as compared to others, for the purpose of identifying which applicants are best suited to operate in compliance with the MRTMA." *Exclusive Capital Partners*, ___ Mich App at ___. "Taken as a whole, the criteria serve as guideposts allowing a decision-maker to determine which applicants are most favorable for operating in compliance with the MRTMA, providing criteria an applicant may satisfy by varying degrees." *Id*. at ___. "Because the criteria allow for meaningful distinctions between applicants, the criteria are necessarily competitive." *Id*. at ___. Regarding the as-applied challenge, plaintiff argued that defendant's "implementation of the competitive process ran afoul of both the MRTMA and [defendant's] own marijuana ordinance, because the city manager admitted he did not understand his task to select applicants best suited to operate in compliance with the MRTMA and failed to rank or score the applicants, because the interpretation and application of the criteria were contrary to the text of the ordinance, and because some applicants were outright disqualified although the ordinance did not allow for disqualification." *Id*. at ___. "Ultimately, the city manager reviewed all the applications, considered each in relation to the competitive criteria of the marijuana ordinance, compared the applicants to one another, and independently ranked the applicants into three categories consisting of the two successful applicants, applicants put on standby, and applicants who were rejected." *Id*. at ___. The Court concluded that summary disposition of plaintiff's facial and as-applied challenges to defendant's competitive-process procedure was proper because "[t]here [was] no genuine issue of material fact as to whether [defendant] violated either the MRTMA or its marijuana ordinance by implementing this competitive process." *Id*. at ___.

4. Conditions of Probation

Pursuant to MCL 771.3(1)(a), "it is permissible to proscribe the use of marijuana as a condition of probation for nonmarijuana-

related crimes." *People v Hess*, ___ Mich App ___, ___ (2024). In this case, defendant pleaded guilty to retail fraud and was sentenced to serve 12 months' probation. *Id*. at ___. "The order of probation prohibited defendant from using or possessing marijuana and required that she submit to drug screening for marijuana." *Id*. at ___. After twice testing positive for marijuana and receiving two violations of probation, "defendant moved . . . to amend the terms of her probation to allow the use and possession of marijuana, . . . arguing that the condition of her probation that prohibited her use of marijuana violated the plain language of the MRTMA." *Id*. at ___. "Defendant [sought] to extend [*People v*] *Thue*'s reasoning . . . raising the same argument as the defendant in [*People v*] *Lopez-Hernandez*," contending "that because the MRTMA prohibits penalizing the use of marijuana in a manner compliant with the statute and it mirrors the language of the MMMA on the same subject, the probation condition prohibiting her use of recreational marijuana is unenforceable." *Id*. at ___, citing *People v Thue*, 336 Mich App 35, 47 (2021); *People v Lopez- Hernandez*, ___ Mich App ___, ___ (2024). However, the *Thue* Court explained in dicta that "the MMMA was inapplicable to the recreational use of marijuana[.]" *Hess*, ___ Mich App at ___. "*Lopez-Hernandez* has turned the dicta of *Thue* into the binding precedent that the MRTMA does not automatically preclude a condition of probation that prohibits the use or possession of marijuana." *Hess*, ___ Mich App at ___. Further, "MCL 771.3(1)(a) states that "[d]uring the term of . . . probation, the probationer shall not violate any criminal law of this state, the *United States*, or another state or any ordinance of any municipality in this state or another state." *Hess*, ___ Mich App at ___. "Using recreational marijuana may be permissible in Michigan but it is still prohibited by federal law." *Id*. at ___. Therefore, defendant "violated her lawfully imposed terms of probation." *Id*. at ___.

E. Relationship to Article 7 of the Public Health Code

"[T]he MRTMA does not prevent a person accused of possession with intent to deliver between 5 and 45 kilograms of marijuana from being prosecuted under MCL 333.7401(2)(d)(*ii*) [Article 7 of the Public Health Code]." *People v Soto*, ___ Mich App ___, ___ (2024). "MCL 333.7401 provides that 'a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, . . . '" *Soto*, ___ Mich App at ___, quoting MCL 333.7401(1). A person who violates the statute involving between 5 and 45 kilograms of marijuana is guilty of a felony and may be sentenced to "imprisonment for not more than 7 years or a fine of not more than $500,000 or both." *Soto*, ___ Mich

App at ___, quoting MCL 333.7401(2)(d)(*ii*). Conversely, "[t]here is no counterpart for defendant's alleged conduct in the MRTMA." *Soto*, ___ Mich App at ___. Section 4 of the MRTMA sets forth conduct unauthorized by the Act, and provides that all other laws inconsistent with [the] act do not apply to conduct that is permitted by [the] act." *Soto*, ___ Mich App at ___ (quotation marks and some brackets omitted). "Notably, although possession with intent to deliver marijuana is addressed in Subsections (1) and (2) [of Section 15 of the MRTMA], it is absent from the provision penalizing the possession, cultivation, or delivery without remuneration more than twice the amount of marijuana allowed by § 5 as a misdemeanor[.]" *Soto*, ___ Mich App at ___. However, "the conduct underlying defendant's possession-with-intent-to-deliver-marijuana charge expressly implicates Article 7 of the Public Health Code, which . . . penalizes possession with the intent to deliver between 5 and 45 kilograms of marijuana as a felony." *Soto*, ___ Mich App at ___, citing MCL 333.7401(2)(d)(*ii*). Consequently, "the MRTMA does not supersede Article 7 . . . with regard to the felony prosecution of persons who possess with the intent to deliver more than twice the amount of marijuana allowed by MCL 333.27955." *Soto*, ___ Mich App at___.

8.15 Penalties for Violation of the MRTMA

"A person who commits any of the following acts [set forth in the following subsections], and is not otherwise authorized by [the MRTMA] to conduct such activities, may be punished only as provided in [MCL 333.27965] and is not subject to any other form of punishment or disqualification, unless the person consents to another disposition authorized by law[.]" MCL 333.27965.

A. Possession of Not More Than the Amount Permitted by § 27955

"Except for a person who engaged in conduct described in [MCL 333.27954(1)(a), MCL 333.27954(1)(b), MCL 333.27954(1)(c), MCL 333.27954(1)(d), MCL 333.27954(1)(g), or MCL 333.27954(1)(h)], a person who possesses not more than the amount of marihuana allowed by [MCL 333.27955], cultivates not more than the amount of marihuana allowed by [MCL 333.27955], delivers without receiving any remuneration to a person who is at least 21 years of age not more than the amount of marihuana allowed by [MCL 333.27955], or possesses with intent to deliver not more than the amount of marihuana allowed by [MCL 333.27955], is responsible for a civil infraction and may be punished by a fine of not more than $100 and forfeiture of the marihuana." MCL 333.27965(1).

B. Possession of Not More Than Twice the Amount Permitted by § 27955

"Except for a person who engaged in conduct described in [MCL 333.27954], a person who possesses not more than twice the amount of marihuana allowed by [MCL 333.27955], cultivates not more than twice the amount of marihuana allowed by [MCL 333.27955], delivers without receiving any remuneration to a person who is at least 21 years of age not more than twice the amount of marihuana allowed by [MCL 333.27955], or possesses with intent to deliver not more than twice the amount of marihuana allowed by [MCL 333.27955]:

> (a) for a first violation, is responsible for a civil infraction and may be punished by a fine of not more than $500 and forfeiture of the marihuana;
>
> (b) for a second violation, is responsible for a civil infraction and may be punished by a fine of not more than $1,000 and forfeiture of the marihuana;
>
> (c) for a third or subsequent violation, is guilty of a misdemeanor and may be punished by a fine of not more than $2,000 and forfeiture of the marihuana." MCL 333.27965(2).

C. Possession of More Than Twice the Amount Permitted by § 27955

"Except for a person who engaged in conduct described in [MCL 333.27954], a person who possesses more than twice the amount of marihuana allowed by [MCL 333.27955], cultivates more than twice the amount of marihuana allowed by [MCL 333.27955], or delivers without receiving any remuneration to a person who is at least 21 years of age more than twice the amount of marihuana allowed by [MCL 333.27955], shall be responsible for a misdemeanor, but shall not be subject to imprisonment unless the violation was habitual, willful, and for a commercial purpose or the violation involved violence." MCL 333.27965(4).

The penalty provisions of the MRTMA, not those of Article 7 of the PHC, "provide the framework for prosecuting a manufacturing-marijuana charge in cases involving unlicensed commercial grow operations." *People v Kejbou*, ___ Mich App ___, ___ (2023) (defendant was charged with manufacturing 200 or more marijuana plants in violation of MCL 333.7401(2)(d)(*i*) and argued the charge should be quashed because MCL 333.27965(4) limits the prosecution of the charge to misdemeanor status). The Court examined both the

MRTMA and Article 7 of the PHC and concluded that the "MRTMA broadly decriminalizes the use, possession, and cultivation of marijuana, while the Public Health Code expressly criminalizes the same activities." *Kejbou*, ___ Mich App ___. "The conduct underlying defendant's manufacturing-marijuana charge—cultivating more than 1,000 marijuana plants—obviously implicates both the prohibition of cultivating 200 or more such plants for purposes of a felony prosecution under Article 7 of the Public Health Code, *and* the prohibition of cultivating more than twice the allowed 12 plants for purposes of a misdemeanor prosecution under the MRTMA[.]" *Id*. at ___ (citations omitted). The MRTMA "acknowledges that its provisions *do* create conflicts with other criminal statutes, and emphatically decrees that, when they do, the MRTMA prevails"; accordingly, "when it comes to commercial grow operations like the one at issue in this case, Article 7 has been effectively repealed, moderated, or otherwise supplanted by the MRTMA." *Id*. at ___. Consequently, "the circuit court correctly held that defendant's manufacturing-marijuana charge is now covered by the MRTMA, and thus defendant was not subject to prosecution under [Article 7 of the Public Health Code]." *Id*. at ___. However, the Court expressed no "position on whether the MRTMA controls where a defendant is charged for possessing an amount of marijuana or marijuana plants in excess of the amounts considered legal for personal, recreational use under the MRTMA." *Id.* at ___ n3.

The decision in *Soto* "does not conflict with [the] decision [in *Kejbou*] that a defendant's manufacturing-marijuana charge was covered by the MRTMA rather than Article 7 of the Public Health Code." *Soto*, ___ Mich App at ___, citing *People v Kejbou*, ___ Mich App ___, ___ (2023). The *Soto* Court was "not limited by the decision in *Kejbou* . . . because the relevant statutory provisions [in *Kejbou* were] not in conflict in this case." *Soto*, ___ Mich App at ___.

D. Possession By Person Under 21 Years of Age

"Except for a person who engaged in conduct described by [MCL 333.27954(1)(a), MCL 333.27954(1)(d), or MCL 333.27954(1)(g)], a person under 21 years of age who possesses not more than 2.5 ounces of marihuana or who cultivates not more than 12 marihuana plants:

> (a) for a first violation, is responsible for a civil infraction and may be punished as follows:
>
> > (1) if the person is less than 18 years of age, by a fine of not more than $100 or community service,

> forfeiture of the marihuana, and completion of 4 hours of drug education or counseling; or
>
> (2) if the person is at least 18 years of age, by a fine of not more than $100 and forfeiture of the marihuana.
>
> (b) for a second violation, is responsible for a civil infraction and may be punished as follows:
>
> (1) if the person is less than 18 years of age, by a fine of not more than $500 or community service, forfeiture of the marihuana, and completion of 8 hours of drug education or counseling; or
>
> (2) if the person is at least 18 years of age, by a fine of not more than $500 and forfeiture of the marihuana." MCL 333.27965(3).

Operating a motor vehicle. The MRTMA does not "decriminalize the use of any amount of marijuana by persons under the age of 21 even if operating a motor vehicle." *People v Perry*, 338 Mich App 363, 368 (2021). See Section 8.18 for a detailed discussion of this issue.

8.16 Civil Action for Improper Sale or Transfer of Marijuana

"A licensee authorized to sell or otherwise transfer marihuana under [the MRTMA] or a rule promulgated under [the MRTMA] shall not directly, or by a clerk, agent, or servant, sell or otherwise transfer marihuana to a minor or to an individual who, at the time of the sale or transfer, is visibly intoxicated." MCL 333.27961a(1).

Cause of action. "Except as otherwise provided in [MCL 333.27961a], an individual who suffers damage or is personally injured by a minor or visibly intoxicated person as a result of a violation of [MCL 333.27961a(1)], if the violation is a proximate cause of the damage or personal injury or death, shall have a right of action in his or her name against the licensee that sold or transferred the marihuana." MCL 333.27961a(2). "It is presumed that a licensee, other than the licensee that last sold or transferred marihuana to a minor or visibly intoxicated person, is not a proximate cause of an injury that gave rise to a cause of action under [MCL 333.27961a(2)]. This presumption may be overcome by clear and convincing evidence." MCL 333.27961a(7).

Statute of limitations. "An action under [MCL 333.27961a] must be instituted within 2 years after the injury or death." MCL 333.27961a(3).

Required written notice. "A person shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purposes of pursuing a claim for damages under [MCL 333.27961a]. Failure to give written notice to the licensee within that time period is grounds for dismissal of the claim unless the licensee could not be identified within that time period with reasonable diligence. If the licensee is identified after that time period, failure to give written notice within 120 days thereafter is grounds for dismissal. In the event of the death of either party, the right of action under [MCL 333.27961a] survives to or against his or her personal representative." MCL 333.27961a(3).

Required party. "An action under [MCL 333.27961a] shall not be commenced unless the minor or alleged visibly intoxicated individual is a named defendant and is retained in the action until the litigation is concluded by final action or the licensee is dismissed with prejudice." MCL 333.27961a(4).

Right to indemnification. "A licensee described in [MCL 333.27961a(2)] has the right to full indemnification from the minor or alleged visibly intoxicated individual for all damages awarded against the licensee." MCL 333.27961a(5).

Defenses. "All defenses of the minor or alleged visibly intoxicated individual are available to the licensee. In an action alleging a violation of [MCL 333.27961a(1)] involving a minor, proof that the licensee demanded and was shown a government-issued photographic identification appearing to be genuine and showing the minor to be 21 years of age or older, is a complete defense to the action." MCL 333.27961a(6).

Damages. "An individual who suffers damage or who is personally injured by a minor or visibly intoxicated person as a result of a violation of [MCL 333.27961a(1)] has the right to recover actual damages in a sum of not less than $50.00 in each case in which the court or jury determines that intoxication was a proximate cause of the damage, injury, or death." MCL 333.27961a(9).

Required insurance. "A licensee authorized to sell or otherwise transfer marihuana under [the MRTMA] or a rule promulgated under [the MRTMA] must maintain insurance coverage provided by a licensed and admitted insurance company in Michigan in a minimum amount of $50,000.00 for actions brought under [MCL 333.27961a(2)]." MCL 333.27961a(10).

Exclusive remedy. "[MCL 333.27961a] provides the exclusive remedy for money damages against a licensee and the licensee's clerks, agents, and employees arising out of a violation of [MCL 333.27961a(1)]. [MCL 333.27961a(11)] does not apply to a remedy available under law to lawful

users of marihuana for liability resulting from the manufacture, distribution, transportation, or sale of adulterated marihuana." MCL 333.27961a(11).

Revised Judicature Act applies. "Except as otherwise provided in [MCL 333.27961a], a civil action against a licensee is subject to the revised judicature act of 1961, . . . MCL 600.101 to [MCL] 600.9947." MCL 333.27961a(12).

No cause of action. "A minor or alleged visibly intoxicated individual does not have a cause of action under [MCL 333.27961a]. A person does not have a cause of action against a licensee for any loss or damage sustained resulting from the injury or death of the minor or visibly intoxicated person." MCL 333.27961a(8).

8.17 Other Sections of the MRTMA

Implementation, administration, and enforcement. "The cannabis regulatory agency is responsible for implementing [the MRTMA] and has the powers and duties necessary to control the commercial production and distribution of marihuana." MCL 333.27957(1). MCL 333.27957 through MCL 333.27961 and MCL 333.27966 detail the agency's authority, responsibilities, rulemaking, licensure process, ability to enter into agreements—including agreements with Indian tribes, regulation of marihuana establishments, and the consequences for any failure of the agency to act. A full discussion of the Cannabis Regulatory Agency's duties and powers is outside the scope of this benchbook.

Taxes and regulation fund. MCL 333.27962 permits certain state tax deductions for computing a marihuana establishment's net income.

MCL 333.27963 imposes an excise tax to be administered by the Department of Treasury and also creates exemptions to the excise tax.

MCL 333.27964 creates a marihuana regulation fund in the state treasury and provides for its administration and allocation of expenditures.

Construction and severability. MCL 333.27967 provides that the MRTMA "shall be broadly construed to accomplish its intent as stated in [MCL 333.27952]," and states that the act does not purport to supersede any applicable federal law except as allowed by federal law. It further provides that the act is self-executing, and any section "found invalid as to any person or circumstances shall not affect the application of any other section of [the MRTMA] that can be given full effect without the invalid section or application." *Id.*

See the Cannabis Regulatory Agency's website for more information.

8.18 Operating a Motor Vehicle[346]

The MRTMA does not conflict with or preempt MCL 257.625(8), which prohibits a person from operating a vehicle with any amount of a schedule I controlled substance in their body. *People v Perry*, 338 Mich App 363, 368 (2021). Specifically, MCL 333.27965(3) decriminalizes "the 'possession' and 'cultivation' of marijuana for individuals under the age of 21," it does not decriminalize the *use* of marijuana, and "[u]sing or consuming marijuana is a necessary step leading to the operation of a motor vehicle with marijuana in the driver's system, in violation of MCL 257.625(8)[.]" *Perry*, 338 Mich App at 372-372.

Further, MCL 333.27965(3) "carves out exceptions to the statutory rule that a person under 21 years of age who possesses not more than 2.5 ounces of marijuana or who cultivates not more than 12 marihuana plants is responsible only for a civil infraction," and those statutory exceptions include the operation, navigation, or physical control of a motor vehicle while under the influence of marijuana and the consumption of marijuana while operating, navigating, or being in physical control of any motor vehicle. *Perry*, 338 Mich App at 373-374. See also MCL 333.27954(1)(a) and MCL 333.27954(1)(g) (the relevant statutory exceptions listed in MCL 333.27965(3)).[347]

Accordingly, "the MRTMA did not remove all criminal penalties for persons under the age of 21 who operate a motor vehicle with marijuana in their system, is under the influence of marijuana while driving, or consumes marijuana while operating a vehicle." *Perry*, 338 Mich App at 375, 379 (concluding that "[b]ecause defendant's behavior fits within one of the exceptions listed in MCL 333.27965(3), she is not entitled to the lower civil infraction penalty" set out in MCL 333.27965(3)). See also *People v Lopez-Hernandez*, ___ Mich App ___ (2024) (discussing the MVC in context of the MMMA and the MRTMA).

8.19 Probable Cause to Search a Motor Vehicle

"[I]n light of the voters' intent to legalize marijuana usage and possession, the smell of marijuana, standing alone, no longer constitutes

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[346]For a detailed discussion of operating while intoxicated (OWI) and operating while visibly impaired (OWVI) offenses under MCL 257.625, see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

[347]The Court acknowledged the decision in *People v Koon*, 494 Mich 1 (2013), where the Michigan Supreme Court held that the MMMA's protection superseded the Michigan Vehicle Code to allow "a registered patient to drive when he or she had indications of marijuana in his or her system but is not otherwise under the influence of marijuana," but noted that the exception in MCL 333.27954(1)(g) does not contain the "under the influence" language, and further stated it "would strain credulity to conclude that the mere inclusion of the 'under the influence' language in the exception set forth in MCL 333.27954(1)(a) requires that [the Court] hold that it implicitly repealed MCL 257.625(8) insofar as it relates to persons under the age of twenty-one." *People v Perry*, 338 Mich App 363, 375-376 n 8 (2021).

probable cause sufficient to support a search for contraband." *People v Armstrong*, ___ Mich ___, ___ (2025), aff'g 344 Mich App 286 (2022). In *People v Kazmierczak*, 461 Mich 411 (2000), the Michigan Supreme Court held "that the smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement." *Armstrong*, ___ Mich at ___ , quoting *Kazmierczak*, 461 Mich at 413. However, "*Kazmierczak*'s holding is no longer good law in light of the passage of the MRTMA" in 2018.[348] *Armstrong*, ___ Mich at ___. "MCL 333.27955 provides a list of permissible acts for adults who are 21 years of age or older under the MRTMA, including possessing, using, purchasing, transporting, or processing 2.5 to 15 grams of marijuana." *Armstrong*, ___ Mich at ___. "[N]ow that marijuana possession and use is generally legal, the odor of marijuana does not on its own supply a *substantial* basis for inferring a fair probability that contraband or evidence of illegal activity will be found in a particular place." *Id*. at ___, citing *Illinois v Gates*, 462 US 213, 238 (1983). Going forward, "the appropriate rule is that the smell of marijuana is one factor that may play a role in the probable-cause determination." *Armstrong*, ___ Mich at ___. "Other relevant inculpatory facts might include, for example, an officer's observation of evidence suggesting intoxication or the presence of smoke." *Id*. at ___.

In *Armstrong*, a police officer "observed a Jeep Cherokee parked on the side of the street and allegedly smelled the scent of burnt marijuana coming from the vehicle as she drove by." *Id*. at ___. "Defendant denied smoking marijuana in the car, stating that he had just got into the vehicle." *Id*. at ___. The officer ultimately "asked defendant to step out of the vehicle." *Id*. at ___. The officer "patted him down and handcuffed him." *Id*. at ___. Another police officer "recorded that she observed a black handgun under the front passenger seat as . . . [defendant was being removed] from the vehicle." *Id*. at ___. "Based on the body camera footage, however, the trial court determined that the firearm was not visible until [defendant] had already been removed from the vehicle and that [the police officer] did not discover the gun until she *searched* the vehicle, and under the front passenger seat." *Id*. at ___ (quotation marks omitted). Defendant was charged with various firearms offenses, and "moved to suppress the introduction of the gun as evidence, arguing that the gun was the fruit of a search that violated the Fourth Amendment of the United States Constitution." *Id*. at ___. "Because the officers in this case lacked probable cause, the automobile exception to the warrant requirement did not apply." *Id*. at ___. "Moreover, even assuming that the police officers possessed reasonable suspicion to detain and

[348]Specifically, the Michigan Supreme Court held that "*Kazmierczak*'s rule that the smell of marijuana, standing alone, is sufficient to support a finding of probable cause under the automobile exception to the warrant requirement is no longer viable in light of the enactment of the MRTMA." *People v Armstrong*, ___ Mich ___, ___ (2025), aff'g 344 Mich App 286 (2022).

investigate defendant based on the smell of marijuana, the trial court did not clearly err when it held that the gun was discovered during a search based on the smell of burnt marijuana, not because it was seized while in plain view." *Id*. at ___. "A warrantless search must be based on probable cause and the smell of marijuana is insufficient to support probable cause." *Id*. at ___.

8.20 Setting Aside Misdemeanor Marijuana Convictions

"Beginning on January 1, 2020,[349] a person convicted of 1 or more misdemeanor marihuana offenses may apply to set aside the conviction or convictions under [MCL 780.621e(1)]." MCL 780.621e(1).

See also the Michigan Judicial Institute's *Setting Aside a Conviction for Misdemeanor Marijuana* Checklist.

A. Application Procedure

Applications to set aside a misdemeanor marihuana offense must include:

- Full name of applicant;
- Current address of applicant; and
- Certified record of each conviction to be set aside. MCL 780.621e(2).

The application to set aside a misdemeanor marihuana offense must be served on the agency that prosecuted the offense. MCL 780.621e(3).

B. Rebuttable Presumption

"A rebuttable presumption that a conviction for a misdemeanor marihuana offense sought to be set aside by an applicant was based on activity that would not have been a crime if committed on or after December 6, 2018 arises upon the filing of an application under [MCL 780.621e(1)]." MCL 780.621e(4). The agency that prosecuted the case may rebut the presumption by demonstrating "by a preponderance of the evidence that the conduct on which the applicant's conviction was or convictions were based would constitute a criminal violation of the laws of this state or a political subdivision of this state if it had been committed on or after December 6, 2018." *Id.*

[349] Note, however, that 2020 PA 192 was not effective until April 11, 2021.

"An answer made under [MCL 780.621e(4)] must be filed no later than 60 days from the date of service of the application." MCL 780.621e(4). "If an answer is filed with the convicting court, the answering party must serve the answer upon the other parties to the matter." *Id.*

If the prosecuting agency does not file an answer to an application to set aside a misdemeanor marijuana conviction addressing the rebuttable presumption within 60 days of service of the application, "the convicting court must within 21 days enter an order setting aside the conviction or convictions and serve a copy of the order upon the applicant, the arresting agency, the prosecuting agency, and the department of the state police." MCL 780.621e(5).

C. Hearing Required if Rebuttable Presumption is Challenged

"If the prosecuting agency files an answer addressing the rebuttable presumption in [MCL 780.621e(4)], the convicting court must promptly set the matter for a hearing no later than 30 days from its receipt of the answer, and serve a notice of the hearing upon the applicant." MCL 780.621e(6).

"At the hearing, the prosecuting agency must prove by a preponderance of the evidence that a conviction or convictions sought to be set aside by an applicant were based upon conduct that would constitute a criminal violation of the laws of this state or a political subdivision of this state if it had been committed on or after December 6, 2018." MCL 780.621e(6).

"An applicant is not required to present evidence that his or her conviction was based upon conduct that would not constitute a criminal violation of the laws of this state or a political subdivision of this state on or after December 6, 2018." MCL 780.621e(6). "The evidentiary burden under [MCL 780.621e(6)] rests solely on the objecting prosecuting agency." *Id.*

"After a hearing under [MCL 780.621e(6)], the court shall enter an order denying or granting the application no later than 14 days after completion of the hearing and serve any written opinions and orders, including an order setting aside the conviction or convictions, upon the parties, including the department of state police. The rules of evidence do not apply to a hearing under [MCL 780.621e(6)]." MCL 780.621e(6).

D. Procedures After an Application to Set Aside is Granted

Records. "[T]he the arresting agency and the department of the state police shall maintain the nonpublic record created under [MCL 780.623] for use as authorized under [MCL 780.623]." MCL 780.621f(1).

No resentencing in other cases. "If an application to set aside a conviction or convictions is granted under [MCL 780.621e], the applicant may not thereafter seek resentencing in another criminal case the applicant was sentenced for during which the conviction or convictions at issue were used in determining an appropriate sentence for the applicant, whether or not the setting aside of the conviction or convictions would have changed the scoring of a prior record variable for purposes of the sentencing guidelines or otherwise." MCL 780.621f(2).

Rehearing, reconsideration, and appeal of decision to set aside conviction. "A party aggrieved by the ruling of the convicting court considering an application under [MCL 780.621e] may seek a rehearing or reconsideration under the applicable rules of the convicting court or may file an appeal with the circuit court or, if applicable, the court of appeals in accordance with the rules of those courts." MCL 780.621f(3).

E. Court-Ordered Financial Obligations

"The setting aside of a conviction under [MCL 780.621e] does not entitle the applicant to the return of any fines, costs, or fees imposed as part of the applicant's sentence for the conviction or convictions or of any money or property forfeited by the prosecuting agency or any law enforcement agency as a result of the conduct leading to the conviction or as a result of the conviction itself." MCL 780.621f(4).

Chapter 9: Evidentiary Issues

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9.1 Scope Note

This chapter discusses evidentiary issues specifically relevant to controlled substances cases. For a detailed discussion of general evidentiary issues, see the Michigan Judicial Institute's *Evidence Benchbook*.

9.2 Admission of Physical Evidence

Note that effective January 1, 2024, ADM File No. 2021-10 amended the Michigan Rules of Evidence. Generally, the amendments are stylistic; however, the application of caselaw interpreting older versions of the rules to the current version of the rules has not been addressed by any binding legal authority.

A. Generally

Evidence must be authenticated and identified before admission. See MRE 901. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what its proponent claims it is." MRE 901(a). To lay the foundation for the admission of real evidence, the proponent must at least show that:

- the object offered is the object which was involved in the incident, and
- the condition of the object is substantially unchanged. *People v White (Prentis)*, 208 Mich App 126, 129-131 (1994). See also MRE 901(b) (a nonexhaustive list of evidence that satisfies MRE 901).

"[C]hallenges to the authenticity of evidence involve two related, but distinct, questions. The first question is whether the evidence has been *authenticated*—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is *actually authentic* or *genuine*—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 154 (2017).

The first question, whether the evidence has been authenticated, "is reserved solely for the trial judge." *Mitchell*, 321 Mich App at 154. The proponent of the evidence bears the burden of presenting evidence "sufficient to support a finding that the matter in question is what its proponent claims." *Id.* at 155 (quotation marks and citation omitted). The proponent is not required "to sustain this burden in any particular fashion," and "evidence supporting authentication may be

direct or circumstantial and need not be free of all doubt." *Id.* at 155. The proponent is required "only to make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be." *Id.* at 155. "Once the proponent of the evidence has made the prima facie showing, the evidence is authenticated under MRE 901(a) and may be submitted to the jury." *Mitchell*, 321 Mich App at 155. Authentication may be opposed "by arguing that a reasonable juror could not conclude that the proffered evidence is what the proponent claims it to be"; however, "this argument must be made on the basis of the proponent's proffer; the opponent may not present evidence in denial of the genuineness or relevance of the evidence at the authentication stage." *Id.* at 155.

"[T]he second question—the weight or reliability (if any) given to the evidence—is reserved solely to the fact-finder[.]" *Mitchell*, 321 Mich App at 156. "When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court." *Id.* at 156. "Accordingly, the parties may submit evidence and argument, pro and con, to the jury regarding whether the authenticated evidence is, in fact, genuine and reliable." *Id.* at 156.

B. Controlled Substances

More elaborate testimony is required for admission when real evidence, such as a controlled substance, is not readily identifiable or is susceptible to alteration by tampering or contamination. *White (Prentis),* 208 Mich App at 130. To lay the foundation for admitting such evidence, the prosecution must introduce testimony tracing the chain of custody of the item in addition to showing that the object was involved in the incident and that its condition is substantially unchanged. *Id.*

"A perfect chain of custody is not required for the admission of [controlled substances]." *White (Prentis)*, 208 Mich App at 132-133. Controlled substances and other evidence that is not readily identifiable or susceptible to alteration by tampering or contamination "may be admitted where the absence of a mistaken exchange, contamination, or tampering has been established to a reasonable degree of probability or certainty." *Id*. at 133.

A break or gap in the chain of custody may be relevant to the trial court's determination of whether the prosecution has met the foundational requirements for introduction of real evidence. *White (Prentis)*, 208 Mich App at 133. However, a break or gap in the chain of custody does not require automatic exclusion of the evidence. *Id.* "The threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of each individual case. Once a proper foundation has

been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *Id.* See also *People v Mitchell*, 493 Mich 883, 884 (2012) (noting that "breaks in the chain of custody go to the weight of the evidence not to its admissibility").

There was a sufficient foundation for admission of crack cocaine where the chain of custody was incomplete due to the lack of any testimony regarding the transfer of the cocaine from the evidence room safe because the chain of custody was "substantially complete." *White (Prentis),* 208 Mich App at 133. Further, "the testimony at trial established that reasonable precautions were taken to preserve the original condition of the evidence and prevent its misidentification." *Id.* Specifically, the evidence was sealed in an evidence envelope, locked in a safe at the police station with a receipt and laboratory sheet, the sealed envelope was then transported to a locked evidence locker at the crime laboratory, and removed by a crime lab scientist who wrote the complaint number and signed the envelope. *Id.* at 133-134.

9.3 Destruction of Controlled Substances Seized as Evidence

The PHC governs the destruction of controlled substances seized as evidence. MCL 333.7527.

A. Motion for Destruction

"Prior to trial the prosecuting attorney may move in writing for an order permitting the destruction of all or part of a controlled substance, controlled substance analogue, counterfeit substance, or imitation controlled substance seized as evidence in connection with a violation of [Article 7 of the PHC]. The motion shall specify the reasons supporting the destruction. The prosecuting attorney shall serve a copy of the motion, and any supporting materials, on the defendant or his or her attorney." MCL 333.7527(1).

B. Defendant's Rights

1. Objection to Destruction

"If the defendant objects, the defendant or his or her attorney shall file specific objections within 21 days after receiving the motion described in [MCL 333.7527(1)]. Failing to comply with this time limit waives any objection to the destruction of the evidence." MCL 333.7527(2).

2. Right to Inspect

"Before any hearing on the motion, the defendant or his or her attorney shall have an adequate opportunity to inspect or test, or both, the evidence sought to be destroyed, subject to reasonable supervision by laboratory or law enforcement personnel." MCL 333.7527(3).

C. Destruction

"Following a hearing, the court may order destruction of all or part of the controlled substance, controlled substance analogue, counterfeit substance, or imitation controlled substance if the court determines on the record that the destruction is warranted. The court shall specify the evidence to be destroyed and may include further provisions in the order as the interests of justice require." MCL 333.7527(4).

"The law enforcement agency having custody of the evidence shall destroy the controlled substance, controlled substance analogue, counterfeit substance, or imitation controlled substance in accordance with an order entered under subsection (4). Before destroying the evidence, the law enforcement agency shall make an accurate photographic record of the controlled substance, controlled substance analogue, counterfeit substance, or imitation controlled substance. The court may order that further records be made before the evidence is destroyed." MCL 333.7527(5).

9.4 Forensic Laboratory Reports

A. Required Procedures

MCR 6.202 concerns forensic laboratory reports and certificates, and applies to criminal trials in district and circuit court. MCR 6.202(A).

1. Disclosure of Report

"Upon receipt of a forensic laboratory report and certificate, if applicable, by the examining expert, the prosecutor shall serve a copy of the laboratory report and certificate on the opposing party's attorney or party, if not represented by an attorney, within 14 days after receipt of the laboratory report and certificate." MCR 6.202(B). Additionally, proof of service of the report and certificate (if applicable) on the opposing party's attorney (or party, if not represented by an attorney), must be filed with the court. MCR 6.202(B).

2. Notice

If a party intends to offer a forensic laboratory report as evidence at trial, the party's attorney (or party, if not represented by an attorney), must provide the opposing party's attorney (or party, if not represented by an attorney), with written notice of that fact. MCR 6.202(C)(1). If the prosecuting attorney intends to offer a forensic laboratory report as evidence at trial, notice to defense counsel (or the defendant, if not represented by counsel), must be included with the report. MCR 6.202(C)(1). If a defendant intends to offer a forensic laboratory report as evidence at trial, notice to the prosecuting attorney must be provided within 14 days after receiving the report. MCR 6.202(C)(1). "Except as provided in [MCR 6.202(C)(2)], a forensic laboratory report and certification (if applicable) is admissible in evidence to the same effect as if the person who performed the analysis or examination had personally testified." MCR 6.202(C)(1).

3. Objection to Use of Report

After receipt of a copy of the forensic laboratory report and certificate (if applicable), the opposing party's attorney (or party, if not represented by an attorney), may file a written objection to the use of the forensic laboratory report and certificate. MCR 6.202(C)(2). The written objection must be filed with the court where the matter is pending, and must be served on the opposing party's attorney (or party, if not represented by an attorney), within 14 days of receiving the notice. MCR 6.202(C)(2). If a written objection is filed, the forensic laboratory report and certificate are inadmissible under MCR 6.202(C)(1). If no objection is made to the use of the forensic laboratory report and certificate within 14 days of receipt of the notice, the forensic laboratory report and certificate are admissible in evidence as set out in MCR 6.202(C)(1). MCR 6.202(C)(2). The court must extend the time period of filing a written objection for good cause. MCR 6.202(C)(3). Compliance with MCR 6.202 constitutes good cause for adjourning trial. MCR 6.202(C)(4).

4. Certification

The analyst who conducted the analysis on the forensic sample and signed the report must complete a certificate on which he or she must state (1) that he or she is qualified by education, training, and experience to perform the analysis; (2) the name and location of the laboratory where the analysis was performed; (3) that performing the analysis is part of his or her regular duties; and (4) that the tests were performed under industry-approved procedures or standards and the report

accurately reflects the analyst's findings and opinions regarding the results of those tests or analysis. MCR 6.202(D). Alternatively, a report submitted by an analyst employed by a laboratory that is accredited by a national or international accreditation entity that substantially meets the certification requirements set out in the court rule may provide proof of the laboratory's accreditation certificate in lieu of a separate certificate. MCR 6.202(D).

B. Confrontation Clause Issues

"The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination." *People v Payne*, 285 Mich App 181, 197 (2009), citing *Crawford v Washington*, 541 US 36, 68 (2004) and *People v Walker*, 273 Mich App 56, 60-61 (2006).

Admitting a laboratory report without having an analyst available for cross examination violates the defendant's right to confrontation when the nontestifying analyst knew that the purpose of the report was for use in criminal proceedings. *Payne*, 285 Mich App at 198-199. See also *Melendez-Diaz v Massachusetts*, 557 US 305, 310-311, 320, 329 (2009) (holding that police "certificates" are affidavits that constitute testimonial statements and admission of the certificate stating that the substance was found to contain cocaine without testimony from the analyst who performed the testing on the substance violated the defendant's right to confrontation). Thus, there is no "'forensic evidence' exception" to a defendant's right to confrontation, and "a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding" is "testimonial[.]" *Bullcoming v New Mexico*, 564 US 647, 658-659 (2011), citing *Melendez-Diaz*, 557 US at 320-321. However, admission of test results that are "self-explanatory data produced entirely by a machine and not the out-of-court statements of a witness" is not restricted by the Confrontation Clause. *People v Dinardo*, 290 Mich App 280, 291 (2010) (holding that the admissibility of DataMaster test results was not restricted by the Confrontation Clause).

Further, testimony from a witness with basic knowledge concerning testing and the methods used to prepare reports in general is insufficient to satisfy the defendant's right to confrontation where the witness did not personally conduct the testing, did not personally examine the evidence collected, and did not personally reach any of the scientific conclusions contained in the reports. *Payne*, 285 Mich App at 198. See also *Bullcoming*, 564 US at 651-652 (holding that the defendant's right to confrontation was violated where a forensic laboratory report certifying that the defendant's blood-alcohol

concentration was above the legal limit was admitted through testimony from an analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample). In *Bullcoming*, the Court noted that the forensic laboratory report contained a testimonial certification made for the purpose of proving a particular fact, and concluded that the testimony from a scientist who did not sign the certification or perform or observe the test reported in the certification did not satisfy the defendant's constitutional right to confrontation. *Id.*

In *Williams v Illinois*, 567 US 50, 57-58 (2012) (plurality opinion), a forensic specialist's testimony that a DNA profile produced by an outside laboratory matched the profile produced by the state police laboratory did not violate the Confrontation Clause because "[o]ut-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." The plurality further noted that the report was not admitted into evidence, the expert did not testify to the truth of the outside laboratory's tests or about anything done at the outside laboratory, did not vouch for the quality of the laboratory's work, and made no other reference to the laboratory's report. *Id.* at 70-71. Finally, the plurality noted that "even if the report produced by [the outside laboratory] had been admitted into evidence, there would have been no Confrontation Clause violation[,]" because the report "was produced before any suspect was identified[and] . . . was sought not for the purpose of obtaining evidence to be used against petitioner[.]" *Id.* at 58.

Admitting DataMaster logs reflecting that a particular DataMaster machine was tested by an operator who verified its accuracy and certified that it was in proper working order without calling the operator to testify about his tests would not violate a defendant's right to confrontation because the DataMaster logs are nontestimonial. *People v Fontenot*, 333 Mich App 528, 535-536 (2020), vacated in part on other grounds 509 Mich 1073 (2022).[350] Specifically, the logs "were created before defendant's breath test to prove the accuracy of the DataMaster machine; they were not created for the purpose of prosecuting defendant[.]" *Id.* at 535. "Furthermore, the DataMaster logs were created as part of the Michigan State Police's normal administrative function of assuring that the DataMaster machine

[350]For more information on the precedential value of an opinion with negative subsequent history, see our note. See also *People v Fontenot*, 509 Mich 1073, ___ (2022) (MCCORMACK, C.J., concurring) (noting that by denying leave on the "question of whether a technician's inspection logs of a DataMaster breath-testing machine are testimonial statements that trigger constitutional protections under the Confrontation Clauses, . . . the published Court of Appeals opinion holding that such administrative logs are nontestimonial remains binding on lower courts," but writing "to express some reservations about the consensus that has seemingly emerged that these statements are nontestimonial").

produces accurate results," and the machine "would have been checked for proper functioning even if defendant had not been tested with it." *Id.* at 535-536. Accordingly, the logs reflecting the test results were nontestimonial where the primary purpose of the test "was to comply with administrative regulations and to ensure [the machine's] reliability for future [breath] tests—not to prosecute defendant specifically." *Id.* at 536 (citation omitted).

In *Fontenot*, the Michigan Supreme Court vacated Part II(C) of the Court of Appeals opinion, which addressed the business records hearsay exception under MRE 803(6).[351] *Fontenot*, 509 Mich at 1073. For a detailed discussion of the hearsay rule and its exceptions, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 5.

C. Admission of Reports at Preliminary Examination

At a preliminary examination the rule against hearsay will not exclude "a report of the results of properly performed drug analysis field testing to establish that the substance tested is a controlled substance." MCL 766.11b(1)(a). Moreover, such a report is admissible at the preliminary examination "without requiring the testimony of the author of the report, keeper of the records, or any additional foundation or authentication[.]" *Id.*

MCL 766.11b irreconcilably conflicts with MCR 6.110(C) (providing that the Michigan Rules of Evidence apply at preliminary examinations) because it permits the admission of evidence that would be excluded under the Michigan Rules of Evidence. *People v Parker*, 319 Mich App 664, 667 (2017). "MCL 766.11b is an enactment of a substantive rule of evidence, not a procedural one[; a]ccordingly, the specific hearsay exception in MCL 766.11b takes precedence over the general incorporation of the Michigan Rules of Evidence found in MCR 6.110(C)." *Parker*, 319 Mich App at 674 (holding that "[t]he district court properly admitted the laboratory report [of the defendant's blood draw at his preliminary examination on a charge of operating while intoxicated] pursuant to the statutory hearsay exception in MCL 766.11b," and "[t]he circuit court abused its discretion by remanding defendant's case to the district court for continuation of the preliminary examination").

9.5 Drug Dealer Profiles

Police officers may testify as experts in controlled substances cases. *People v Murray*, 234 Mich App 46, 53 (1999).

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[351] Effective January 1, 2024, ADM File No. 2021-10 amended the Michigan Rules of Evidence; the business records exception to hearsay is now found in MRE 803(6)(B).

Drug dealer profiles, as testified to by a police officer, are generally not admissible as substantive evidence of a defendant's guilt of an offense under Article 7 of the PHC. *People v Hubbard*, 209 Mich App 234, 240-241 (1995), citing *United States v Hernandez-Cuartes*, 717 F2d 552, 555 (CA 11, 1983). Because drug dealer profiles have a great potential for inculpating innocent citizens, particularly when presented as expert opinion by law enforcement officials, a profile's probative value is generally outweighed by the danger of unfair prejudice under MRE 403. See *People v Murray*, 234 Mich App 46, 52-53 (1999); *Hubbard*, 209 Mich App at 241. However, drug dealer profiles may properly be used for the limited purposes of explaining the significance of items seized and the circumstances of the investigation of criminal activity. *Murray*, 234 Mich App at 53.

A court may consider the following factors to distinguish between the appropriate and inappropriate use of drug profile evidence when determining the admissibility of such evidence:

- the reason given and accepted for the admission of the profile testimony must only be for a proper use, such as to assist the jury as background or modus operandi explanation;
- the profile, without more, should not normally enable a jury to infer the defendant's guilt;
- because the focus is primarily on the jury's use of the profile, the court must make clear to the jury, through use of a jury instruction, what is and is not a proper use for the testimony; and
- the expert witness should not express his or her opinion, based on a profile, that the defendant is guilty, nor should he or she expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied. *Murray*, 234 Mich App at 56-58.

M Crim JI 4.17 is applicable when drug profile evidence is used. M Crim JI 4.17 provides:

> "You have heard testimony from [*name witness(es)*] about [his / her / their] training or experience concerning other drug cases. This testimony is not to be used to determine whether the defendant committed the crime charged in this case. This testimony may be considered by you only for the purpose of *[state purpose for which evidence was offered and admitted]*."

"Drug profile evidence" is "an informal compilation of characteristics often displayed by those trafficking in drugs." *People v Hines*, ___ Mich App ___, ___ (2025) (quotation marks and citation omitted). "[D]rug

profile evidence is generally inadmissible as substantive evidence of guilt, but trial courts may admit it to explain the significance of other evidence." *Id*. at ___. However, "there is often a very fine line between the probative use of profile evidence as background or modus operandi evidence and its prejudicial use as substantive evidence." *Id*. at ___ (cleaned up). "Trial courts therefore must make a case-by-case determination to allow drug profile testimony that aids the jury in intelligently understanding the evidentiary backdrop of the case, and the modus operandi of drug dealers, but stop short of enabling profile testimony that purports to comment directly or substantively on a defendant's guilt." *Id*. at ___ (quotation marks and citation omitted). Here, defendant's argument focuses on "whether the drug profile testimony amounted to opinion testimony on his guilt." *Id*. at ___. In this case, "[defendant] was convicted on each count submitted to the jury: one count of possession with intent to deliver methamphetamine, one count of possession with intent to deliver less than 50 grams of fentanyl, and one count of possession with intent to deliver imitation controlled substances." *Id*. at ___. Two drug task force officers who were qualified as expert witnesses "provided permissible drug profile testimony and testimony that crossed the line into impermissible comments on [defendant's] guilt." *Id*. at ___. One expert witness "testified that the police did not find pipes, needles, or items associated with drug *use* (as opposed to trafficking) during the search of [defendant's] residence." *Id*. at ___. Further, the expert witness "also vaguely opined that the quantity of drugs [defendant] had was not indicative of personal use." *Id*. at ___. The other expert witness "opined that the 31 bindles[352] of fentanyl recovered from [defendant] were indicative of packaging for delivery because of the number." *Id*. at ___. "This likely crossed the line into opinion testimony because it directly linked general characteristics to the evidence identified in [defendant's] case." *Id*. at ___. "This was inadmissible because it was essentially an opinion of [defendant's] guilt." *Id*. at ___. "Likewise, [the expert witness's] comment that a user might purchase more than one bindle but 'you're very rarely gonna [come] across users with 30 packets, 31 packets' was impermissible." *Id*. at ___. This comment "linked common traits directly to the facts of this case." "Finally, [the expert witness] speculated on why [defendant] might not have money with him suggesting that he 'recently re-upped,'" which was also impermissible. *Id*. at ___. The Court noted that "[s]eparate from the impermissible drug profile evidence, both [expert witnesses provided admissible drug profile evidence" and that it was "difficult to say that the impermissible drug profile evidence made a difference." *Id*. at ___. "Though inadmissible, under the facts of this case, [the drug profile evidence] arguably made explicit connections a reasonable jury would have already made." *Id*. at ___. Therefore, defendant "[could not]

[352] A police officer witness testified that "bindles" are "lottery ticket[s] cut up into pieces, folded up, usually containing some type of narcotics." *Hines*, ___ Mich App at ___.

establish that the improper drug profile evidence affected the outcome of the trial." *Id*. at ___.

9.6 Expert Testimony

MRE 702 provides the standard for admissibility of expert testimony. It provides: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." MRE 702.

Whether a party has provided the proper foundation for admission of expert testimony is a question for the trial court. MRE 104(a). Whether a witness is qualified as an expert and whether expert testimony is admissible is a matter within the trial court's discretion. *People v Wood*, 307 Mich App 485, 507 (2014).

"In determining the admissibility of scientific evidence, the court, as gatekeeper, must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue." *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 580 (1993). See also *Wood*, 307 Mich App at 507. Factors that a court may consider include:

- whether the scientific theory or technique can be tested and has been tested;
- whether the theory or technique has been subjected to peer review and publication;
- the known or potential error rate of the theory or technique and the existence and maintenance of standards controlling the theory or technique's operation; and
- whether the theory or technique has attracted widespread acceptance within a relevant scientific community. *Daubert*, 509 US at 580; *People v Kowalski*, 492 Mich 106, 131 (2012).

This gatekeeper test, known as the Daubert Test, was extended to nonscientific expert testimony in *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 147-149 (1999). "Although the *Daubert* gatekeeping function applies to all experts, the list of factors in *Daubert* is flexible and nonexhaustive: '*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.'" *Danhoff v Fahim*, ___ Mich ___, ___ (2024), quoting *Kumho Tire Co*, 526 US at 141.

"A person does not have to have formal education to be an expert, but may acquire special knowledge of the subject by other means." *People v Towlen*, 66 Mich App 577, 579 (1976). Moreover, "[a] witness need not possess specialized knowledge as a result of experience as well as training and eduction in order to be qualified as an expert." *Osner v Boughner*, 180 Mich App 248, 261 (1989) (holding that the officer was qualified to provide expert testimony despite the fact that the accident he investigated was the officer's first investigation). An expert also need not be a licensed professional. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403 (1989). While a proposed expert's expertise may not be as extensive as the expert's expertise on the opposing side, such consideration goes to the weight of the evidence rather than its admissibility. *People v Whitfield*, 425 Mich 116, 123-124 (1986). A trial court may properly consider other trial experience in determining whether a proposed expert should be allowed to testify, and the court may consider the fact that the witness has been qualified as an expert in other cases. *People v Lewis*, 160 Mich App 20, 28 (1987).

"[T]he guidepost for admissibility [of expert witness testimony] is reliability, and trial courts must consider MRE 702 as well as the statutory reliability factors presented in MCL 600.2955 when determining if an expert is reliable." *Danhoff*, ___ Mich at ___ (holding that some conditions are so rare that there exists little to no published literature discussing them, and that the lack of published literature should not solely determine whether an expert witness's testimony is reliable and admissible; even in the absence of supportive literature or other evidence, an expert witness's opinion may be "otherwise sufficiently reliable under the factors provided by statute and MRE 702"). Opinions are not unreliable simply because there is no literature to support them. *Id*. at ___. In *Danhoff*, the Court held that "[t]he trial court abused its discretion by inadequately assessing [the expert witness's] reliability as a standard-of-care expert without appropriately analyzing MRE 702 or the statutory reliability factors of MCL 600.2955." *Danhoff*, ___ Mich at ___.

9.7 Drug Recognition Experts (DREs)[353]

A drug recognition expert or drug recognition evaluator (DRE) is a specially trained police officer who is skilled in detecting and identifying persons under the influence of drugs and in determining the category or categories of drugs that caused the impairment.[354]

DRE testimony is not automatically admissible, and the trial court must still make a determination whether a DRE officer is qualified to offer expert testimony, as outlined in Section 9.6. See *People v Bowden*, 344 Mich App 171, 175 n 2 (2022) (noting that even if a person's "certification designates him as a drug recognition 'expert,' that label has no bearing on whether he may properly testify as an expert for purposes of MRE 702").

In *Bowden*, 344 Mich App at 175-177, the defendant was charged with operating while intoxicated on the basis of marijuana use, and "the prosecution filed a motion in the district court requesting the court to 'declare [a deputy involved in the traffic stop with the defendant] an expert in the field of Drug Evaluation and Classification be allowed to testify, and provide an expert opinion, as a Drug Recognition Expert.'" The Court held that "the prosecution did not present any evidence in the district court to show that the DRE protocol had been validated as a reliable method for demonstrating a person's *level of impairment* due to marijuana or the *degree to which a person's driving abilities could be diminished* by any given level of marijuana." *Id.* at 189. "The studies on which the prosecution relied demonstrated the DRE protocol's level of accuracy with respect to determining whether a particular type of substance was *present* in a person's blood," but "the determination under the DRE protocol that a person is 'impaired' and unable to safely drive a car appears to be ultimately based on the DRE officer's subjective judgment, and there is no evidence in this record that the ability of a person to make such a judgment based on the application of the DRE protocol has been tested to demonstrate the accuracy and validity of reaching such a conclusion on a person's level of impairment due to marijuana." *Id*. at 189, 191-192 (holding that the proposed expert testimony was inadmissible under MRE 702 because the prosecution failed to meet its burden to establish the reliability of the proposed expert testimony).

[353]For further information on DREs, contact the Michigan State Police DRE Program Coordinator. Note that this entire section is primarily quoted from http://www.decp.org.

[354]See the website for The International Drug Evaluation and Classification Program (DECP), available at: http://www.decp.org.

A. Determinations Made by DRE

"A DRE conducts a detailed, diagnostic examination of persons arrested or suspected of drug-impaired driving or similar offenses."[355] "Based on the results of the drug evaluation, the DRE forms an expert opinion on . . . (1) whether or not the suspect is impaired; if so, (2) whether the impairment relates to drugs or a medical condition; and if drugs, (3) what category or combination of categories of drugs are the likely cause of the impairment."[356] The process "is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment."[357]

B. The 12-Step DRE Protocol

"The DRE's utilize a 12-step process to assess their suspects:

1. *Breath Alcohol Test*

The arresting officer reviews the subject's breath alcohol concentration (BrAC) test results and determines if the subject's apparent impairment is consistent with the subject's BrAC. If so, the officer will not normally call a DRE. If the impairment is not explained by the BrAC, the officer requests a DRE evaluation.

2. *Interview of the Arresting Officer*

The DRE begins the investigation by reviewing the BrAC test results and discussing the circumstances of the arrest with the arresting officer. The DRE asks about the subject's behavior, appearance, and driving. The DRE also asks if the subject made any statements regarding drug use and if the arresting officer(s) found any other relevant evidence consistent with drug use.

3. *Preliminary Examination and First Pulse*

The DRE conducts a preliminary examination, in large part, to ascertain whether the subject may be suffering from an injury or other condition unrelated to drugs. Accordingly, the DRE asks the subject a series of standard questions relating to the subject's health and recent ingestion of food, alcohol and drugs, including prescribed medications. The DRE observes the subject's attitude, coordination, speech, breath and face. The DRE also determines if the subject's pupils are of equal size and if the subject's eyes can follow a moving

[355] https://www.theiacp.org/what-they-do.

[356] https://www.theiacp.org/what-they-do and https://www.theiacp.org/sites/default/files/all/0-2/12-Step-DRE-Process.pdf.

[357] https://www.theiacp.org/sites/default/files/all/0-2/12-Step-DRE-Process.pdf.

stimulus and track equally. The DRE also looks for horizontal gaze nystagmus (HGN) and takes the subject's pulse for the first of three times. The DRE takes each subject's pulse three times to account for nervousness, check for consistency and determine if the subject is getting worse or better. If the DRE believes that the subject may be suffering from a significant medical condition, the DRE will seek medical assistance immediately. If the DRE believes that the subject's condition is drug-related, the evaluation continues.

4. *Eye Examination*

The DRE examines the subject for HGN, vertical gaze Nystagmus (VGN) and [] for a lack of ocular convergence. A subject lacks convergence if his [or her] eyes are unable to converge toward the bridge of his [or her] nose when a stimulus is moved inward. Depressants, inhalants, and dissociative anesthetics, the so-called "DID drugs[,]"[] may cause HGN. In addition, the DID drugs may cause VGN when taken in higher doses for that individual. The DID drugs, as well as cannabis (marijuana), may also cause a lack of convergence.

5. *Divided Attention Psychophysical Tests*

The DRE administers four psychophysical tests: the Romberg Balance, the Walk and Turn, the One Leg Stand, and the Finger to Nose tests. The DRE can accurately determine if a subject's psychomotor and/or divided attention skills are impaired by administering these tests.

6. *Vital Signs and Second Pulse*

The DRE takes the subject's blood pressure, temperature and pulse. Some drug categories may elevate the vital signs. Others may lower them. Vital signs provide valuable evidence of the presence and influence of a variety of drugs.

7. *Dark Room Examinations*

The DRE estimates the subject's pupil sizes under three different lighting conditions with a measuring device called a pupilometer. The device will assist the DRE in determining whether the subject's pupils are dilated, constricted, or normal. Some drugs increase pupil size (dilate), while others may decrease (constrict) pupil size. The DRE also checks for the eyes' reaction to light. Certain drugs may slow the eyes' reaction to light. Finally, the DRE examines the subject's nasal and oral cavities for signs of drug ingestion.

8. *Examination for Muscle Tone*

The DRE examines the subject's skeletal muscle tone. Certain categories of drugs may cause the muscles to become rigid. Other categories may cause the muscles to become very loose and flaccid.

9. *Check for Injection Sites and Third Pulse*

The DRE examines the subject for injection sites, which may indicate recent use of certain types of drugs. The DRE also takes the subject's pulse for the third and final time.

10. *Subject's Statements and Other Observations*

The DRE typically reads Miranda,[358] if not done so previously, and asks the subject a series of questions regarding the subject's drug use.

11. *Analysis and Opinions of the Evaluator*

Based on the totality of the evaluation, the DRE forms an opinion as to whether or not the subject is impaired. If the DRE determines that the subject is impaired, the DRE will indicate what category or categories of drugs may have contributed to the subject's impairment. The DRE bases these conclusions on his [or her] training and experience and the DRE Drug Symptomatology Matrix. While DREs use the drug matrix, they also rely heavily on their general training and experience.

12. *Toxicological Examination*

After completing the evaluation, the DRE normally requests a urine, blood and/or saliva sample from the subject for a toxicology lab analysis."[359]

C. Drug Categories

"DREs classify drugs in one of seven categories: Central Nervous System (CNS) Depressants, CNS Stimulants, Hallucinogens, Phencyclidine (PCP) and its analogs, Narcotic Analgesics, Inhalants, and Cannabis. Drugs from each of these categories can affect a person's central nervous system [and] impair a person's normal faculties, including a person's ability to safely operate a motor vehicle."[360]

"1. Central Nervous System (CNS) Depressants

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[358] *Miranda v Arizona*, 384 US 436 (1966).

[359] https://www.theiacp.org/sites/default/files/all/0-2/12-Step-DRE-Process.pdf.

[360] https://www.theiacp.org/7-drug-categories. Note that operating while under the influence offenses are discussed in the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

CNS Depressants slow down the operations of the brain and the body. Examples of CNS Depressants include alcohol, barbiturates, anti-anxiety tranquilizers (e.g., Valium, Librium, Xanax, Prozac, and Thorazine), GHB (Gamma Hydroxybutyrate), Rohypnol and many other anti-depressants (e.g., as Zoloft, Paxil).

2. CNS Stimulants

CNS Stimulants accelerate the heart rate and elevate the blood pressure and 'speed-up' or over-stimulate the body. Examples of CNS Stimulants include Cocaine, 'Crack[,]'[] Amphetamines and Methamphetamine ('Crank').

3. Hallucinogens

Hallucinogens cause the user to perceive things differently than they actually are. Examples include LSD, Peyote, Psilocybin and MDMA (Ecstasy).

4. Dissociative Anesthetics

One of the seven drug categories. It includes drugs that inhibit pain by cutting off the brain's perception of the pain. PCP and its analogs are examples of Dissociative Anesthetics.

5. Narcotic Analgesics

A narcotic analgesic relieves pain, induces euphoria and creates mood changes in the user. Examples of narcotic analgesics include Opium, Codeine, Heroin, Demerol, Darvon, Morphine, Methadone, Vicodin and OxyContin.

6. Inhalants

Inhalants include a wide variety of breathable substances that produce mind-altering results and effects. Examples of inhalants include Toluene, plastic cement, paint, gasoline, paint thinners, hair sprays and various anesthetic gases.

7. Cannabis

Cannabis is the scientific name for marijuana. The active ingredient in cannabis is delta-9 tetrahydrocannabinol, or THC. This category includes cannabinoids and synthetics like Dronabinol."[361]

[361] https://www.theiacp.org/7-drug-categories.

D. Roadside Drug Testing

"The department of state police may establish a pilot program in [Michigan] for roadside drug testing to determine whether an individual is operating a vehicle while under the influence of a controlled substance in violation of [MCL 257.625]." MCL 257.625t(1).

An officer who is a certified drug recognition expert participating in a roadside drug testing pilot program may use preliminary oral fluid analysis to determine whether an individual is operating a vehicle while under the influence of a controlled substance. See MCL 257.43b.

For a detailed discussion of roadside drug testing, see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

9.8 Issues Involving Informants

A. Informant's Identity

"'Generally, the people are not required to disclose the identity of confidential informants.' *People v Cadle*, 204 Mich App 646, 650 (1994), [mod on other grounds 209 Mich App 467 (1995) and] overruled in part on other grounds [by] *People v Perry*, 460 Mich 55 (1999)."[362] *People v Henry (Randall) (After Remand)*, 305 Mich App 127, 156 (2014).[363] "However, when a defendant demonstrates a possible need for the informant's testimony, a trial court should order the informant produced and conduct an in camera hearing to determine if the informant could offer any testimony beneficial to the defense." *Id*., citing *People v Underwood*, 447 Mich 695, 705-706 (1994). "Whether a defendant has demonstrated a need for the testimony depends on the circumstances of the case and a court should consider 'the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'" *Henry (Randall) (After Remand)*, 305 Mich App at 156, quoting *Underwood*, 447 Mich at 705.

1. Defendant's Right to Confrontation

Both the United States Constitution and the Michigan Constitution afford a defendant the right of confrontation. US

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

[363]The informer's privilege has been recognized in Michigan, *People v Underwood*, 447 Mich 695, 703 (1994), and "entitles the government to preserve the anonymity of citizens who have furnished information concerning violations of the law to law enforcement officers, thus encouraging them to communicate such knowledge to the police." *People v Sammons*, 191 Mich App 351, 368 (1991).

Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause concerns out-of-court statements of witnesses, that is, persons who bear testimony against the defendant." *Henry (Randall) (After Remand)*, 305 Mich App at 153. "'As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.'" *Id.*, quoting *Bullcoming v New Mexico*, 564 US 647, 657 (2011).

The use of confidential informants can implicate a defendant's right to confrontation. "'A statement by a confidential informant to the authorities generally constitutes a testimonial statement. However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. Thus, a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause. Specifically, a statement offered to show why police officers acted as they did is not hearsay.'" *Henry (Randall) (After Remand)*, 305 Mich App at 153-154, quoting *People v Chambers*, 277 Mich App 1, 10-11 (2007). Further, live testimony from the informant may not be sufficient to satisfy the defendant's right to confrontation if the informant's identity is concealed. *People v Sammons*, 191 Mich App 351, 359, 361-362 (1991) (holding that the defendant's right to confrontation was violated at his entrapment hearing where cross-examination regarding identifying information was precluded and the informant testified while wearing a mask that concealed his identity).

2. Res Gestae Witnesses

Where the informant may have participated in the charged crime, the informant's privilege will not protect him from production as a res gestae witness. *People v Cadle*, 204 Mich App 646, 650 (1994), mod on other grounds, 209 Mich App 467 (1995) and overruled in part on other grounds by *People v Perry*, 460 Mich 55 (1999).[364] "The prosecution must use due diligence, that is, use all reasonable means, in helping defendants identify and locate res gestae witnesses." *Cadle*, 204 Mich App at 650-651.[365]

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

[365]Note that "the prosecution has neither the obligation to produce at trial, not the obligation to call as a witness at trial, a res gestae witness." *People v Cook*, 266 Mich App 290, 292-293 n 2 (2005). The prosecution must "notify a defendant of all *known* res gestae witnesses and all witnesses that the prosecution *intends to produce*." *Id.* at 295.

3. Challenging the Validity of a Search Warrant

"[A] trial judge may exercise his discretion to require production of an informant who allegedly supplied police with information which led to the issuance of a search warrant where a defendant claims that the informant does not exist." *People v Poindexter*, 90 Mich App 599, 608 (1979). The Court of Appeals set forth the procedure to be followed in resolving such claims:

> "To begin with, there is a presumption of validity with respect to the affidavit supporting the search warrant and this presumption applies throughout the procedure.
>
> To mandate an evidentiary hearing, defendant's attack must be more than conclusory, if possible, and must be supported by more than a mere desire to determine who the informant was. There must be specific allegations of deliberate falsehood or of reckless disregard for the truth. Those allegations must be accompanied by an offer of proof and should be accompanied by a statement of supporting reasons. Also, the defendant should furnish reliable statements of witnesses to support his [or her] claim, or satisfactorily explain their absence. If these requirements are met to the trial court's satisfaction and the statements challenged by the defendant are set aside but sufficient content still remains in the affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient to support a finding of probable cause, the defendant is entitled to an evidentiary hearing.
>
> At the hearing, the trial judge should question the officer involved and consider any other relevant evidence offered by the prosecutor or the defendant. If the judge is convinced that the officer is being truthful regarding the existence of the informant, he [or she] should deny defendant's request for production. However, if the judge determines that there is some doubt as to the officer's credibility, he [or she] may require production of the informant.
>
> Once a trial judge decides to order production of an informant, he [or she] should conduct a closed hearing to protect the informant's identity. The trial

> judge is also free to take *any other protective measures* deemed necessary.
>
> If the prosecutor believes the trial judge abused his [or her] discretion in ordering production of the informant, the prosecutor should seek immediate appellate review of the court order." *Poindexter*, 90 Mich App at 609-610.

Where a defendant's sole purpose in requesting production of the informant is to challenge the truth of the information supplied to the police, the informant need not be produced. *People v Johnson (Jerry)*, 83 Mich App 1, 11 (1978) (noting that the defendant did not claim that the informant had exculpatory evidence and solely wanted to challenge the truth of the information used to obtain the search warrant).

B. Addict–Informant's Testimony

Because the credibility of an addict-informer is a jury question, the jury may convict a defendant solely on the uncorroborated testimony of an addict-informer. *People v Atkins*, 397 Mich 163, 172 (1976). "'[A]n instruction concerning special scrutiny of the testimony of addict-informants should be given upon request, where the testimony of the informant is the only evidence linking the defendant to the offense.'" *People v Griffin*, 235 Mich App 27, 40 (1999), quoting *People v Smith (Phillip)*, 82 Mich App 132, 133-134 (1978). However, the trial court has no duty, in the absence of a defendant's request, to give a cautionary instruction sua sponte. See MCL 768.29.

The mere fact that a witness was receiving physician-ordered medication when he gave a statement implicating the defendant did not entitle the defendant to an addict-informant jury instruction with respect to the witness's trial testimony. *People v Jackson (Andre)*, 292 Mich App 583, 601-602 (2011). Further, because the trial court's general instructions regarding the evaluation of witnesses' testimony were sufficient, defense counsel was not ineffective in failing to request an addict-informant instruction or a modified "medicated witness" instruction. *Id.* at 602.

M Crim JI 5.7 sets forth a jury instruction to be used by courts in connection with an addict-informant's testimony.

9.9 Evidence of Other Crimes, Wrongs, or Acts[366]

"Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." MRE 404(b)(1). However,

evidence of other crimes, wrongs, or acts may be admissible for other reasons; specifically, "[i]f it is material, the evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, absence of mistake, or lack of accident." MRE 404(b)(2). See also *People v VanderVliet*, 444 Mich 52 (1993), amended 445 Mich 1205 (1994) (discussing admission of evidence under MRE 404(b)). MRE 404(b) is inclusionary, and "if proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, [MRE] 404(b) is not implicated." *VanderVliet*, 444 Mich at 64. Other acts evidence is admissible when it is offered for a proper purpose, is relevant to an issue or fact of consequence, and its probative value is not substantially outweighed by the danger of unfair prejudice under MRE 403. *VanderVliet*, 444 Mich at 74-75. Upon request, the trial court may provide a limiting instruction under MRE 105. *VanderVliet*, 444 Mich at 75.

The prosecutor is required to provide written notice of intent to introduce evidence of other crimes, wrongs, or acts at least 14 days in advance of trial, "unless the court, for good cause, excuses pretrial notice, in which case the notice may be submitted in any form." MRE 404(b)(3); *VanderVliet*, 444 Mich at 89. The notice must articulate the permitted purpose for which the prosecutor intends to offer the evidence. MRE 404(b)(3)(B). Respecting the privilege against self-incrimination, the court may require the defendant to state their theory of defense if necessary to determine the admissibility of the evidence. MRE 404(b)(4).

The admissibility of other acts evidence can be an issue in controlled substances cases, as set out in the following examples:

- The trial court abused its discretion by admitting the defendant's prior drug-delivery conviction because it was not sufficiently similar to the charged offense of possession with intent to deliver. *People v Crawford*, 458 Mich 376, 395-396 (1998). Cocaine was discovered in the dashboard of the defendant's car and the defendant claimed lack of knowledge. *Id.* at 396. The prosecution sought to admit the defendant's prior drug-delivery conviction that resulted from the defendant's delivery of a pound of cocaine to an undercover officer in an apartment building to show lack of accident or innocence. *Id.* The Michigan Supreme Court concluded that there was "an insufficient factual nexus between the prior conviction and the present charged offense to warrant admission of the evidence under the doctrine of chances." *Id.* at 395-396.

[366]This section focuses on cases involving controlled substance offenses; for a detailed discussion of evidence of other crimes, wrongs, or acts, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 2.

- The trial court abused its discretion by barring the admission of other acts evidence showing that on the same date that the defendant's residence was searched, the defendant, who denied knowledge of a large amount of marijuana discovered in the living room of his shared residence, (1) was found in a cafe where marijuana was sold and smoked, (2) paid an entrance fee to sell marijuana before entering the cafe, and (3) was found with 323 grams of marijuana packaged for sale, hashish, THC (tetrahydrocannabinol) candy, packaging material, a scale, a tally sheet, a cell phone, and $2,434 in cash. *People v Danto*, 294 Mich App 596, 600, 603 (2011). Because whether the defendant knew about and controlled the marijuana discovered in the living room was a material issue, "[e]vidence that the defendant was found in possession of a large quantity of marijuana that was packaged for sale identically to the marijuana found in the living room of his home on the same day would tend to make it more likely than not that he knew the substance in the living room was marijuana and that he controlled it." *Id.* at 600-601.

- The trial court did not abuse its discretion in admitting other acts evidence of the defendant's prior possession and distribution of controlled substances to demonstrate that the defendant knowingly possessed the controlled substances, intended to deliver the controlled substances, and had a plan or scheme. *People v McGhee*, 268 Mich App 600, 610 (2005). Admission of the evidence was not an abuse of discretion because knowledge and intent were at issue in the case. *Id.* Further, two of the prior acts were very similar in that they involved the same house and garage, the same controlled substances hidden in the same places, and amounts in a quantity that suggested an intent to distribute. *Id.* at 611. The third prior act was sufficiently similar in that it involved sales of cocaine, which was one of the controlled substances involved in the other prior acts, and the sale took place at the apartment where the defendant was living, consistent with the fact that drugs were previously found at the defendant's home. *Id.* at 612.

Evidence of an uncharged act that constitutes res gestae evidence[367] must still satisfy the requirements of MRE 404(b). *People v Jackson (Timothy)*, 498

[367]Evidence of uncharged conduct constitutes res gestae evidence is if the act is "so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Delgado*, 404 Mich 76, 83-84 (1978) (quotation and citation omitted) (holding that evidence of an uncharged act was properly admitted as res gestae evidence where the defendant sold a sample of heroin to an undercover officer as a prerequisite to a larger sale that took place five days later).

Mich 246, 250-251, 268 n 9 (2015) (holding that there is no "res gestae exception" to MRE 404(b) and overruling all cases holding to the contrary). The Court noted that its clarification that there is no res gestae exception to MRE 404(b) "does not mean that all evidence meeting the [definition of res gestae as set forth in *People v Delgado*, 404 Mich 76, 83-84 (1978)] is other-acts evidence subject to scrutiny under MRE 404(b); to the contrary, there is likely to be substantial overlap between evidence of acts properly understood to be part of the 'res gestae' of the charged conduct, and evidence of acts that directly prove or contemporaneously facilitate the commission of that conduct." *Jackson (Timothy)*, 498 Mich at 274-275 n 11.

9.10 Drug-Sniffing Dogs

Unreasonable searches and seizures are prohibited by the Michigan Constitution and the United States Constitution. Const 1963, art 1, §11; US Const, Am IV. In addition, under both the Michigan Constitution and the United States Constitution, probable cause is required before a warrant may be issued. Const 1963, art 1, §11; US Const, Am IV. Subject to a limited number of specific exceptions, warrantless searches and seizures are per se unreasonable. *Katz v United States*, 389 US 347, 357 (1967); *People v Champion*, 452 Mich 92, 98 (1996).

Where a person's protection against unreasonable searches and seizures is violated, the exclusionary rule generally prohibits the use in a criminal prosecution of any evidence obtained as a result of a constitutional violation. *People v Cartwright*, 454 Mich 550, 558 (1997).

This section discusses search and seizure issues related to drug-sniffing dogs. Issues related to marijuana are discussed in Chapter 8. For a detailed discussion of search and seizure issues, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 11.

Using drug-sniffing dogs to detect the presence of illegal drugs is generally not considered a search. See *Illinois v Caballes*, 543 US 405, 408-409 (2005) (because a person has no legitimate expectation of privacy in contraband, "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,' [*United States v Place*, 462 US 696, 707 (1983)]—during a lawful traffic stop, generally does not implicate legitimate privacy interests"); *Place*, 462 US at 707 ("exposure of respondent's luggage, which was located in a public place [(an airport)], to a trained canine[ ]did not constitute a 'search' within the meaning of the Fourth Amendment"); *People v Jones (Jeffrey)*, 279 Mich App 86, 93 (2008) ("a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused").

A. Intrusion Onto Private Property

Officers may not "physically intrud[e] on [a homeowner's] property," including a front porch, for the purpose of gathering evidence, and "[the use of] a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment" because it constitutes "an unlicensed physical intrusion" into an area that is protected under the Fourth Amendment. *Florida v Jardines*, 569 US 1, 3, 8-9, 11 (2013) (holding that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" went beyond the "implicit license [that] typically permits [a] visitor to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave").

B. Reliability

In order to show that the dog's "alert" to the presence of drugs is reliable, the prosecution must introduce evidence of the dog's training and current certification. *People v Clark*, 220 Mich App 240, 244 (1996). See also *Florida v Harris*, 568 US 237, 246-247 (2013) (noting that "[t]he better measure of a dog's reliability . . . comes away from the field, in controlled testing environments[, and f]or that reason, evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert" and where a dog has been certified after testing in a controlled setting "a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search").

C. Traffic Stops[368]

Generally, a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's prescription of unreasonable seizures. *Caballes*, 543 US at 408. However, a traffic stop may not be prolonged in order to conduct a dog sniff. *Rodriguez v United States*, 575 US 348, 350 (2015). If a permissible traffic stop is extended beyond the time needed to handle the matter for which the stop was made, the extended seizure violates a person's Fourth Amendment rights. *Id*. (holding that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures"). "A seizure justified only by a police-observed traffic violation . . . 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e]

[368]Because an automobile can quickly be moved from a location so that it is impracticable to seek and obtain a warrant, law enforcement officers may conduct a warrantless search of a car if the officers have probable cause to believe that the car contains contraband. *Carroll v United States*, 267 US 132, 153-154 (1925).

mission' of issuing a ticket for the violation."*Id*. at 350-351, 353 (quoting *Caballes*, 543 US at 407, and holding that "police [may not] routinely . . . extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff"). "[A]lthough police officers 'may conduct certain unrelated checks during an otherwise lawful traffic stop]' they 'may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.'" *People v Kavanaugh*, 320 Mich App 293, 300-301 (2017), quoting *Rodriguez*, 575 US at 355.

"Detaining defendant [following a traffic stop] to wait for a drug sniffing dog and its handler to arrive and perform their work was an unconstitutional seizure of his person." *Kavanaugh*, 320 Mich App at 308-309. The officer testified that he was suspicious of the defendant and decided to detain him because the defendant "did not pull over until he had nearly reached the end of the exit ramp[,]" appeared nervous throughout their encounter, could not produce the registration or title for the vehicle he was driving, left the door to the police car open after the officer directed the defendant to sit with him in the parked police car, and the defendant and his passenger gave inconsistent answers to questions about whether they were dating, what hotels they stayed at, and what they did while in town.[369] *Id.* at 303-306. "[T]he relevant testimony as well as the complete video/ audio recording of the encounter from [the officer's] first observation of defendant's car through the arrest" demonstrated that the officer "did not have a reasonable suspicion of any criminal activity sufficient to justify his extension of the traffic stop to allow for a dog sniff." *Id.* at 302-303 n 9 (noting that "whenever practicable, such videotapes should be provided to the court, the court should review them, and they should be made part of the record on appeal"). Specifically, the Court rejected the officer's claims of reasonable suspicion because the officer agreed that the defendant did not appear to be attempting to flee or avoid the stop and "the video makes plain that, until the end of the ramp where the roadway widened, there was very little, if any, room for a car to pull over." *Id.* at 303. The Court further noted that nervousness during a traffic stop is "of limited significance in determining whether reasonable suspicion exists[;]" however, to the extent it matters, the video of the encounter did not show the defendant acting unusually nervous during his interaction with the officer and the defendant did not appear to be making any special efforts to avoid eye contact with the officer. *Id.* at 303-304 (quotation marks and citation omitted). While the defendant's failure to produce the registration or title of the vehicle "would provide reasonable suspicion that defendant may have stolen the car," the officer was able to run the vehicle's VIN

[369]The defendant stated "they didn't do anything special while his passenger said they went to an 'art festival' and 'apple orchard.'" *Kavanaugh*, 320 Mich App at 306.

number and determine that the defendant was the vehicle's owner and that there were no warrants out for the defendant. *Id.* at 305. The Court rejected the officer's argument that the defendant leaving the police car door open was suspicious, noting that there was no indication that the defendant was trying to flee. *Id.* at 305. Finally, the Court noted that absent "an articulated basis, slightly different answers to three general questions, none of which go to criminal activity, by two people traveling together is not grounds to reasonably suspect them of a criminal activity." *Id.* at 306. The Court concluded that some of the officer's testimony conflicted with the videotape, and the officer "was never able to articulate any specific inferences of possible criminal activity[;]" accordingly, "the traffic stop was completed when the officer determined that the vehicle was owned by defendant, gave him a warning about the traffic violations, and told him there would not be a ticket issued." *Id.* at 299-300, 307 (noting that "[a] hunch is not enough[]" to satisfy the constitutional requirement).

To "determine if the 'alert' of a drug-detection dog during a traffic stop provides probable cause to search a vehicle," "[t]he court should allow the parties to make their best case, consistent with the usual rules of criminal procedure[,] . . . [a]nd . . . should then evaluate the proffered evidence to decide what all the circumstances demonstrate." *Harris*, 568 US at 240, 247. "If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause." *Id.* at 248.[370] "If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence." *Id*. at 248. "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." *Id*. "A sniff is up to snuff when it meets that test." *Id*.

[370] "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to . . . presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." *Harris*, 568 US at 246-247.

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10.1 Scope Note

This chapter primarily discusses drug treatment courts. Other problem-solving courts utilized in Michigan are also briefly discussed; specifically, veterans treatment courts, mental health courts, and family treatment courts.

For more information on implementing a problem-solving court and other administrative matters, see https://www.courts.michigan.gov/administration/court-programs/problem-solving-courts/. Links to resources for each specific type of problem-solving court can be found on that webpage. Problem-solving court resources related to developing courts and advancing programs is available here: https://www.courts.mi.gov/administration/court-programs/problem-solving-courts/resources-and-training/. The State Court Administrative Office (SCAO) has published standards and best practices manuals for problem-solving courts, including Adult Drug Court, Adult Mental Health Court, Veterans Treatment Court. Another resource published by SCAO is the *Policy and Procedure Manual for Certification of Problem-Solving Courts*.

10.2 Treatment of Substance Use Disorders Resources

The Substance Abuse and Mental Health Services Administration (SAMHSA) is an agency within the U.S. Department of Health and Human Services that seeks to reduce the impact of substance abuse and mental illness in America. SAMHSA discusses strategies for the treatment of substance use disorders on its website. Generally, SAMHSA provides information about different service components of treatment systems for substance use disorders, including individual and group counseling, inpatient and residential treatment, intensive outpatient treatment, partial hospital programs, case or care management, medication, recovery support services, 12-step fellowship, and peer supports. SAMHSA also provides resources for specific substance use disorders, including alcohol use, cannabis use, stimulant use, and opioid use.

Regarding opioid use disorders, one resource courts might find helpful that is not specifically linked by SAMHSA is the State of Michigan *Medication Assisted Treatment Guidelines for Opioid Use Disorders*.

10.3 State Certified Treatment Courts

Drug treatment courts, DWI/sobriety courts, mental health courts, juvenile mental health courts, veterans treatment courts, and family treatment courts operating in Michigan, or a circuit court in any judicial circuit or the district court in any judicial district seeking to adopt or institute one of these problem-solving courts must be certified by the State Court Administrative Office (SCAO). MCL 600.1062(5); MCL 600.1084(3); MCL 600.1091(3); MCL 600.1099c(4); MCL 600.1201(5); MCL 600.1099bb(3).

A. Certification of Drug Treatment Courts and DWI/Sobriety Courts

SCAO must establish the certification procedure. MCL 600.1062(5). See SCAO's problem-solving courts website, which contains detailed information about the certification process.

In order to begin or continue operating a drug treatment court, it must be approved and certified by SCAO. MCL 600.1062(5). SCAO must include a certified drug treatment court on the statewide official list of drug treatment courts; however, it is prohibited from including on the list those courts that are not certified. *Id*.

"A drug treatment court that is not certified under [MCL 600.1062(5)] shall not perform any of the functions of a drug treatment court, including, but not limited to, doing any of the following:

> (a) Charging a fee under [MCL 600.1070].
>
> (b) Discharging and dismissing a case as provided in [MCL 600.1076].
>
> (c) Receiving funding under [MCL 600.1080].
>
> (d) Certifying to the secretary of state that an individual is eligible to receive a restricted license under [MCL 600.1084] . . . and . . . MCL 257.304." MCL 600.1062(5).

DWI/sobriety courts "must be certified by the [SCAO] in the same manner as required for a drug treatment court under [MCL 600.1062(5)]." MCL 600.1084(3). "A DWI/sobriety court shall not perform any of the functions of a DWI/sobriety court, including, but not limited to, the functions of a drug treatment court described in

[MCL 600.1062(5)] unless the court has been certified by the [SCAO] as provided in [MCL 600.1062(5)]." MCL 600.1084(3).

B. Certification of Mental Health Courts and Juvenile Mental Health Courts

SCAO must establish the certification procedure. MCL 600.1091(3); MCL 600.1099c(4). See SCAO's problem-solving courts website, which contains detailed information about the certification process.

In order to begin or continue operating a mental health court or a juvenile mental health court, it must be approved and certified by SCAO. MCL 600.1091(3); MCL 600.1099c(4). SCAO must include a certified mental health court or juvenile mental health court on the statewide official list of mental health or juvenile mental courts; however, it is prohibited from including on the lists those courts that are not certified. MCL 600.1091(3); MCL 600.1099c(4).

"A mental health court that is not certified under [MCL 600.1091(3)] shall not perform any of the functions of a mental health court, including, but not limited to, any of the following functions:

> (a) Charging a fee under [MCL 600.1095].
>
> (b) Discharging and dismissing a case as provided in [MCL 600.1098].
>
> (c) Receiving funding under [MCL 600.1099a].
>
> (d) Certifying to the secretary of state that an individual is eligible to receive a restricted license under [MCL 600.1084] . . . and . . . MCL 257.304." MCL 600.1091(3).

Similar restrictions apply to juvenile mental health courts that are not certified. See MCL 600.1099c(4). For a detailed discussion of juvenile mental health courts, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1.

C. Certification of Veterans Treatment Court

SCAO must establish the certification procedure. MCL 600.1201(5). See SCAO's problem-solving courts website, which contains detailed information about the certification process.

In order to begin or continue operating a veterans treatment court, it must be approved and certified by SCAO. MCL 600.1201(5). SCAO must include a certified veterans treatment court on the statewide official list of veterans treatment courts; however, it is prohibited from including on the list those courts that are not certified. *Id.*

"A veterans treatment court that is not certified under this subsection shall not perform any of the functions of a veterans treatment court, including, but not limited to, any of the following functions:

> (a) Charging a fee under [MCL 600.1206].
>
> (b) Discharging and dismissing a case as provided in [MCL 600.1209].
>
> (c) Receiving funding under [MCL 600.1211].
>
> (d) Certifying to the secretary of state that an individual is eligible to receive a restricted license under [MCL 600.1084] . . . and . . . MCL 257.304." MCL 600.1201(5).

D. Certification of Family Treatment Court

"A family treatment court operating in this state, or a circuit court in any judicial circuit seeking to adopt or institute a family treatment court, must be certified by [SCAO]" according to procedures that SCAO must establish. MCL 600.1099bb(3). Under the "direction and supervision of the supreme court," SCAO must "include a family treatment court certified under this subsection on the statewide official list of family treatment courts." *Id*.

"A family treatment court that is not certified under this subsection shall not perform any of the functions of a family treatment court, including, but not limited to, receiving funding under section 1099*ll*."MCL 600.1099bb(3); MCL 600.1099*ll*. The state drug treatment court advisory committee shall monitor the effectiveness of family treatment courts. MCL 600.1082(10).

E. Transfer to State-Certified Treatment Court

"[A] case may be transferred totally from 1 court to another court for the defendant's participation in a state-certified treatment court." MCL 600.1088(1).

"A total transfer may occur prior to or after adjudication, but must not be consummated until the completion and execution of a memorandum of understanding that must include, but need not be limited to, all of the following:

> (a) A detailed statement of how all funds assessed to defendant will be accounted for, including, but not necessarily limited to, the need for a receiving state-certified treatment court to collect funds and remit them to the court of original jurisdiction.

> (b) A statement providing which court is responsible for providing information to the department of state police, as required under . . . MCL 28.243, and forwarding an abstract to the secretary of state for inclusion on the defendant's driving record.
>
> (c) A statement providing where jail sanctions or incarceration sentences would be served, as applicable.
>
> (d) A statement that the defendant has been determined eligible by and will be accepted into the state-certified treatment court upon transfer.
>
> (e) The approval of all of the following:
>
> > (*i*) The chief judge and assigned judge of the receiving state-certified treatment court and the court of original jurisdiction.
> >
> > (*ii*) A prosecuting attorney from the receiving state-certified treatment court and the court of original jurisdiction.
> >
> > (*iii*) The defendant." MCL 600.1088(1).

Part I—Drug Treatment Courts

10.4 Drug Treatment Courts

A. Statutory Authority

MCL 600.1062(1) provides, in relevant part, the statutory basis for the creation of specialized drug treatment courts:

> "The circuit court in any judicial circuit or the district court in any judicial district may adopt or institute a drug treatment court, pursuant to statute or court rules."

Similarly, juvenile drug treatment courts are authorized by statute under MCL 600.1062(2):

> "The family division of circuit court in any judicial circuit may adopt or institute a juvenile drug treatment court, pursuant to statute or court rules."

Drug treatment courts must be certified by SCAO before performing the functions of a drug treatment court. MCL 600.1062(5). See Section 10.3.

Juvenile drug treatment courts are subject to the same procedures and requirements as drug treatment courts, except as specifically provided otherwise in Chapter 10A of the Revised Judicature Act of 1961, MCL 600.101 *et seq*. MCL 600.1062(2). This chapter will specify when juvenile drug treatment courts have a different procedure or requirement.

All drug treatment courts are required to "collect and provide data on each individual applicant and participant and the entire program as required by the [SCAO,]" and each drug treatment court must provide SCAO with the information it requests. MCL 600.1078(1); MCL 600.1078(5).[371] Information collected under MCL 600.1078 about individual participants is exempt from disclosure under the Freedom of Information Act. MCL 600.1078(7).

B. Additional Requirements for Individuals Eligible for Discharge or Dismissal of an Offense or for Special Sentencing

1. Drug Treatment Court Requirements

"[I]f the drug treatment court will include in its program individuals who may be eligible for discharge and dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines,[372] the circuit or district court shall not adopt or institute the drug treatment court unless the circuit or district court enters into a memorandum of understanding with each participating prosecuting attorney in the circuit or district court district, a representative of the criminal defense bar, and a representative or representatives of community treatment providers." MCL 600.1062(1). The memorandum of

[371] MCL 600.1078(2)-(4) specifically set out the type of information a drug treatment court must collect.

[372] MCL 333.7410(5) allows a court to depart from the mandatory minimum sentence for "substantial and compelling reasons[.]" However, now that the statutory sentencing guidelines are advisory only, departures from the guidelines do not need to be justified by substantial and compelling reasons; MCL 769.34—which previously required a substantial and compelling reason to depart—has been amended to permit a "reasonable" departure. See 2020 PA 395, effective March 24, 2021; *People v Lockridge*, 498 Mich 358, 364-365 (2015); MCL 769.34(3). The *Lockridge* Court additionally stated that "[t]o the extent that any part of MCL 769.34 or *another statute* refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1 (emphasis added). It is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. For a detailed discussion of *Lockridge*, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1.

understanding may include additional parties considered necessary and must describe the role of each party. *Id.* See also *People v Baldes*, 309 Mich App 651, 656-657 (2015) (holding that a "prosecuting attorney's decision to sign [a] referral form" for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) does not constitute approval of the defendant's admission into drug treatment court if the form "[does] not state that it constitute[s] approval of the individual's admission into the drug treatment court program[;]" furthermore, "a prosecutor's silence is not sufficient to constitute approval under [MCL 600.1068.]"[373]

2. Juvenile Drug Treatment Court Requirements

"[I]f the [juvenile] drug treatment court will include in its program individuals who may be eligible for discharge or dismissal of an offense, or a delayed sentence, the family division of circuit court shall not adopt or institute a juvenile drug treatment court unless the family division of circuit court enters into a memorandum of understanding with each participating county prosecuting attorney in the circuit or district court district, a representative of the criminal defense bar specializing in juvenile law, and a representative or representatives of community treatment providers." MCL 600.1062(2). The memorandum of understanding may include additional parties considered necessary and must describe the role of each party. *Id.*

C. Admission to Drug Treatment Court When Candidate is From Another Jurisdiction

A drug treatment court may admit participants from outside its jurisdiction "based upon either the residence of the participant in the receiving jurisdiction or the unavailability of a drug treatment court in the jurisdiction where the participant is charged." MCL 600.1062(4).

The admission of a participant from another jurisdiction is not valid unless it is agreed to by all of the following:

> "(a) The defendant or respondent.
>
> (b) The attorney representing the defendant or respondent.

[373] MCL 600.1068(2) requires approval from the prosecutor in conformity with the memorandum of understanding under MCL 600.1062.

> (c) The judge of the transferring court and the prosecutor of the case.
>
> (d) The judge of the receiving drug treatment court and the prosecutor of a court funding unit of the drug treatment court." MCL 600.1062(4).

See also the State Court Administrative Office's publication *Transferring a Case to a Problem-Solving Court*.

D. Hiring or Contracting With Treatment Providers

"A drug treatment court may hire or contract with licensed or accredited treatment providers, in consultation and cooperation with the local substance abuse coordinating agency, and other such appropriate persons to assist the drug treatment court in fulfilling its requirements under [Chapter 10A of the Revised Judicature Act of 1961], such as the investigation of an individual's background or circumstances, or the clinical evaluation of an individual, for his or her admission into or participation in a drug treatment court." MCL 600.1063.

10.5 Admission Requirements

"Each drug treatment court shall determine whether an individual may be admitted to the drug treatment court." MCL 600.1064(1). "An individual does not have a right to be admitted into a drug treatment court." *Id.* *Id*. Participation in drug treatment court is generally voluntary; however, an individual may be ordered to participate in a drug treatment court as a term of his or her probation. See MCL 600.1064(3); MCL 771.3(2)(g); MCL 712A.18(1)(b). "Unless the drug treatment court judge and the prosecuting attorney, in consultation with any known victim in the instant case, consent, a violent offender[374] must not be admitted into a drug treatment court." MCL 600.1064(1).

"An individual must not be admitted to a drug treatment court if either of the following applies:

> (a) The individual is currently charged with or, if the individual is a juvenile, is currently alleged to have committed first degree murder in violation of . . . MCL 750.316, criminal sexual conduct in the first, second, or third degree in violation of . . . MCL 750.520b, [MCL] 750.520c, and

[374]Note that there are four distinct definitions of *violent offender* depending on whether the term is used in the context of a drug treatment court, veterans treatment court, mental health court, or juvenile mental health court.

> [MCL] 750.520d, or child sexually abusive activity in violation of . . . MCL 750.145c.
>
> (b) The individual has been convicted of or, if the individual is a juvenile, found responsible for first degree murder in violation of . . . MCL 750.316, or criminal sexual conduct in the first degree in violation of . . . MCL 750.520b." MCL 600.1064(1).

An individual applying for admission into a drug treatment court "must cooperate with and complete a preadmissions screening and evaluation assessment and must agree to cooperate with any future evaluation assessment as directed by the drug treatment court." MCL 600.1064(3).[375]

If these requirements are met, individuals who have been assigned the status of youthful trainee under MCL 762.11, or who have been placed on probation pursuant to the deferred adjudication provisions of MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (specific domestic violence offenses), MCL 750.430 (impaired healthcare professionals), or MCL 750.350a (parental kidnapping), are eligible for admission into a drug treatment court. MCL 600.1064(2).

10.6 Preadmission Screening and Evaluation Assessment

In order to be admitted to a drug treatment court, an individual "must cooperate with and complete a preadmissions screening and evaluation assessment and must agree to cooperate with any future evaluation assessment as directed by the drug treatment court." MCL 600.1064(3). The preadmission screening and evaluation assessment must include all of the following:

- "A complete review of the individual's criminal history[.]"[376] MCL 600.1064(3)(a).
- "[A] review of whether or not the individual has been admitted to and has participated in or is currently participating in a drug treatment court, . . . and the results of the individual's participation." MCL 600.1064(3)(a).

[375]For discussion of the preadmissions screening and evaluation assessment, see Section 10.6.

[376]A drug treatment court may consider a review of the law enforcement information network (LEIN) sufficient for purposes of conducting the review required by MCL 600.1064(3)(a). In addition, "the [drug treatment court] may accept other verifiable and reliable information from the prosecution or defense to complete its review and may require the individual to submit a statement as to whether or not the individual has previously been admitted to a drug treatment court and the results of the individual's participation in the prior program or programs." *Id.*

- "An assessment of the risk of danger or harm to the individual, others, or the community." MCL 600.1064(3)(b).

- "As much as practicable, a complete review of the individual's history regarding the use or abuse of any controlled substance or alcohol and an assessment of whether the individual abuses controlled substances or alcohol or is drug or alcohol dependent."[377] MCL 600.1064(3)(c).

- A review of the individual's special needs or circumstances that could "potentially affect the individual's ability to receive substance abuse treatment and follow the court's orders." MCL 600.1064(3)(d).

- If the individual is a juvenile, "an assessment of the family situation including, as much as practicable, a comparable review of any guardians or parents." MCL 600.1064(3)(e).

A drug treatment court may also request that the department of state police provide the court with information contained in the law enforcement information network (LEIN) regarding the individual's criminal history, including whether he or she has previously participated in a drug treatment court and the results of that participation. MCL 600.1064(5). Upon request from a drug treatment court, the department of state police must provide the information requested. *Id*.

10.7 Confidentiality of Information Obtained

Except as otherwise permitted by the statutes governing drug treatment courts, MCL 600.1060, *et seq*., information obtained as a result of an individual's participation in a preadmission screening and evaluation assessment is confidential, is exempt from disclosure under the Freedom of Information Act, MCL 15.231 to MCL 15.246, and cannot be used in a criminal prosecution unless the information "reveals criminal acts other than, or inconsistent with, personal drug use." MCL 600.1064(4).

10.8 Required Preadmission Findings by the Court

"Before an individual is admitted into a drug treatment court, the court shall find on the record, or place a statement in the court file pertaining to, all of the following:

[377] With regard to the substance abuse or alcohol abuse history review, "[i]t is the intent of the legislature that this assessment should be a clinical assessment as much as practicable." MCL 600.1064(3)(c).

(a) The individual is dependent upon or abusing drugs or alcohol and is an appropriate candidate for participation in the drug treatment court.

(b) The individual understands the consequences of entering the drug treatment court and agrees to comply with all court orders and requirements of the court's program and treatment providers.

(c) The individual is not an unwarranted or substantial risk to the safety of the public or any individual, based upon the screening and assessment or other information presented to the court.

(d) Either the individual is not a violent offender or, subject to subdivisions (e) and (f), the drug treatment court judge and the prosecuting attorney, in consultation with any known victim in the instant case, consent to the violent offender being admitted to the drug treatment court.

(e) The individual is not currently charged with or, if the individual is a juvenile, is not currently alleged to have committed first degree murder, criminal sexual conduct in the first, second, or third degree, or child sexually abusive activity.

(f) The individual has never been convicted of or, if the individual is a juvenile, has never been found responsible for first degree murder or criminal sexual conduct in the first degree.

(g) The individual has completed a preadmission screening and evaluation assessment under [MCL 600.1064(3)[378]] and has agreed to cooperate with any future evaluation assessment as directed by the drug treatment court.

(h) The individual meets the requirements, if applicable, under [MCL 333.7411 (specific controlled substance offenses), MCL 762.11 (youthful trainee status), MCL 769.4a (specific domestic violence offenses), MCL 771.1 (probation conditions), MCL 750.350a (parental kidnapping), or MCL 750.430 (impaired healthcare professionals).]

(i) The terms, conditions, and the duration of the agreement between the parties, especially as to the outcome for the participant of the drug treatment court upon successful completion by the participant or termination of participation." MCL 600.1066.

[378] See Section 10.6.

10.9 Admission to Drug Treatment Court When Individual is Charged With a Criminal Offense

Additional conditions apply in cases where the individual being considered for admission to a drug treatment court is charged with a crime. MCL 600.1068.

If the individual is charged with a crime, or is a juvenile alleged to have engaged in activity that would constitute a criminal act if committed by an adult, his or her admission is subject to the following conditions:

> "(a) The offense[(s)] . . . allegedly committed must be related to the abuse, illegal use, or possession of a controlled substance or alcohol.
>
> (b) The individual, if an adult, must plead guilty to the charge[(s)] . . . on the record[, or] if a juvenile, must admit responsibility for the violation[(s)] . . . that he or she is accused of having committed.
>
> (c) The individual must waive, in writing, the right to a speedy trial, the right to representation at drug treatment court review hearings by an attorney, and, with the agreement of the prosecutor, the right to a preliminary examination.
>
> (d) [T]he individual must sign a written agreement to participate in the drug treatment court." MCL 600.1068(1).

A. Individuals Eligible for Discharge and Dismissal of an Offense or Special Sentencing

"In the case of an individual who will be eligible for discharge and dismissal of an offense, delayed sentence, or deviation from the sentencing guidelines,[379] the prosecutor must approve of the admission of the individual into the drug treatment court in

[379] MCL 333.7410(5) allows a court to depart from the mandatory minimum sentence for "substantial and compelling reasons[.]" However, now that the statutory sentencing guidelines are advisory only, departures from the guidelines do not need to be justified by substantial and compelling reasons; MCL 769.34—which previously required a substantial and compelling reason to depart—has been amended to permit a "reasonable" departure. See 2020 PA 395, effective March 24, 2021; *People v Lockridge*, 498 Mich 358, 364-365 (2015); MCL 769.34(3). The *Lockridge* Court additionally stated that "[t]o the extent that any part of MCL 769.34 or *another statute* refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1 (emphasis added). It is unclear whether or to what extent such statutory references (together with caselaw construing them) are of continuing relevance, or which such references are severed or struck down by operation of footnote 1 in *Lockridge*. For a detailed discussion of *Lockridge*, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1.

conformity with the memorandum of understanding under [MCL 600.]1062." MCL 600.1068(2). See also *People v Baldes*, 309 Mich App 651, 656-657 (2015) (holding that a "prosecuting attorney's decision to sign [a] referral form" for completion of a drug treatment court preadmissions screening and evaluation assessment under MCL 600.1064(3) does not constitute approval of the defendant's admission into drug treatment court if the form "[does] not state that it constitute[s] approval of the individual's admission into the drug treatment court program[;]" furthermore, "a prosecutor's silence is not sufficient to constitute approval under [MCL 600.1068.]"

B. Traffic Offenses

"An individual shall not be admitted to, or remain in, a drug treatment court pursuant to an agreement that would permit a discharge or dismissal of a traffic offense upon successful completion of the drug treatment court program." MCL 600.1068(3).

C. Crime Victims

In addition to complying with the Crime Victim's Rights Act, MCL 780.751 *et seq*, a drug treatment court is required to permit any victim of an individual's charged offense(s), any victim of a prior offense for which an individual was convicted, as well as members of the community in which the offenses were committed or in which the individual resides, to submit a written statement regarding the advisability of admitting the individual into the drug treatment court. MCL 600.1068(4).

D. Withdrawal of Plea or Admission

An individual has the right to withdraw his or her plea or admission and to reassert his or her right to a preliminary examination if the individual is not admitted to a drug treatment court. MCL 600.1068(5).

10.10 Post-Admission Procedures

MCL 600.1070 sets forth the procedures that apply once an individual has been admitted to a drug treatment court.[380]

[380]Local practice may impose additional conditions.

A. Disposition of Case

MCL 600.1070(1) sets forth three separate dispositional rules, depending on the status of the case against the individual at the time he or she is admitted to drug treatment court.

1. Individuals Against Whom Criminal Charges are Pending at the Time of Admission

When an individual is admitted to drug treatment court based on criminal charges that are still pending against him or her, the drug treatment court must accept the guilty plea or, in the case of a juvenile, the admission of responsibility. MCL 600.1070(1)(a).

2. Individuals Who Have Pleaded Guilty or Admitted Responsibility Before Admission to Drug Treatment Court

When an individual is admitted to drug treatment court based on criminal charges to which the individual has pleaded guilty or, in the case of a juvenile, has admitted responsibility, the drug treatment court has two dispositional options:

- If the offense was not a traffic offense and the individual is eligible for discharge and dismissal of the charge upon successful completion of the drug treatment court program, the court must not enter a judgment of guilt or adjudication of responsibility. MCL 600.1070(1)(b)(*i*).

- If the offense was a traffic offense, or the individual may not be eligible for discharge and dismissal upon successful completion of the drug treatment court program, the court must enter a judgment of guilt or an adjudication of responsibility. MCL 600.1070(1)(b)(*ii*).

A table comparing the actions taken for cases involving deferred judgments, delayed sentences, and traditional sentences may be found at: https://www.courts.michigan.gov/siteassets/court-administration/resources/deferred_vs_delayed_sentence.pdf.

3. Imposition of Deferred or Immediate Sentence

When an individual is admitted to drug treatment court based on criminal charges for which the individual and the prosecuting attorney have reached an agreement, the court may either defer proceedings until completion of the drug treatment

court program, or may proceed to sentencing and place the individual on probation or other court supervision with participation in drug treatment court as a term of the individual's probation or supervision. MCL 600.1070(1)(c).

B. Jurisdiction Over Drug Treatment Court Participants and Others

A drug treatment court has continuing jurisdiction over participants in its program: "[u]nless a memorandum of understanding made pursuant to [MCL 600.1088[381]] between a receiving drug treatment court and the court of original jurisdiction provides otherwise, the original court of jurisdiction maintains jurisdiction over the drug treatment court participant . . . until final disposition of the case, but not longer than the probation period [set forth in MCL 771.2]." MCL 600.1070(2).

Except as otherwise provided in MCL 771.2a and MCL 768.36, the probation period for a felony conviction must not exceed 3 years, and for misdemeanor or nonfelony convictions, the probation period must not exceed 2 years. MCL 771.2(1). A felony probation term may be extended up to two times for not more than one additional year each time "if the court finds that there is a specific rehabilitation goal that has not yet been achieved, or a specific articulable, and ongoing risk of harm to a victim that can be mitigated only with continued probation supervision." *Id.* MCL 771.2(2) permits the court to reduce a defendant's felony probationary term for certain offenses after the defendant has completed half of the original felony probationary period. See Section 6.20(A) for a detailed discussion of MCL 771.2(2).

"In the case of a juvenile participant, the court may obtain jurisdiction over any parents or guardians of the juvenile in order to assist in ensuring the juvenile's continued participation and successful completion of the drug treatment court, and may issue and enforce any appropriate and necessary order regarding the parent or guardian of a juvenile participant." MCL 600.1070(2).

C. Other Post-Admission Procedures

MCL 600.1070 also governs additional post-admission procedures:

- Drug treatment courts must "cooperate with, and act in a collaborative manner with, the prosecutor, defense counsel, treatment providers, the local substance abuse coordinating agency for that circuit or district, probation

[381] See Section 10.3(E).

departments, and, to the extent possible, local law enforcement, the department of corrections, and community corrections agencies." MCL 600.1070(3).

- Drug treatment courts may require an individual admitted into the court to pay a reasonable drug court fee that is reasonably related to the cost of the program's administration as set out in the memorandum of understanding. MCL 600.1070(4). See also MCL 600.1062.

- Drug treatment courts may request that the department of state police provide them with information contained in the law enforcement information network (LEIN) pertaining to a participant's criminal history for purposes of determining the participant's compliance with all court orders. MCL 600.1070(5). The department of state police must provide this information upon request. *Id.*

10.11 Components of Drug Treatment Court

Drug treatment courts must provide drug court participants with all of the following:

- **Monitoring—**"[c]onsistent, continual, and close monitoring of the participant and interaction among the court, treatment providers, probation officers, and the participant." MCL 600.1072(1)(a).

- **Drug testing—**"[m]andatory periodic and random testing for the presence of any controlled substance or alcohol in a participant's blood, urine, or breath, using to the extent practicable the best available, accepted, and scientifically valid methods." MCL 600.1072(1)(b).

- **Progress evaluations—**"[p]eriodic evaluation assessments of the participant's circumstances and progress in the program." MCL 600.1072(1)(c).

- **Sanctions and rewards—**"[a] regimen or strategy of appropriate and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of incarceration or confinement." MCL 600.1072(1)(d).

- **Treatment services—**"[s]ubstance abuse treatment services, relapse prevention services, education, and vocational

opportunities as appropriate and practicable." MCL 600.1072(1)(e).

Confidentiality. "Any statement or other information obtained as a result of participating in assessment, treatment, or testing while in a drug treatment court is confidential and is exempt from disclosure under the freedom of information act, . . . MCL 15.231 to [MCL] 15.246, and shall not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal drug use." MCL 600.1072(2).

Specialty court interlock program. Drug treatment courts may participate in the specialty court interlock program that permits issuance of a restricted license to a participant after the installation of an ignition interlock device on their motor vehicle. MCL 600.1084(6); MCL 600.1084(9)(d)(*i*). For a detailed discussion of the specialty court interlock program, see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

10.12 Requirements for Continuing and Completing a Drug Treatment Court Program

To continue to participate in and successfully complete a drug treatment court program, a participant must satisfy several specific requirements, discussed in the following subsections. MCL 600.1074(1).

A. Compliance with All Court Orders

A drug treatment court participant must comply with all of the court's orders to successfully complete the drug court treatment program. MCL 600.1074(1)(e). The court has discretion to impose sanctions on a participant for any violation of its orders. *Id*.

B. Payment of Fines, Costs, Fees, Restitution, and Assessments

Pursuant to MCL 600.1074(1)(a)-(d), successful completion of a drug treatment court program requires that a participant pay all of the following:

- All court ordered fines and costs, including minimum state costs.
- The drug treatment court fee authorized under MCL 600.1070(4) ("The drug treatment court may require an individual admitted into the court to pay a reasonable drug court fee that is reasonably related to the cost to the court for administering the drug treatment court

program as provided in the memorandum of understanding[.]")

- All court-ordered restitution.
- All crime victims' rights assessments under MCL 780.905.

A participant is also required to "pay all, or make substantial contributions toward payment of, the costs of the treatment and the drug treatment court program services provided to the participant, including, but not limited to, the costs of urinalysis and such testing or any counseling provided." MCL 600.1074(3).

"However, if the court determines that the payment of fines, the fee, or the costs of treatment would be a substantial hardship for the individual, or would interfere with the individual's substance abuse treatment, the court may waive all or part of those fines, the fee, or costs of treatment." MCL 600.1074(3). Payment of restitution or the crime victim's rights assessment may not be waived. See *id.*

C. Avoidance of New Crimes

"The drug treatment court must be notified if [a] participant is accused of a new crime[.]"[382] MCL 600.1074(2). Upon such notification, the court must "consider whether to terminate the participant's participation in the drug treatment program in conformity with the memorandum of understanding under [MCL 600.1062]." MCL 600.1074(2). "If [a] participant is convicted of a felony for an offense that occurred after the defendant is admitted to drug treatment court, [the court] shall terminate the participant's participation in the program unless, after consultation with the treatment team and the agreement of the prosecuting attorney, [the court] decides to continue the participant in the program." *Id.*

10.13 Successful Completion of the Drug Court Treatment Program

"Upon completion or termination of the drug treatment court program, the court shall find on the record or place a written statement in the court file as to whether the participant completed the program successfully or whether the individual's participation in the program was terminated and, if it was terminated, the reason for the termination." MCL 600.1076(1).

[382]The statute does not specify who must initiate the notification.

"For a participant who successfully completes probation or other court supervision and whose proceedings were deferred or who was sentenced under [MCL 600.1070[383]], the court shall comply with the agreement made with the participant upon admission into the drug treatment court, or the agreement as it was altered after admission by the court with approval of the participant and the prosecutor for that jurisdiction as provided in [MCL 600.1076(3)-(8)]." MCL 600.1076(2).

A. Individuals Whose Adjudication Was Deferred[384]

If an individual who successfully completes drug treatment court is participating pursuant to MCL 762.11 (youthful trainee status), MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (domestic violence offenses), MCL 750.350a (parental kidnapping), or MCL 750.430 (impaired healthcare professionals), the court must proceed pursuant to the applicable section of law. MCL 600.1076(3). Only one discharge or dismissal is permitted under MCL 600.1076(3).

B. Individuals Entitled to Discharge and Dismissal

Subject to the memorandum of understanding under MCL 600.1062, and with the prosecutor's affirmative consent, the trial court "may discharge and dismiss the proceedings against an individual who meets all of the following criteria:[385]

> "(a) The individual has participated in a drug treatment court for the first time.
>
> (b) The individual has successfully completed the terms and conditions of the drug treatment court program.
>
> (c) The individual is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty.
>
> (d) The individual is not currently charged with and has not pled guilty to a traffic offense.
>
> (e) The individual has not previously been subject to more than 1 of any of the following:

[383] See Section 10.10.

[384] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9 for more information about deferred adjudication.

[385] Additional requirements apply to dismissal and discharge of proceedings against an individual charged with a domestic violence offense. See MCL 600.1076(5) (setting forth additional requirements that must be met before a domestic violence offense may be discharged or dismissed). See Section 10.13(C).

> (*i*) Assignment to the status of youthful trainee under . . . MCL 762.11.
>
> (*ii*) The dismissal of criminal proceedings against him or her under . . . MCL 333.7411, . . . MCL 769.4a, . . . MCL 750.350a, [or] . . . [MCL 750.430]." MCL 600.1076(4).

"A discharge and dismissal under [MCL 600.1076(4)] shall be without adjudication of guilt or, for a juvenile, without adjudication of responsibility and are not a conviction or a finding of responsibility for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or, for a juvenile, a finding of responsibility. There may only be 1 discharge and dismissal under [MCL 600.1076(4)] for an individual." MCL 600.1076(6).

C. Discharge and Dismissal for Individuals Charged with a Domestic Violence Offense

In addition to the requirements in MCL 600.1076(4)(a)-(e), discussed above, dismissal and discharge of proceedings against a drug treatment court participant charged with a domestic violence offense must meet additional criteria:

> "(a) The individual has not previously had proceedings dismissed under . . . MCL 769.4a.
>
> (b) The domestic violence offense is eligible to be dismissed under . . . MCL 769.4a.
>
> (c) The individual fulfills the terms and conditions imposed under . . . MCL 769.4a, and the discharge and dismissal of proceedings are processed and reported under . . . MCL 769.4a." MCL 600.1076(5).

D. Individuals Not Entitled to Dismissal and Discharge

"Except as provided in [MCL 600.1076(3), MCL 600.1076(4), or MCL 600.1076(5)], if an individual has successfully completed probation or other court supervision, the court shall do the following:

> (a) If the court has not already entered an adjudication of guilt or responsibility, enter an adjudication of guilt or, in the case of a juvenile, enter a finding or adjudication of responsibility.

> (b) If the court has not already sentenced the individual, proceed to sentencing or, in the case of a juvenile, disposition pursuant to the agreement.
>
> (c) Send a record of the conviction and sentence or the finding or adjudication of responsibility and disposition to the criminal justice information center of the department of state police. The department of state police shall enter that information into the law enforcement information network [LEIN] with an indication of successful participation by the individual in a drug treatment court." MCL 600.1076(7).[386]

10.14 Unsuccessful Participation in Drug Treatment Court

When a participant does not successfully complete the drug treatment court program or is terminated from the program before completion, the court must indicate on the record, or in a written statement in the court file, that the individual's participation in the program was terminated and the reason for termination. MCL 600.1076(1).

"For a participant whose participation is terminated or who fails to successfully complete the drug treatment court program, the court shall enter an adjudication of guilt, or, in the case of a juvenile, a finding of responsibility, if the entering of guilt or adjudication of responsibility was deferred under [MCL 600.1070], and shall then proceed to sentencing or disposition of the individual for the original charges to which the individual pled guilty or, if a juvenile, to which the juvenile admitted responsibility prior to admission to the drug treatment court." MCL 600.1076(8). The court must send a record of the sentence or disposition and the individual's unsuccessful participation in the drug treatment court to the department of state police, which must "enter that information into the law enforcement information network [LEIN], with an indication that the individual unsuccessfully participated in a drug treatment court." *Id*.

10.15 Record Requirements Upon Completion or Termination of Drug Treatment Court Program

All court proceedings regarding a participant's completion or termination of the drug treatment court program under MCL 600.1076 are open to the public. MCL 600.1076(9).

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[386] See Section 10.15 for more information on record requirements upon completion of drug treatment court.

A. Retention and Availability of Nonpublic Record

"Unless the court enters a judgment of guilt or an adjudication of responsibility under this section, the department of state police shall retain a nonpublic record of the arrest, court proceedings, and disposition of the criminal charge under this section. However, the nonpublic record shall be open to the following individuals and entities for the purposes noted:

> (a) The courts of this state, law enforcement personnel, the department of corrections, and prosecuting attorneys for use only in the performance of their duties or to determine whether an employee of the court, law enforcement agency, department of corrections, or prosecutor's office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, law enforcement agency, department of corrections, or prosecutor's office.
>
> (b) The courts of this state, law enforcement personnel, and prosecuting attorneys for the purpose of showing that a defendant has already once availed himself or herself of this section.
>
> (c) The department of human services for enforcing child protection laws and vulnerable adult protection laws or ascertaining the preemployment criminal history of any individual who will be engaged in the enforcement of child protection laws or vulnerable adult protection laws." MCL 600.1076(10).

B. Deferred Adjudication

Except for the nonpublic record that must be maintained by the department of state police and made available under certain limited circumstances under MCL 600.1076(10), "if the record of proceedings . . . is deferred under [MCL 600.1076], the record of proceedings during the period of deferral shall be closed to public inspection." MCL 600.1076(9).

C. Discharge and Dismissal

Following a discharge and dismissal under MCL 600.1076(4), the court must send a record of the discharge and dismissal to the department of state police, which must "enter that information into the law enforcement information network [LEIN] with an indication of participation by the individual in a drug treatment court." MCL 600.1076(6). All records of the drug treatment court proceedings

under MCL 600.1076(4) are closed to public inspection and exempt from public disclosure under the Freedom of Information Act, MCL 15.231 *et seq*. MCL 600.1076(6).

D. Successful Participants Not Entitled to Dismissal and Discharge

If an adjudication of guilt or responsibility and a sentence or disposition are entered following successful participation in the drug treatment court program, the court must "[s]end a record of the conviction and sentence or the finding or adjudication of responsibility and disposition to the criminal justice information center of the department of state police. The department of state police shall enter that information into the law enforcement information network [LEIN] with an indication of successful participation by the individual in a drug treatment court." MCL 600.1076(7)(c).

E. Unsuccessful Participants

Upon sentencing or disposition of an individual whose participation is terminated or who fails to successfully complete the drug treatment court program, the court must send a record of the sentence or disposition and the individual's unsuccessful participation in the drug treatment court to the department of state police, which must "enter that information into the law enforcement information network [LEIN], with an indication that the individual unsuccessfully participated in a drug treatment court." MCL 600.1076(8).

Part II—Family Treatment Court

10.16 Family Treatment Court

A. Statutory Authority

MCL 600.1099bb provides, in relevant part, the statutory basis for the creation of family treatment courts:

"The circuit court in any judicial circuit may adopt or institute a family treatment court, pursuant to statute or court rules." MCL 600.1099bb(1).

Family treatment courts must be certified by SCAO before performing the functions of a family treatment court. MCL 600.1099bb(3). See Section 10.3(D).

B. Adopting or Instituting a Family Treatment Court

"The circuit court shall not adopt or institute the family treatment court unless the circuit court enters into a memorandum of understanding with the prosecuting attorney, a representative of the bar specializing in family or juvenile law, a lawyer-guardian ad litem, a representative or representatives of the department, and a representative or representatives of community treatment providers." MCL 600.1099bb(1).

Other parties that are considered necessary may be included in the memorandum of understanding, "such as a court appointed special advocate, local law enforcement, the local substance abuse coordinating agency for that circuit court, a mental health treatment provider, a domestic violence services provider, an Indian child's tribe, or child and adolescent services providers." *Id*. The memorandum of understanding must describe each party's role. *Id*.

A court adopting a family treatment court must participate in training required by SCAO. MCL 600.1099bb(2).

C. Hiring or Contracting with Treatment Providers

"A family treatment court may hire or contract with licensed or accredited treatment providers in consultation and cooperation with the local substance abuse coordinating agency, the local community mental health service provider, and other such appropriate persons to assist the family treatment court in fulfilling its requirements . . . ." MCL 600.1099cc.

D. Collection of Data and Program Maintenance

SCAO requires "[e]ach family treatment court [to] collect and provide data on each individual applicant and participant in the program," and "[SCAO] is responsible for evaluating and collecting data on the performance of family treatment courts . . . ." MCL 600.1099kk(1), (6).

Additionally, SCAO requires family treatment courts to maintain files or databases on each individual participant in the program for review and evaluation. MCL 600.1099kk(3). This information should be maintained in the court files and should, as much as practicable, include all of the following:

> "(a) Location and contact information for each individual participant, on admission and termination or completion of the program for follow-up reviews, and third-party contact information.
>
> (b) Significant transition point dates, including dates of referral, enrollment, new court orders, violations, detentions, changes in services or treatments provided, discharge for completion or termination, any provision of after-care, and after-program recidivism.
>
> (c) The individual's precipitating adjudication and significant factual information, source of referral, and all family treatment court evaluations and assessments.
>
> (d) Treatments provided, including the intensity of care or dosage, and the outcome of each treatment.
>
> (e) Other services or opportunities provided to the individual and resulting use by the individual, such as education or employment and the participation of and outcome for that individual.
>
> (f) Reasons for discharge, completion, or termination of the program.
>
> (g) Outcomes related to reunification and placement of a child or children." MCL 600.1099kk(3).

10.17 Admission to Family Treatment Court

A. Preadmission Screening and Evaluation

"A family treatment court shall determine whether an individual may be admitted to the family treatment court." MCL 600.1099dd(1). "An individual does not have a right to be admitted into a family treatment court." *Id*. "Unless the family treatment court judge and the prosecuting attorney, in consultation with any known victim in the instant case, consent, a violent offender must not be admitted into a family treatment court." *Id*.

"To be admitted into a family treatment court, admission must be indicated as appropriate as a result of a preadmission screening, evaluation, or assessment with an evidence-based screening and assessment tool." MCL 600.1099dd(2). "An individual shall cooperate with and complete a preadmission screening, evaluation, or assessment, and shall agree to cooperate with any future evaluation or assessment as directed by the family treatment court." *Id*. "A

preadmission screening, evaluation, or assessment must include all of the following:

> (a) A complete review of the individual's criminal history, and a review of whether or not the individual has been admitted to, has participated in, or is currently participating in a problem-solving court. The court may accept verifiable and reliable information from the prosecutor or the individual's attorney to complete its review and may require the individual to submit a statement as to whether or not the individual has previously been admitted to a problem-solving court and the results of the individual's participation in the prior program or programs.
>
> (b) A complete review of the individual's child protective services history.
>
> (c) As much as practicable, a complete review of the individual's civil record, including any records pertaining to divorce, custody, personal protection order, and extreme risk protection order proceedings.
>
> (d) An assessment of the family situation, including any nonrespondent parent and family support.
>
> (e) An assessment of the risk of danger or harm to the individual, the individual's children, or the community.
>
> (f) As much as practicable, a complete review of the individual's history regarding the use or abuse of any controlled substance or alcohol and an assessment of whether the individual abuses controlled substances or alcohol or is drug or alcohol dependent. As much as practicable, the assessment must be a clinical assessment.
>
> (g) A review of any special needs or circumstances of the individual that may potentially affect the individual's ability to receive substance abuse treatment and follow the court's orders." *Id*.

B. Required Preadmission Findings by the Court

"Before an individual is admitted into a family treatment court, the court shall find on the record, or place a statement in the court file establishing all of the following:

> (a) That the individual has a substance use disorder and is an appropriate candidate for participation in the

> family treatment court as determined by the preadmission screening, evaluation, or assessment.
>
> (b) That the individual understands the consequences of entering the family treatment court and agrees to comply with all court orders and requirements of the family treatment court and treatment providers.
>
> (c) That either the individual is not a violent offender or, subject to [MCL 600.1099ee(d) and MCL 600.1099ee(e)], the family treatment court judge, the lawyer-guardian ad litem, and the prosecuting attorney, in consultation with any known victim in the instant case, consent to the violent offender being admitted to the family treatment court.
>
> (d) The individual is not currently charged with first degree murder or criminal sexual conduct in the first, second, or third degree.
>
> (e) The individual has never been convicted of first degree murder, criminal sexual conduct in the first degree, or child sexually abusive activity.
>
> (f) That an individual has completed a preadmission screening, evaluation, or assessment under section 1099dd and has agreed to cooperate with any future evaluation or assessment as directed by the family treatment court.
>
> (g) The terms and conditions of the agreement between parties." MCL 600.1099ee.

"The court may request that the department provide to the court information about an individual applicant's child protective services history to determine an individual's admission into the family treatment court." MCL 600.1099dd(5).

C. When Admission to Family Treatment Court Is Prohibited

An individual currently charged with first-degree murder or criminal sexual conduct in the first, second, or third degree must not be admitted to a family treatment court. MCL 600.1099dd(1)(a).

An individual who has been convicted of first-degree murder, first-degree criminal sexual conduct, or child sexually abusive activity must not be admitted to a family treatment court. MCL 600.1099dd(1)(b).

10.18 Conditions of Admission

"If the individual being considered for admission to a family treatment court is adjudicated in a civil child neglect and abuse case, the individual's admission is subject to all of the following conditions:

> (a) The allegations contained in the petition must be related to the abuse, illegal use, or possession of a controlled substance or alcohol.
>
> (b) The individual must make an admission of responsibility to the allegations on the record.
>
> (c) The individual must sign a written agreement to participate in the family treatment court." MCL 600.1099ff.

"On admitting an individual into a family treatment court, both of the following apply:

> (a) For an individual who is admitted to a family treatment court based on having an adjudicated child neglect or abuse case, the court shall accept the admission of responsibility to the allegations described in [MCL 600.1099ff].
>
> (b) The court may place the individual under court jurisdiction in the family treatment court program with terms and conditions as considered necessary by the court." MCL 600.1099gg(1).

"The family treatment court shall cooperate with, and act in a collaborative manner with, the prosecutor, representative of the bar specializing in family or juvenile law, treatment providers, lawyer-guardian ad litem, local substance abuse coordinating agency, department, and, to the extent possible, court appointed special advocate, local law enforcement, child and adolescent services providers, domestic violence services providers, Indian child's tribe, and community corrections agencies." MCL 600.1099gg(2).

"The family treatment court may require an individual admitted into the court to pay a reasonable family treatment court fee that is reasonably related to the cost to the court of administering the family treatment court program . . . ." MCL 600.1099gg(3).

10.19 Components of Family Treatment Court

"A family treatment court shall provide a family treatment court participant with all of the following:

(a) Consistent, continual, and close monitoring of the participant and interaction among the court, treatment providers, department, and participant.

(b) Mandatory periodic and random testing for the presence of any controlled substance, alcohol, or other abused substance in a participant's blood, urine, saliva, or breath, using to the extent practicable the best available, accepted, and scientifically valid methods.

(c) Periodic evaluation assessments of the participant's circumstances and progress in the program.

(d) A regimen or strategy of appropriate and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of incarceration or confinement.

(e) Substance abuse treatment services, including, but not limited to, family-centered treatment, relapse prevention services, mental health treatment services, education, and vocational opportunities as appropriate and practicable." MCL 600.1099hh(1).

10.20 Continued Participation, Successful Completion, or Termination of Family Treatment Court Program

A. Continued Participation

"To continue to participate in and successfully complete a family treatment court program, an individual must do both of the following:

> (a) Pay the family treatment court fee . . . .
>
> (b) Comply with all court orders and case service plans, violations of which may be sanctioned according to national and state recognized family treatment court best practices and standards." MCL 600.1099ii(1).

"The family treatment court must be notified of any new neglect and abuse allegations against the participant or if the participant is accused of a crime. The judge shall consider whether to terminate the participant's participation in the family treatment court . . . ." MCL 600.1099ii(2).

The court may waive all or part of a participant's family treatment court program fee if "the court determines that the payment of the fee

would be a substantial hardship for the participant or would interfere with the participant's substance abuse treatment." MCL 600.1099ii(3).

B. Completion or Termination of Participation

"On completion of or termination from a family treatment court program, the court shall find on the record or place a written statement in the court file as to whether the participant completed the program successfully or whether the individual's participation in the program was terminated and, if it was terminated, the reason for the termination." MCL 600.1099jj(1).

If the participant successfully completes the family treatment court program, the court will send notice of completion and final disposition to the department of health and human services (DHHS). MCL 600.1099jj(2). Similarly, if the participant is terminated from the program, the court will send notice of the termination to the DHHS. MCL 600.1099jj(3).

"All court proceedings under [MCL 600.1099jj] must be open to the public." MCL 600.1099jj(4).

10.21 Confidentiality of Information Obtained

The information received for a family treatment court assessment "is confidential and must not be used for any purpose other than treatment and case planning." MCL 600.1099dd(3).

"Except as otherwise permitted . . . , any statement or other information obtained as a result of participating in a preadmission screening, evaluation, or assessment under [MCL 600.1099dd(2)] is confidential and is exempt from disclosure under the freedom of information act, [MCL 15.231 to MCL 15.246], and must not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal drug use." MCL 600.1099dd(4).

"Any statement or other information obtained as a result of participating in an assessment, evaluation, treatment, or testing while in a family treatment court is confidential and is exempt from disclosure under the freedom of information act, [MCL 15.231 to MCL 15.246], and must not be used in a criminal prosecution, unless it reveals criminal acts other than, or inconsistent with, personal drug use. MCL 600.1099hh(2).

Part III—Other Types of Problem-Solving Courts

10.22 Veterans Treatment Courts[387]

In addition to possible eligibility for admission to a drug treatment court, an individual who is dependent upon or abusing drugs or alcohol may be eligible for admission to a veterans treatment court. See MCL 600.1201(2); MCL 600.1204(b). Admission to a veterans treatment court is available to a veteran who is dependent on alcohol or drugs, a substance abuser, or mentally ill and who meets certain additional requirements, including that he or she is not a violent offender[388] or an unwarranted or substantial risk to the safety of the public or an individual. MCL 600.1204. Further, an individual eligible for admission who has had criminal proceedings deferred and who is on probation under MCL 333.7411 (possession or use of specified controlled substances) may be admitted to a veterans treatment court. MCL 600.1203(2)(b)*(i)*.[389]

An individual admitted to a veterans treatment court is entitled to certain services, including close monitoring, a mentorship relationship with another veteran, and substance abuse and mental health treatment services as appropriate and practicable. MCL 600.1207(1).

10.23 Mental Health Courts and Juvenile Mental Health Courts[390]

In addition to possible eligibility for admission to a drug treatment court, an individual who is charged with a controlled substance offense may be eligible for admission to a mental health court or a juvenile mental health court if he or she is not a violent offender.[391] See MCL 600.1093(1); MCL 600.1094(1); MCL 600.1099e(1); MCL 600.1099f(1). "Unless the mental health court judge and the prosecuting attorney, in consultation with any known victim in the instant case, consent, a violent offender must not be admitted into mental health court." MCL 600.1093(1). "An individual

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[387]For more information on this topic, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9.

[388]Note that there are three distinct definitions of *violent offender* depending on whether the term is used in the context of a drug treatment court, veterans treatment court, or a mental health court.

[389] MCL 600.1203(2)(b) specifies other situations in which a defendant may be eligible for admission. However, they are outside the scope of this benchbook.

[390]For more information on mental health courts, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9; for more information on juvenile mental health courts, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 1.

[391]Note that there are four distinct definitions of *violent offender* depending on whether the term is used in the context of a drug treatment court, veterans treatment court, mental health court, or juvenile mental health court.

must not be admitted to a mental health court if either of the following applies:

> (a) The individual is currently charged with first degree murder in violation of . . . MCL 750.316, criminal sexual conduct in the first, second, or third degree in violation of . . . MCL 750.520b, [MCL] 750.520c, and [MCL] 750.520d, or child sexually abusive activity in violation of . . . MCL 750.145c.
>
> (b) The individual has been convicted of first degree murder in violation of . . . MCL 750.316, or criminal sexual conduct in the first degree in violation of . . . MCL 750.520b." MCL 600.1093(1).

ˆurther, an individual who has had criminal proceedings deferred and who is on probation under MCL 333.7411 (possession or use of specified controlled substances) may be eligible for admission to a mental health court. MCL 600.1093(2)(b)(*i*).[392]

A mental health court is required to provide a participant with several services as set out in MCL 600.1096(1), including mental health and substance use disorder services, MCL 600.1096(1)(e), and a regimen of immediate rewards for compliance and sanctions for noncompliance, MCL 600.1096(1)(d). Juvenile mental health courts operate similarly to adult mental health courts. See Chapter 10C of the Revised Judicature Act, MCL 600.1099b *et seq.*

10.24 DWI/Sobriety Court and Specialty Court Interlock Program

MCL 600.1084 governs the DWI/sobriety court and the specialty court interlock program. See MCL 600.1084(1). Drug treatment courts, DWI/sobriety courts, courts that are a hybrid of drug treatment and DWI/sobriety courts, mental health courts, and veterans treatment courts may all participate in the specialty court interlock program that permits issuance of a restricted license to a participant after the installation of an ignition interlock device on their motor vehicle. MCL 600.1084(6); MCL 600.1084(9)(d). For a detailed discussion of DWI/sobriety courts and the specialty court interlock program, see the Michigan Judicial Institute's *Traffic Benchbook*, Chapter 9.

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[392] MCL 600.1093(2)(b) specifies other situations in which a defendant may be eligible for admission. However, they are outside the scope of this benchbook.

10.25 Swift and Sure Sanctions Probation Program

The Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, established a voluntary, grant-funded "state swift and sure sanctions program" for the supervision of participating offenders who have been placed on probation for committing a felony. MCL 771A.3; see also MCL 771A.2(b). Under the Probation Swift and Sure Sanctions Act, a circuit court may apply to the State Court Administrative Office (SCAO) for a grant to fund a swift and sure probation supervision program. MCL 771A.4(3).[393] A probationer participating in such a program is subject to close monitoring and to prompt arrest and the immediate imposition of sanctions following a probation violation. See MCL 771A.3; MCL 771A.5(1).

"The circuit court in any judicial circuit may adopt or institute a swift and sure sanctions court, by statute or court rule." MCL 600.1086(1). "A swift and sure sanctions court shall carry out the purposes of the swift and sure sanctions act[.]" MCL 600.1086(2). "A circuit court that has adopted a swift and sure sanctions court may accept participants from any other jurisdiction in this state based upon either the residence of the participant in the receiving jurisdiction or the unavailability of a swift and sure sanctions court in the jurisdiction where the participant is charged. The transfer is not valid unless it is agreed to by all of the following individuals:

> (a) The defendant or respondent.
>
> (b) The attorney representing the defendant or respondent.
>
> (c) The judge of the transferring court and the prosecutor of the case.
>
> (d) The judge of the receiving swift and sure sanctions court and the prosecutor of a court funding unit of the swift and sure sanctions court." MCL 600.1086(3). See also MCL 771A.4(4).

"An individual is eligible for the swift and sure probation supervision program if he or she receives a risk score of other than low on a validated risk assessment[,]" and is not charged with a crime under one or more of the following sections:

- MCL 750.316,
- MCL 750.317,

[393] "The funding of all grants under [Chapter XIA of the Code of Criminal Procedure] is subject to appropriation." MCL 771A.4(3).

- MCL 750.520b,
- MCL 750.520d,
- MCL 750.529,
- MCL 750.544, and
- a major controlled substance offense.[394] MCL 771A.6(2)-(3).

See also the Michigan Judicial Institute's table listing all the charges that render an individual ineligible for supervision under the Probation Swift and Sure Sanctions Act.

For a detailed discussion of the Probation Swift and Sure Sanctions Act, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 3*, Chapter 2. See also the Court's webpage on Swift and Sure Sanctions Probation Programs.

[394] A defendant charged with a violation of MCL 333.7403(2)(a)(v) is still eligible to participate in a swift and sure probation supervision program if he or she receives a qualifying risk score. MCL 771A.6(3)(b).

Chapter 11: Forfeiture

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11.1 Scope Note

This chapter discusses Michigan's civil drug forfeiture laws. Specifically, this chapter discusses MCL 333.7521 (describing the types of property subject to forfeiture and under what circumstances forfeiture is permissible); MCL 333.7521a (providing certain property subject to seizure may not be forfeited or disposed of unless relevant criminal proceedings have concluded in a conviction); MCL 333.7522 (explaining the methods by which property subject to forfeiture may be seized by the government); MCL 333.7523 (providing for the institution of judicial forfeiture proceedings and administrative forfeiture proceedings); MCL 333.7523a (providing for the stay of forfeiture proceedings, burden of proof at forfeiture hearings, and return of property under certain circumstances); MCL 333.7524 (providing for the disposition of forfeited property); MCL 333.7525 (providing for summary forfeiture of schedule 1 controlled substances and plants from which schedule 1 and 2 controlled substances may be derived); and the Uniform Forfeiture Reporting Act, MCL 28.111 *et seq*. Where applicable, this chapter will include federal caselaw to provide guidance on forfeiture issues where there are gaps in Michigan law.

11.2 Forfeiture Actions Generally

Forfeiture is a procedure by which the government takes property without compensating the owner because the property has been illegally used or obtained. The procedure is in rem, against the property, as opposed to in personam, against the person. *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 343 (1995). On or after August 7, 2019,[395] and unless certain specified exceptions are met, seized property is not subject to forfeiture until a criminal proceeding involving or relating to the property has been completed and a conviction is entered. MCL 333.7521a.[396]

A. Types of Forfeiture Proceedings

There are three types of forfeiture:

- **Judicial forfeiture**, where forfeiture is accomplished through civil proceedings. See MCL 333.7522; MCL 333.7523.

- **Administrative forfeiture**, where the seizing agency attempts to forfeit the seized property without going to court. See MCL 333.7522; MCL 333.7523.

[395] See 2019 PA 7, effective August 7, 2019.

[396] See Section 11.11(A) for a discussion of MCL 333.7521a.

- **Summary forfeiture**, where there is automatic seizure and forfeiture of an item that is a schedule 1 controlled substance or a plant from which a schedule 1 or 2 controlled substance may be derived. See MCL 333.7525.

B. Burden of Proof

"The plaintiff in a forfeiture action under [Article 7 of the PHC] has the burden of proving a violation of [Article 7 of the PHC] by clear and convincing evidence." MCL 333.7521(2).[397] See also MCL 333.7523a(2) (setting forth what the plaintiff at a forfeiture hearing must prove if MCL 333.7521a applies, the seized property is subject to forfeiture under MCL 333.7521, and the person filed a claim under MCL 333.7523).

"In order for an asset to be ordered forfeited, the trial court must find that there is a substantial connection between that asset and the underlying criminal activity. In contrast, property that has only an incidental or fortuitous connection to the unlawful activity is not subject to forfeiture." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 146 (1992). The substantial connection test is discussed further in Section 11.7(B).

11.3 Jurisdiction

A. Subject Matter Jurisdiction

Circuit courts have subject matter jurisdiction over civil drug forfeiture actions. See MCL 600.605 ("Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.") See also *People v One 1973 Pontiac,* 84 Mich App 231, 234 (1978) (holding that the applicable forfeiture statute required the prompt institution of in rem judicial forfeiture proceedings in the circuit court).[398]

Generally, in in rem proceedings, "possession or control over the subject matter or res of the action is essential to the court's jurisdiction to enter a judgment." *In re Forfeiture of 301 Cass Street*, 194 Mich App 381, 387 (1992). Specifically, "[a] forfeiture proceeding

[397]The clear and convincing evidence burden of proof applies to forfeiture proceedings commenced under Article 7 of the PHC on or after January 18, 2016. MCL 333.7521(2); see 2015 PA 154. Before 2015 PA 154 amended MCL 333.7521 to specify the plaintiff's burden of proof, the government had to prove its case by a preponderance of the evidence. *In re Forfeiture of $25,505*, 220 Mich App 572, 574 (1996).

[398]This case construed MCL 335.355, the predecessor statute to MCL 333.7523.

brought under [Article 7 of the PHC] requires the seizing agency to be in possession or control of the res in order to vest the court with jurisdiction to enter an order of forfeiture." *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 343 (1995), citing *In re Forfeiture of 301 Cass Street*, 194 Mich App at 387. Control over property may be accomplished by placing the property under seal, removing it, or turning it over to an administrator. *In re Forfeiture of 301 Cass Street*, 194 Mich App at 387 (citation omitted). See also MCL 333.7523(3)(a)-(c). However, MCL 333.7523 "does not exclude other methods of exercising possession or control." *In re Forfeiture of 301 Cass Street*, 194 Mich App at 387. See also *In re Forfeiture of 19203 Albany*, 210 Mich App at 344 (holding that the filing of a notice of lis pendens against the property before filing a forfeiture complaint was sufficient to vest jurisdiction in the circuit court).

B. Jurisdiction to Review Administrative Forfeiture Proceedings

"[I]f the prosecutor gives proper notice to the owners of [seized] property and no claim is filed within twenty days of its receipt, the property may be deemed forfeited[, and t]he trial court no longer has jurisdiction." *Hollins v Detroit Police Dep't*, 225 Mich App 341, 347 (1997). See also MCL 333.7523(1)(c).[399] Accordingly, once an administrative forfeiture has been declared, see MCL 333.7523(1)(d), a circuit court does not have jurisdiction to review the forfeiture. *In re Return of Forfeited Goods*, 452 Mich 659, 662 (1996) (holding that where the sheriff's department fully complied with the statutory procedures for administrative forfeiture under Article 7 of the PHC and because the defendant failed to properly contest the forfeiture under MCL 333.7523, the circuit court lacked jurisdiction to review the procedure and was without authority to order the return of the defendant's property after charges against him were dismissed; the fact that the prosecutor agreed to return the property did not confer subject matter jurisdiction on the circuit court). However, where the government fails to provide proper notice to the property owner, the circuit court has jurisdiction to order the return of property. *Hollins*, 225 Mich App at 346-347. "To hold otherwise would be to deny plaintiffs a forum in which to seek relief. It would deprive them of a remedy for the claim that a defendant wrongfully seized their property without giving notice as due process requires." *Id.* at 347.

[399] Notice is discussed in Section 11.12(C).

C. Appellate Jurisdiction

The Michigan Court of Appeals has jurisdiction to hear, as an appeal of right, appeal of certain "final judgment[s] or final order[s] of the circuit court[.]" MCR 7.203(A)(1). Accordingly, the Court of Appeals has jurisdiction to review a forfeiture case after the circuit court issues a final forfeiture order. *In re Forfeiture of $28,088*, 172 Mich App 200, 203-204 (1988). Moreover, a reviewing court maintains jurisdiction over a forfeiture case after disposition of the forfeited property, and the sale or disposition of seized property does not render a forfeiture dispute moot. *In re Forfeiture of $256*, 445 Mich 279, 282 (1994).

D. Out-of-State Property

"Michigan courts only have jurisdiction over land situated within its territorial borders." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 140 (1992) (holding that the trial court lacked jurisdiction over property located in Florida), citing MCL 600.751 ("The courts of record of this state shall have jurisdiction over land situated within the state whether or not the persons owning or claiming interests therein are subject to the jurisdiction of the courts of this state.").

11.4 Venue

"Venue involving claims concerning the recovery of personal property lies in the county in which the subject of the action is situated." *In re Forfeiture of Certain Personal Prop*, 441 Mich 77, 83 (1992), citing MCL 600.1605. "Property taken or detained pursuant to forfeiture proceedings is deemed to be in the custody of the seizing agency." *In re Forfeiture of Certain Personal Prop*, 441 Mich at 83 (citation omitted). See also MCL 333.7523(3). In cases where venue is proper in more than one circuit court, the forfeiture action must proceed in the first county in which the forfeiture complaint is filed. *In re Forfeiture of Certain Personal Prop*, 441 Mich at 87.

11.5 Standing

In order for a claimant to have standing to challenge a forfeiture, he or she must have a recognizable interest in the property. *In re Forfeiture of $53*, 178 Mich App 480, 494 (1989). See also MCL 333.7523(1)(c) (detailing the requirements for filing a claim or objection regarding seized property). See Section 11.12(E).

A. Standing of a Bailee

A bailee has standing to challenge the forfeiture of property. *In re Forfeiture of $11,800*, 174 Mich App 727, 731-732 (1989) (holding the bailee had standing to challenge the forfeiture where the money he was responsible for was either stolen or taken from him without permission by his roommate and subsequently seized).

B. Standing of a Personal Representative or Heir

Where the owner of seized property is deceased, a personal representative or heir is "vested with a recognizable ownership interest in the property at the time it was seized and the interest [may be] sufficient to confer standing[to challenge the forfeiture of the property as an innocent owner under MCL 333.7521(1)(f)]." *In re Forfeiture of $234,200*, 217 Mich App 320, 326, 328 (1996).

C. Standing of Other Individuals

Federal courts[400] have found that the following individuals have standing to challenge the forfeiture of property under federal statutes:

- A person whose name is on the title of the forfeited property and who exercises dominion and control over the property. *United States v One Lincoln Navigator 1998*, 328 F3d 1011, 1013 (CA 8, 2003); *United States v Nava*, 404 F3d 1119, 1130 n 6 (CA 9, 2005) (holding that mere legal title without evidence of dominion or control over the property is insufficient to confer standing).

- A lienholder with a recorded interest in the forfeited property. *United States v Premises Known as 7725 Unity Ave*, 294 F3d 954, 957 (CA 8, 2002).

- A joint account holder of a bank account. *United States v United States Currency, $81,000*, 189 F3d 28, 34, 39-40 (CA 1, 1999).

- A person who has a financial interest in the outcome of the forfeiture or who will suffer injury as a result of the forfeiture. *One Lincoln Navigator 1998*, 328 F3d at 1013; *United States v 8402 W 132nd St*, 103 F Supp 2d 1040, 1041-1042 (ND Ill, 2000); *United States v 5 S 351 Tuthill Rd*, 233 F3d 1017, 1022 (CA 7, 2000).

[400] Decisions of lower federal courts are not binding on Michigan courts; however, they may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004).

- A beneficiary of an express trust. *United States v Santoro*, 866 F2d 1538, 1544-1545 (CA 4, 1989).

- A beneficiary of a land trust. *5 S 351 Tuthill Rd*, 233 F3d at 1022.

- A beneficiary of an irrevocable trust. *8402 W 132nd St*, 103 F Supp 2d at 1041-1042.

Federal courts have found that the following individuals *do not* have standing to challenge the forfeiture of property:

- A person who has obtained title to the forfeited property via a fraudulent transfer. *United States v Real Property Located at 5208 Los Franciscos Way*, 385 F3d 1187, 1192-1193 (CA 9, 2004).

- A child with a future interest in property. *United States v One Parcel of Property Located at RR 2*, 959 F2d 101, 103-104 (CA 8, 1992).

11.6 Constitutionality

The statutory sections governing forfeiture contained in Article 7 of the PHC do not violate equal protection or due process. *In re Forfeiture of $109,901*, 210 Mich App 191, 197-198 (1995). See also *Derrick v Detroit*, 168 Mich App 560, 563 (1988).

11.7 Property Subject to Forfeiture

The types of property subject to forfeiture under Article 7 of the PHC are set forth by statute. See MCL 333.7521.

A. Statutory Authority

MCL 333.7521(1) provides: "The following property is subject to forfeiture:

> (a) A prescription form, controlled substance, an imitation controlled substance, a controlled substance analogue, or other drug that has been manufactured, distributed, dispensed, used, possessed, or acquired in violation of [Article 7 of the PHC].
>
> (b) A raw material, product, or equipment of any kind that is used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance, a controlled substance

analogue, or other drug in violation of [Article 7 of the PHC]; or a raw material, product, or equipment of any kind that is intended for use in manufacturing, compounding, processing, delivering, importing, or exporting an imitation controlled substance in violation of [MCL 333.7341].

(c) Property that is used, or intended for use, as a container for property described in subdivision (a) or (b).

(d) Except as provided in subparagraphs (*i*) to (*iv*), a conveyance, including an aircraft, vehicle, or vessel used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in subdivision (a) or (b):

(*i*) A conveyance used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of [Article 7 of the PHC].

(*ii*) A conveyance is not subject to forfeiture by reason of any act or omission established by the owner of that conveyance to have been committed or omitted without the owner's knowledge or consent.

(*iii*) A conveyance is not subject to forfeiture for a violation of [MCL 333.7403(2)(c) (possession of lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5) or MCL 333.7403(d) (possession of marijuana), MCL 333.7404 (use of a controlled substance), or MCL 333.7341(4) (use or possession with intent to use an imitation controlled substance)].

(*iv*) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission.

(e) Books, records, and research products and materials, including formulas, microfilm, tapes, and data used, or intended for use, in violation of [Article 7 of the PHC].

> (f) Any thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of [Article 7 of the PHC] that is traceable to an exchange for a controlled substance, an imitation controlled substance, or other drug in violation of [Article 7 of the PHC] or that is used or intended to be used to facilitate any violation of [Article 7 of the PHC] including, but not limited to, money,[401] negotiable instruments, or securities. To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent. Any money that is found in close proximity to any property that is subject to forfeiture under subdivision (a), (b), (c), (d), or (e) is presumed to be subject to forfeiture under this subdivision. This presumption may be rebutted by clear and convincing evidence.
>
> (g) Any other drug paraphernalia not described in subdivision (b) or (c)."

B. The Substantial Connection Test

There must be a substantial connection between the seized property and the prohibited activity in order to forfeit the property under MCL 333.7521(1)(c) (containers), MCL 333.7521(1)(d) (conveyances), or MCL 333.7521(1)(f) (real property). *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 584 (2016); *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 342 (1995); *In re Forfeiture of $5,264*, 432 Mich 242, 262 (1989). "Property that only has an incidental or fortuitous connection to the unlawful activity is not subject to forfeiture." *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 584.

Some examples of cases applying the substantial connection test include:

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[401] "An attorney for a person who is charged with a crime involving or related to the money seized under [Article 7 of the PHC] must be afforded a period of 60 days within which to examine that money. This 60-day period begins to run after notice is given under [MCL 333.7523(1)(a)] but before the money is deposited into a financial institution under [MCL 333.7523(3)(d)]. If the attorney general, prosecuting attorney, or city or township attorney fails to sustain his or her burden of proof in forfeiture proceedings under [Article 7 of the PHC], the court shall order the return of the money, including any interest earned on money deposited into a financial institution under [MCL 333.7523(3)(d)]." MCL 333.7523(5).

- "[M]ore than a substantial connection between the underlying [unlawful] activity and the [forfeited] Denali and the motorcycle" was established where an officer testified that he had observed an individual well-known for drug dealing in both the Denali and the motorcycle while dealing drugs. *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App at 585.

- A substantial connection, under § 7521(1)(c) and § 7521(1)(f), between the home and underlying illegal transactions warranting forfeiture was established where the evidence showed that 17 pounds of marijuana were located throughout a home, records in the claimant's bedroom suggested that approximately 27 customers owed him $20,000 for marijuana, an affiant stated that he purchased marijuana from the claimant and that the home was used for many of the transactions, and drug-packaging paraphernalia was found in the home. *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App 255, 257-258 (2002).

- A substantial connection between cash found in the ceiling of the claimant-father's basement and drug trafficking warranting forfeiture under § 7521(1)(f) was established where the claimant-son, who was involved in drug trafficking, had access to the claimant-father's house, collected mail at the house, registered his vehicles to the claimant-father's address, and the investigating officers testified that the claimant-father was surprised when he learned of the cash found in his basement. *In re Forfeiture of $25,505*, 220 Mich App 572, 575 (1996). However, there was insufficient evidence of a substantial connection between forfeited furniture and drug trafficking where the furniture was discovered in the claimant-son's apartment and a police officer testified that "he assumed that the furniture was the proceeds of the drug trafficking because [the claimant-son] had been unemployed for some time when arrested." *Id.* at 576. "This [was] mere supposition and insufficient to establish that [the claimant-son] used drug proceeds to purchase the furniture." *Id.* The Court explained that "a prosecutor might meet [the] burden [of establishing a substantial connection] by presenting evidence showing that a claimant purchased the property at issue at a time when he had no alternative source of income or savings other than drug trafficking. Evidence regarding the value of seized property, the manner of payment therefore, and the connection in time of such purchases to drug deals may also aid the prosecution in meeting its burden." *Id.*

- A substantial connection between a mobile home and the sale of marijuana was established warranting forfeiture under § 7521(1)(f) where small amounts of marijuana were

seized during two separate searches of the mobile home, the person who sold marijuana to the undercover officer talked to the claimant (who owned the mobile home) on the phone in order to obtain marijuana and then entered the mobile home and returned with marijuana for the undercover officer, a search of the mobile home uncovered the marked $20 bills used to buy the marijuana, drug paraphernalia indicative of drug dealing such as scales and plastic bags were discovered in the mobile home, stems and seeds were found in the claimant's garbage, and the claimant admitted to selling marijuana from the mobile home. *In re Forfeiture of One 1978 Sterling Mobile Home*, 205 Mich App 427, 430-431 (1994).

- A substantial connection between the seized property and drug trafficking was established warranting forfeiture under § 7521(1)(f) where the prosecution relied on a net-worth theory that the claimant, a retired factory worker, was a drug trafficker, and his unexplained increase in net worth from 1983 to 1989 demonstrated that the later-acquired assets were associated with drug dealing. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 146-147 (1992). The Court noted that it did not agree with the claimant's argument "that a connection with a specific incident of drug dealing must be shown for each asset[.]" *Id.* at 147. Rather, the Court held that "the assets need only be traceable to drug trafficking." *Id.*

C. Forfeiture of Real Property Under § 7521(1)(c)

"Property that is used, or intended for use, as a container for [property subject to forfeiture under MCL 333.7521(1)(a)-(b),]" is subject to forfeiture under MCL 333.7521(1)(c). This provision has been interpreted to include real property within the meaning of the term *container*. *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 340, 343 (1995). The Court explained that while some controlled substances are "easily secreted in small portable containers like a box, crate, can or jar, other controlled substances such as marijuana require larger containers for storage." *Id.* at 341 (citation omitted). Thus, "whether or not a particular dwelling house is a 'container' within the provisions of [MCL 333.7521(1)(c)] is a question of fact for the trial court to determine." *In re Forfeiture of 19203 Albany*, 210 Mich at 341 (citation omitted). The Court held that "upon proof by a preponderance of the evidence[402] that real property subject to

[402]Note that a clear and convincing evidence burden of proof applies to forfeiture proceedings commenced under Article 7 of the PHC on or after January 18, 2016. MCL 333.7521(2); see 2015 PA 154. Before 2015 PA 154 amended MCL 333.7521 to specify the plaintiff's burden of proof, the government had to prove its case by a preponderance of the evidence. *In re Forfeiture of $25,505*, 220 Mich App 572, 574 (1996).

forfeiture has a substantial nexus to illegal drug activity, such that the property constitutes a 'container' under [MCL 333.7521(1)(c)] of [Article 7 of the PHC], a court may order a forfeiture of that real property." *In re Forfeiture of 19203 Albany*, 210 Mich at 342. This "substantial nexus" test is the same as the substantial connection test used in the context of forfeiture under § 7521(1)(f); see Section 11.7(B) for further discussion of the substantial connection test.

D. Forfeiture of Conveyances Under § 7521(1)(d)

A vehicle is not properly forfeited as a conveyance under MCL 333.7521(1)(d) where it "may have been used to facilitate the sale or receipt of a controlled substance not by actual transportation of the controlled substance to a customer but rather by transportation of the customer to the controlled substance." *In re Forfeiture of One 1987 Chevrolet Blazer*, 183 Mich App 182, 185 (1990) (holding that forfeiture was instead permissible under MCL 333.7521(1)(f) because that section "addresses contingencies in addition to those provided for in § 7521(1)(d)[]").

The trial court erred by failing to forfeit a automobile under MCL 333.7521(1)(d) where three witnesses testified that they saw the respondent collect money from cocaine sales and distribute cocaine while driving the automobile. *In re Forfeiture of United States Currency*, 164 Mich App 171, 174-175, 179 (1987). While the automobile was titled in Vivian Turner's name, not the respondent's, there was "significant documentary evidence that placing the title in Turner's name was a mere subterfuge." *Id.* at 179-180. Further, the automobile was registered at an address where the respondent never lived, and testimony showed that respondent and Turner lived together and purchased the automobile together. *Id.* at 180. Thus, "[t]he mere placing of the automobile in Ms. Turner's name [did not] prevent forfeiture." *Id.*

A vehicle is not subject to forfeiture under MCL 333.7521(1)(d), which "requires that a vehicle be used or intended to be used for the transportation of materials specified within the statute for the purpose of their sale or receipt." *In re Forfeiture of 2006 Saturn Ion*, ___ Mich ___, ___ (2024). "The statute covers: (1) a conveyance that is (2) used or intended to be used to (3) transport or facilitate the transportation (4) for the purpose of the sale or receipt of (5) property described in MCL 333.7521(1)(a) or (b)." *In re Forfeiture of 2006 Saturn Ion*, ___ Mich at ___, citing MCL 333.7521(1)(d). "[A]ll of these elements must be fulfilled simultaneously—there must be a conveyance used or intended to be used to transport illicit property that will be sold or received." *In re Forfeiture of 2006 Saturn Ion*, ___ Mich at ___. The Court noted that "MCL 333.7521(1)(d) requires that a vehicle be used or intended to be used for the transportation of

materials specified within the statute for the purpose of their sale or receipt before a forfeiture may be effected. *In re Forfeiture of 2006 Saturn Ion*, ___ Mich at ___. Accordingly, the facts in this case "do not support an inference that the defendant vehicle was used or intended to be used to transport illicit materials for their sale or receipt." *Id*.

"[M]ore than a substantial connection between the underlying [unlawful] activity and the [forfeited vehicle] and the motorcycle" was established where an officer testified that he had observed an individual well-known for drug dealing in both the vehicle and the motorcycle while that individual was dealing drugs. *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 585 (2016).

For a detailed discussion of the statutory exceptions to forfeiture of a conveyance, see Section 11.14(A).

E. Forfeiture Under § 7521(1)(f)

MCL 333.7521(1)(f) permits the forfeiture of several different types of property, including:

- "Any thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of [Article 7 of the PHC] that is traceable to an exchange for [one of the aforementioned substances]."
- Any thing of value that is used or intended to be used to facilitate any violation of Article 7 of the PHC.
- Money found in close proximity to property that is subject to forfeiture under MCL 333.7521(1)(a)-(e) is presumed to be subject to forfeiture, but this presumption may be rebutted by clear and convincing evidence.
- "[A] thing of value is not subject to forfeiture under [MCL 333.7521(1)(f)] by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent." This innocent owner defense to forfeiture is discussed in detail in Section 11.14(B).

1. Facilitation of Any Violation of Article 7 of the PHC Under § 7521(1)(f)

Forfeiture of a vehicle is proper under MCL 333.7521(1)(f) as "any thing of value" used to facilitate a violation of Article 7 of the PHC if the prosecution can prove a substantial connection between the property and the alleged criminal activity. *In re*

Forfeiture of One 1987 Chevrolet Blazer, 183 Mich App 182, 185 (1990) (reversing the trial court's order of dismissal in a proceeding to forfeit a vehicle that was used only to transport individuals to locations where they could purchase controlled substances, but not used to transport any actual controlled substances). The Court explained that there was no conflict between MCL 333.7521(1)(d), which permits the forfeiture of a vehicle used to transport a controlled substance, and MCL 333.7521(1)(f), which permits forfeiture of any thing of value used to facilitate any violation of Article 7 of PHC because "§ 7521(f) addresses contingencies in addition to those provided for in § 7521(1)(d), such as here, where the [vehicle] may have been used to facilitate the sale or receipt of a controlled substance not by actual transportation of the controlled substance to a customer but rather by transportation of the customer to the controlled substance." *In re Forfeiture of One 1987 Chevrolet Blazer*, 183 Mich App at 185.

2. Money Found in Close Proximity to Drugs

"No connection between the money and claimant's alleged illegal drug activity need be established before the proximity presumption of our state statute can be invoked." *In re Forfeiture of $111,144*, 191 Mich App 524, 534 (1992). Rather, the prosecutor need only demonstrate that the money was actually found in close proximity to property subject to forfeiture under Article 7 of the PHC. See *In re Forfeiture of $18,000*, 189 Mich App 1, 3-4 (1991) (holding, however, that the presumption did not apply where "it [was] undisputed that the money at issue was not found in close proximity to [the drugs]").

Several cases have considered whether money found in close proximity to property subject to forfeiture was properly forfeited, for example:

- Money seized from the claimant was properly forfeited under the close proximity provision of § 7521(1)(f), where the claimant had the cash on his person and was standing next to a person caught with cocaine in an amount suggestive of drug dealing, had the cash stacked in a way common for drug dealers, and had his claim about changing bills at a store refuted by testimony from the owners of the store. *In re Forfeiture of $275*, 227 Mich App 462, 464-466, 471 (1998) (SMOLENSKI, J., dissenting), rev'd by 457 Mich 864 (1998) (reversing for the reasons stated in the dissenting opinion in the Court of Appeals case[403]).

- The trial court erred by forfeiting money under the close proximity provision of § 7521(1)(f) because there was not a substantial connection between the money and cocaine where the only evidence linking the money to an exchange for a controlled substance was the fact that a narcotics dog smelled the odor of cocaine on the bills and there was also evidence that the claimant withdrew the money from a bank before posting the money for bond. *In re Forfeiture of $18,000*, 189 Mich App at 5. The Court noted that in the absence of actually finding the money in close proximity to property subject to forfeiture, the mere fact that money may once have been in close proximity to property subject to forfeiture did not justify application of the close proximity presumption. *Id.*

- Forfeiture proceedings were commenced under the close proximity provision of § 7521(1)(f) after the defendant was arrested and several checks were found on his person in close proximity to marijuana. *In re Forfeiture of $111,144*, 191 Mich App 524, 526, 534 (1992). The Court held, in dicta, that checks are to be considered "money" for purposes of the close proximity presumption in § 7521(1)(f). *In re Forfeiture of $111,144*, 191 Mich App at 531 n 1. The Court further rejected the claimant's argument that the prosecution had to establish a connection between the checks and illegal drug activity, holding that "[n]o connection between the money and claimant's alleged illegal drug activity need be established before the proximity presumption [of MCL 333.7521(1)(f)] can be invoked." *In re Forfeiture of $111,144*, 191 Mich App at 534.[404]

- Where $4,082 in cash was discovered on the claimant, who was standing two to three feet from a still-flushing toilet from which a ripped plastic bag that was later determined to have contained cocaine was recovered, the forfeiture of the cash under the close proximity provision of § 7521(1)(f) was proper. *People*

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[403] "An order of [the Michigan Supreme Court] is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm Mut Ins Co*, 491 Mich 359, 369 (2012). An order that refers to the facts and reasons in a dissenting Court of Appeals opinion constitutes binding precedent. *Id.* at 369-370.

[404] The case was remanded back to the trial court in order to allow the defendant to present evidence to rebut the presumption of forfeiture established by the fact that the checks were discovered in close proximity to the marijuana. *In re Forfeiture of $111,144*, 191 Mich App at 533. At the first forfeiture hearing the defendant invoked his Fifth Amendment privilege against self-incrimination and the trial court granted the prosecution's motion for summary disposition without allowing the claimant to present other evidence to rebut the presumption, despite the fact that the claimant had other witnesses present to testify. *Id.*

v United States Currency, 158 Mich App 126, 128, 131 (1986).

11.8 Seizure of Property

"Property that is subject to forfeiture under [Article 7 of the PHC] or pursuant to [MCL 333.7521] may be seized upon process[405] issued by the circuit court having jurisdiction over the property. Seizure without process may be made under any of the following circumstances:

> (a) Incident to a lawful arrest, pursuant to a search warrant, or pursuant to an inspection under an administrative inspection warrant.
>
> (b) The property is the subject of a prior judgment in favor of this state in an injunction or forfeiture proceeding under [Article 7 of the PHC] or pursuant to [MCL 333.17766a[406]].
>
> (c) There is probable cause to believe that the property is directly or indirectly dangerous to health or safety.
>
> (d) There is probable cause to believe that the property was used or is intended to be used in violation of [Article 7 of the PHC] or [MCL 333.17766a]." MCL 333.7522.

Unless a criminal proceeding involving or relating to the property has ended in a conviction, property may be seized under MCL 333.7522 but not be subject to forfeiture under MCL 333.7521 or disposition under MCL 333.7524. MCL 333.7521a(1). However, there are several exceptions to the criminal conviction requirement. See Section 11.11(A) for a full discussion.

A. Probable Cause to Seize Property

"In a forfeiture proceeding, the probable cause which the government must show is 'a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.'" *People v McCullum*, 172 Mich App 30, 35 (1988), quoting *United States v $22,287 United States Currency*, 709 F2d 442, 446-447 (CA 6, 1983). See also *In re Forfeiture of United States Currency*, 164 Mich App 171, 178 (1987) (holding that probable cause exists when the facts "would induce a fair-minded person of average intelligence and judgment to believe that the statute [regarding such forfeiture] was violated"). Circumstantial evidence may be

[405] MCL 333.7522 does not define the term *process*.

[406] MCL 333.17766a, repealed in 2002, pertained to the use, possession, or delivery of androgenic anabolic steroids.

sufficient to establish probable cause to support forfeiture. *McCullum*, 172 Mich App at 35-36.

B. Illegally Seized Property

The protection against unreasonable searches and seizures provided by US Const, Am IV applies to civil forfeiture proceedings. *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 696-697 (1965). Accordingly, illegally seized evidence is generally not admissible in a forfeiture action. *In re Forfeiture of United States Currency*, 166 Mich App 81, 88 (1988), citing *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693 (1965). However, "property subject to forfeiture that was illegally seized 'is not excluded from the proceeding entirely.' Instead the illegally seized property 'may be offered into evidence for the limited purpose of establishing its existence, and the court's in rem jurisdiction over it.'" *In re Forfeiture of $180,975*, 478 Mich 444, 447 (2007), quoting *United States v $639,588*, 293 US App DC 384, 387 (1992).

Further, "the exclusionary rule was never meant to preclude illegally seized property from a subsequent civil forfeiture proceeding involving that property[;]" accordingly, "as long as the order of forfeiture can be established by a preponderance of the evidence[407] untainted by the illegal search and seizure, the forfeiture is valid." *In re Forfeiture of $180,975*, 478 Mich at 447. According to the Court:

> "[T]he illegal seizure of property does not immunize it from forfeiture, and . . . illegally seized property that is the subject, or 'res,' of the forfeiture proceeding may be offered into evidence for the limited purpose of establishing its existence and the court's in rem jurisdiction over it. . . . [I]llegally seized property is forfeitable under MCL 333.7521 as long as the forfeiture can be supported by a preponderance of untainted evidence.
>
> While illegally seized evidence itself is physically excluded, it is not entirely excluded from the forfeiture proceeding. However, questions concerning this excluded evidence should be limited to the circumstances surrounding its existence. For example,

[407]Note that a clear and convincing evidence burden of proof applies to forfeiture proceedings commenced under Article 7 of the PHC on or after January 18, 2016. MCL 333.7521(2); see 2015 PA 154. Before 2015 PA 154 amended MCL 333.7521 to specify the plaintiff's burden of proof, the government had to prove its case by a preponderance of the evidence. *In re Forfeiture of $25,505*, 220 Mich App 572, 574 (1996).

> in the case of illegally seized cash, the state should not be permitted to exploit the search by asking how the money was packaged, or whether evidence of drugs was detected on the money. In addition, any other legally obtained evidence may be introduced to support the forfeiture." *In re Forfeiture of $180,975*, 478 Mich at 460.

In *In re Forfeiture of $180,975*, 478 Mich at 470-471, even though the cash subject to forfeiture was physically inadmissible, evidence established that the claimant's behavior was not "ordinary and innocent" with regard to the cash. The untainted evidence included the claimant's inability to offer a credible explanation for having such a large sum of cash in the rental car she was driving along a corridor known for drug trafficking, her history of repeated car rentals, the absence of any evidence in support of the claimant's intended use of the cash, and the fact that the claimant's negligible taxable earnings made it unlikely that she had the ability to produce such an income. *Id*. at 465-470.

11.9 Custody of Seized Property

"Property taken or detained under [Article 7 of the PHC] is not subject to an action to recover personal property, but is deemed to be in the custody of the seizing agency subject only to this section or an order and judgment of the court having jurisdiction over the forfeiture proceedings. When property is seized under [Article 7 of the PHC], the seizing agency may do any of the following:

> (a) Place the property under seal.
>
> (b) Remove the property to a place designated by the court.
>
> (c) Require the administrator to take custody of the property and remove it to an appropriate location for disposition in accordance with law.
>
> (d) Deposit money seized under [Article 7 of the PHC] into an interest-bearing account in a financial institution. . . ." MCL 333.7523(3).

For purposes of establishing jurisdiction, any of the methods set forth in MCL 333.7523(3) are sufficient to establish possession or control of the property, and no particular method is required to be used. *In re Forfeiture of 301 Cass Street*, 194 Mich App 381, 387 (1992). For a detailed discussion of jurisdiction, see Section 11.3.

11.10 Jurisdiction to Order Return of Seized Property

A criminal court lacks jurisdiction to order the return of seized property when a forfeiture action is pending in addition to the criminal action. *People v Wade*, 157 Mich App 481, 486-488 (1987); *People v Humphrey*, 150 Mich App 806, 814-815 (1986). However, a criminal court does have jurisdiction to order the return of a claimant's property where no forfeiture proceedings have been filed. *People v Washington*, 134 Mich App 504, 508 (1984).

Similarly, where property has been turned over to federal authorities and is the subject of a forfeiture action in federal court, the state district court lacks jurisdiction to order the return of the seized property. *In re 33rd District Court*, 138 Mich App 390, 392-394 (1985).

When an administrative forfeiture has been declared, the circuit court does not have jurisdiction to review the matter or authority to order the return of the forfeited property. *In re Return of Forfeited Goods*, 452 Mich 659, 661 (1996).

11.11 Judicial Forfeiture Procedures

"Subject to [MCL 333.7521a], if property is seized under [MCL 333.7522], forfeiture proceedings must be instituted promptly." MCL 333.7523(1).[408] See Section 11.12 for discussion of administrative forfeiture proceedings.

A. Conviction Generally Required Before Forfeiture[409]

Generally, "property may be seized as provided in [MCL 333.7522] for a violation of [Article 7 of the PHC], but is not subject to forfeiture under [MCL 333.7521] or disposition under [MCL 333.7524] unless a criminal proceeding involving or relating to the property has been completed and the defendant pleads guilty to or is convicted of a violation of [Article 7 of the PHC]." MCL 333.7521a(1).

[408]Note that MCL 333.7523(4) specifically requires judicial forfeiture when real property is involved: "Title to real property forfeited under [Article 7 of the PHC] must be determined by a court of competent jurisdiction." MCL 333.7523(4). See also MCL 600.2932(1) ("Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.").

[409]The requirements in MCL 333.7521a apply to forfeiture proceedings initiated on or after August 7, 2019. MCL 333.7521a(5).

1. Exceptions to Conviction Requirement

"A criminal conviction or guilty plea under [MCL 333.7521a(1)] is not required if 1 or more of the following apply:

> (a) No person claims any interest in the property as provided under [MCL 333.7523] or the owner of the property withdraws his or her claim in the property.
>
> (b) The owner of the property waives the criminal conviction or plea requirement under [MCL 333.7521a(1)] and elects to proceed with the civil forfeiture proceeding.
>
> (c) A criminal charge has been filed and 1 or both of the following apply:
>
> > (*i*) The defendant is outside this state and cannot reasonably be extradited or brought back to the state for prosecution.
> >
> > (*ii*) Reasonable efforts have been made by law enforcement authorities to locate and arrest the defendant, but the defendant has not been located." MCL 333.7521a(2).

Illegal and/or dangerous property. The immediate destruction of property that may not be lawfully possessed by any person or that is dangerous to the health or safety of the public may be immediately destroyed regardless of whether the person is convicted of a violation of Article 7 of the PHC. MCL 333.7521a(4).

Value of property exceeding $50,000. MCL 333.7521a "does not apply to forfeiture proceedings in which the aggregate fair market value of the property and currency seized exceeds $50,000.00, excluding the value of contraband." MCL 333.7521a(6).

Seizure of property by airport authority. MCL 333.7521a "does not apply to forfeiture proceedings in which the aggregate fair market value of the property and currency seized exceeds $20,000.00, excluding the value of contraband, if the forfeiture proceedings were initiated in connection with the seizure of property by law enforcement officers appointed by a public airport authority created under . . . MCL 259.110, or by a regional airport authority created under . . . MCL 259.139." MCL 333.7521a(7).

2. Stay of Proceedings

"If [MCL 333.7521a] applies to a forfeiture case under [Article 7 of the PHC], the seized property is subject to forfeiture under [MCL 333.7521], and a person has filed a claim as provided under [MCL 333.7523(1)(c)], a civil forfeiture action under this act must be stayed during the pendency of the applicable criminal proceedings." MCL 333.7523a(1).

"The civil forfeiture action must proceed after the defendant is convicted of, or enters a guilty plea to, the offense involved, or 1 or more of the events described in [MCL 333.7521a(2)] applies." MCL 333.7523a(1).

3. Section 7411 Deferral Proceedings

The requirement under MCL 333.7521a(1) that a defendant plead guilty to or be convicted of a violation of Article 7 of the PHC is not satisfied where a defendant tenders a plea under MCL 333.7411 and successfully complies with the terms of probation resulting in discharge and dismissal of the proceedings. *In re Forfeiture of $2,124*, 342 Mich App 569, 575-577 (2022).

B. Forfeiture Hearing After Defendant is Convicted/Enters Guilty Plea or Exception to Conviction Requirement Applies

"At the forfeiture hearing, the plaintiff must prove 1 or both of the following, as applicable:

> (a) The property is subject to forfeiture as provided in [MCL 333.7521(1)].
>
> (b) If a person, other than the person who has been convicted of a violation of this article or entered into a plea agreement in connection with a violation of [Article 7 of the PHC] as provided under [MCL 333.7521a(1)], claims an ownership or security interest in the property, that the person claiming the interest in the property had prior knowledge of or consented to the commission of the crime." MCL 333.7523a(2).

"If the plaintiff fails to meet the burden of proof under [MCL 333.7523a(2)], property seized under [MCL 333.7522] must be returned to the owner not more than 14 days from the date the court issues a dispositive order." MCL 333.7523a(3).

"Except as otherwise provided in [MCL 333.7521a], property must be returned to the owner not more than 14 days after the occurrence of any of the following:

> (a) A warrant is not issued against a person for the commission of a crime within 90 days after the property was seized.
>
> (b) All charges against the person relating to the commission of a crime are dismissed.
>
> (c) The person charged with committing a crime is acquitted of the crime.
>
> (d) In the case of multiple defendants, all persons charged with committing a crime are acquitted of the crime.
>
> (e) Entry of a court order under this article for the return of the property." MCL 333.7523a(4).

"A party to a forfeiture proceeding may seek an extension of the time periods described in [MCL 333.7523a] for good cause. The court may grant a motion for an extension under this subsection for good cause shown." MCL 333.7523a(5).

MCL 333.7523a "does not apply to forfeiture proceedings in which the aggregate fair market value of the property and currency seized exceeds $20,000.00, excluding the value of contraband, if the forfeiture proceedings were initiated in connection with the seizure of property by law enforcement officers appointed by a public airport authority created under . . . MCL 259.110, or by a regional airport authority created under . . . MCL 259.139. MCL 333.7523a(6).

C. Applicability of the Michigan Court Rules

The Michigan Court Rules apply to forfeiture actions under Article 7 of the PHC. *In re Forfeiture of 301 Cass Street*, 194 Mich App 381, 384-385 (1992). See also MCR 1.103 ("The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan.").

Accordingly, the discovery rules contained in the Michigan Court Rules are applicable to forfeiture actions. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 142 (1992) (acknowledging that the claimants in a drug forfeiture action are entitled to notice of service of any discovery requests on witnesses, explaining that "[s]uch notice is necessary to any party before discovery may be had in order for the opposing party to assert any objection or move for a

protective order to prohibit the production of any materials otherwise not subject to discovery[]"). Similarly, the Michigan Rules of Evidence are applicable to forfeiture actions under Article 7 of the PHC. *In re Forfeiture of 301 Cass St*, 194 Mich App at 386.

D. Applicability of Privilege Against Self-Incrimination

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." US Const, Am V. The Fifth Amendment also applies to civil drug forfeiture proceedings. See *In re Forfeiture of $111,144*, 191 Mich App 524, 533 (1992) (remanding to allow the claimant "to present evidence apart from his own testimony, which is protected by the Fifth Amendment[]").

In *In re Forfeiture of $111,144*, 191 Mich App at 524, the prosecutor brought a forfeiture action against money in a bank account belonging to a company co-owned by the claimant, and against two checks drawn on that account that were found in close proximity to controlled substances. *Id.* at 526-527. During a motion hearing, the prosecutor asked the claimant whether he had engaged in the business of delivering marijuana. *Id.* at 528. The claimant asserted his Fifth Amendment privilege against self-incrimination and refused to answer the question. *Id.* at 528-529. The prosecution moved for summary disposition and defense counsel stated that he had other witnesses who would testify on the claimant's behalf. *Id.* at 529. The trial court granted the prosecutor's motion for summary disposition. *Id.* at 530. The Court of Appeals reversed, explaining that a solution was necessary "that would both protect the privilege [against self-incrimination] and allow the forfeiture case to go forward." *Id.* at 533, citing *United States v United States Currency*, 626 F2d 11 (CA 6, 1980). The Court held:

> "On remand, claimant shall be allowed the opportunity to present evidence, apart from his own testimony, which is protected by the Fifth Amendment, in his attempt to overcome the burden of rebutting the presumption of forfeiture. The court may also fashion any other remedy, not inconsistent with this opinion, that protects claimant's Fifth Amendment privilege and allows the forfeiture case to proceed." *In re Forfeiture of $111,144*, 191 Mich App at 533.

E. Admissibility of Illegally Seized Evidence

"[I]llegally seized property 'may be offered into evidence for the limited purpose of establishing its existence, and the court's in rem jurisdiction over it.'" *In re Forfeiture of $180,975*, 478 Mich 444, 447

(2007), quoting *United States v $639,588*, 293 US App DC 384, 387 (1992). Further, "[w]hile illegally seized evidence itself is physically excluded, it is not entirely excluded from the forfeiture proceeding. However, questions concerning this excluded evidence should be limited to the circumstances surrounding its existence. For example, in the case of illegally seized cash, the state should not be permitted to exploit the search by asking how the money was packaged, or whether evidence of drugs was detected on the money. In addition, any other legally obtained evidence may be introduced to support the forfeiture." *In re Forfeiture of $180,975*, 478 Mich at 460. The Court further explained:

> "Because a basic purpose of a drug forfeiture proceeding is to establish that the item subject to forfeiture (here the $180,975 in cash) is connected to drug activity, a court cannot be forced to pretend that the cash does not exist. Nor must the court turn a blind eye to the conclusions one reaches when considering all of the circumstances surrounding its existence and its implications. Rather, we apply a commonsense approach to drug forfeiture hearings in which the item subject to forfeiture has been excluded from evidence: while the court may not consider the specific physical characteristics of the item itself, the court can consider evidence presented in relation to the fact of the item's existence, such as the fact that claimant's testimony about the money itself is questionable." *Id.* at 462-463.

For further discussion of illegally seized property, see Section 11.8(B).

F. Discovery of Identity of Confidential Informant

It is not uncommon for the police to obtain information from confidential informants during investigations that result in forfeiture proceedings. "Generally the people are not required to disclose the identity of confidential informants." *People v Henry (Randall) (After Remand)*, 305 Mich App 127, 156 (2014) (quotations and citation omitted).[410] "However, when a defendant demonstrates a possible need for the informant's testimony, a trial court should order the informant produced and conduct an in camera hearing to determine if the informant could offer any testimony beneficial to the defense." *Id.* "Whether a defendant has

[410]Note that *People v Henry (Randall) (After Remand)*, 305 Mich App 127 (2014) was a criminal case and forfeiture proceedings are civil proceedings; accordingly, while *Henry* may apply by analogy no binding caselaw has specifically addressed the procedures regarding confidential informants in a civil forfeiture proceeding.

demonstrated a need for the testimony depends on the circumstances of the case and a court should consider the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* (quotations and citation omitted). In *Henry*, the trial court did not abuse its discretion by denying the defendant's request to disclose the informant's identity because the defendant failed to indicate how disclosure of the informant's identity would have benefited his defense where the jury already knew that the informant was paid for providing information and eye witnesses identified defendant on the basis of their own observations at the time of the robberies. *Id.* at 156-157.

G. No Right to Jury Trial

A claimant does not have the right to a jury trial in a civil drug forfeiture action. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 154-155 (1992). The Court explained:

> "The constitutional right to trial by jury under Const 1963, art 1, § 14 applies to civil actions at law that were triable by a jury at the time the constitutional guarantee was adopted. Because there was no right to a jury trial in equitable matters, matters in equity are not entitled to jury trials unless so preserved or created by the Legislature. The forfeiture act does not indicate a right to a jury trial in forfeiture actions. Because a forfeiture action is equitable in nature, we find that the Legislature's failure to grant the right to a jury trial in forfeiture matters makes the right unavailable." *In re Forfeiture of $1,159,420*, 194 Mich App at 154-155 (internal citations omitted).

H. Burden of Proof

Beginning on January 18, 2016, the plaintiff has the burden of proving a violation of Article 7 of the PHC by clear and convincing evidence.[411] MCL 333.7521(2). See Section 11.2(B) for further discussion.

However, the prosecution is entitled to a presumption that money is subject to forfeiture when it is found in close proximity to other property that is subject to forfeiture under MCL 333.7521(1)(a)-(e). MCL 333.7521(1)(f).[412] In cases where the prosecution establishes

[411] See 2015 PA 154. Before 2015 PA 154 amended MCL 333.7521 to specify the plaintiff's burden of proof, the government had to prove its case by a preponderance of the evidence. *In re Forfeiture of $25,505*, 220 Mich App 572, 574 (1996).

that money was found in close proximity to property subject to forfeiture, the party against whom the presumption applies must come forward with evidence to rebut the presumption. See MRE 301, which states:

> "In a civil case, unless a statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."

The burden of establishing an affirmative defense is on the owner of the property asserting the defense. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 250 (2011). If the property owner produces evidence to support an affirmative defense, the burden shifts back to the plaintiff "to produce clear and decisive evidence to negate the defense." *Id.* at 253. For additional discussion of defenses, see Section 11.14.

Further, note that a claimant must demonstrate a recognizable interest in the property in order to have standing to challenge a forfeiture. *In re Forfeiture of $53*, 178 Mich App 480, 494 (1989). See Section 11.5 for further discussion of standing.

See also MCL 333.7523a(2) (setting forth what the plaintiff at a forfeiture hearing must prove if MCL 333.7521a applies, the seized property is subject to forfeiture under MCL 333.7521, and the person filed a claim under MCL 333.7523).

I. Fees

1. Witness Fees

MCL 600.2552(1) applies to civil drug forfeiture actions. See *In re Forfeiture of $10,780*, 181 Mich App at 766 (holding that witness fees in excess of the amount provided in the statute were not warranted). MCL 600.2552(1) provides:

> "A witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day, or may be paid for his or her loss of working time but not more than $15.00 for each day shall be taxable as costs as his or her witness fee."

[412] For more information about the close proximity presumption, see Section 11.7(E).

2. Towing and Storage Fees

Claimants who successfully avoid forfeiture of their property may not be required to pay towing and storage fees associated with the forfeiture action. *In re Forfeiture of 1987 Mercury*, 252 Mich App 533, 548 (2002).

11.12 Administrative Forfeiture Procedures

Administrative forfeiture[413] occurs when the seizing agency attempts to forfeit the seized property without going to court. See MCL 333.7523(1).

A. Statutory Authority

Administrative forfeiture is permitted "[i]f the property is seized without process under [MCL 333.7522], and the total value of the property seized does not exceed $50,000.00[.]" MCL 333.7523(1).

When undergoing an administrative forfeiture, "the following procedure must be used:

> (a) The local unit of government that seized the property or, if the property was seized by this state, the state shall notify the owner of the property that the property has been seized and, if charges have been filed against a person for a crime, the person charged, and that the local unit of government or, if applicable, the state intends to forfeit and dispose of the property by delivering a written notice to the owner of the property or by sending the notice to the owner by certified mail. If the name and address of the owner are not reasonably ascertainable, or delivery of the notice cannot be reasonably accomplished, the notice must be published on the local unit of government's or the department of the attorney general's public website and in a newspaper of general circulation in the county in which the property was seized, for 10 successive publishing days.
>
> (b) Unless all criminal proceedings involving or relating to the property have been completed, the seizing agency shall immediately notify the prosecuting attorney for the county in which the property was seized or, if the

[413] Although the statute does not use the term *administrative forfeiture*, the Court of Appeals has used this term to refer to forfeitures that occur under MCL 333.7523. See, e.g., *Hollins v Detroit Police Dep't*, 225 Mich App 341, 344-345 (1997).

attorney general is actively handling a case involving or relating to the property, the attorney general of the seizure of the property and the intention to forfeit and dispose of the property.

(c) Any person claiming an interest in property that is the subject of a notice under subdivision (a) may, within 20 days after receipt of the notice or of the date of the first publication of the notice, file a written claim signed by the claimant with the local unit of government or the state expressing his or her interest in the property and any objection to forfeiture. A claim or an objection under this subsection must be written, verified, and signed by the claimant, and include a detailed description of the property and the property interest asserted. The verification must include a certification under the penalty of perjury stating that the undersigned has examined the claim and believes it to be, to the best of the claimant's knowledge, true and complete. A written claim under this subsection must be made on the form[414] developed by the state court administrative office . . . . Upon the filing of the claim, the local unit of government or, if applicable, this state shall transmit the claim with a list and description of the property seized to the attorney general, the prosecuting attorney for the county, or the city or township attorney for the local unit of government in which the seizure was made. The attorney general, the prosecuting attorney, or the city or township attorney shall promptly institute forfeiture proceedings after the expiration of the 20-day period. However, unless all criminal proceedings involving or relating to the property have been completed, a city or township attorney shall not institute forfeiture proceedings without the consent of the prosecuting attorney or, if the attorney general is actively handling a case involving or relating to the property, the attorney general.

(d) If no claim is filed within the 20-day period as described in subdivision (c), the local unit of government or this state shall declare the property forfeited and shall dispose of the property as provided under [MCL 333.7524]. However, unless all criminal proceedings involving or relating to the property have been completed, the local unit of government or the state shall not dispose of the property under this

[414] SCAO Form MC 311, *Seized-Property Claim and Objection to Forfeiture (Drug-Related Forfeiture)*.

> subdivision without the written consent of the prosecuting attorney or, if the attorney general is actively handling a case involving or relating to the property, the attorney general." MCL 333.7523(1).

B. Circumstances Under Which Administrative Forfeiture Proceedings May Be Used

According to MCL 333.7523(1), administrative forfeiture proceedings may be utilized only when two conditions are met:

- the property subject to forfeiture has been seized without process, and
- the property subject to forfeiture is worth less than $50,000.

The monetary limit in MCL 333.7523(1) only controls whether property may be forfeited in an administrative proceeding; accordingly, property worth more than $50,000[415] may still be forfeited using other procedures. *Derrick v Detroit*, 168 Mich App 560, 562 (1988). See Section 11.11 for more information on judicial forfeiture procedures.

C. Notice to Claimant

Notice of intent to administratively forfeit property must be provided to the owner of the property and to any person charged of a crime. MCL 333.7523(1)(a). Specifically, "[t]he local unit of government that seized the property or, if the property was seized by this state, the state shall notify the owner of the property that the property has been seized and, if charges have been filed against a person for a crime, the person charged, and that the local unit of government or, if applicable, the state intends to forfeit and dispose of the property by delivering a written notice to the owner of the property or by sending the notice to the owner by certified mail. If the name and address of the owner are not reasonably ascertainable, or delivery of the notice cannot be reasonably accomplished, the notice must be published on the local unit of government's or the department of the attorney general's public website and in a newspaper of general circulation in the county in which the property was seized, for 10 successive publishing days." *Id*.

"[N]otice [is] defective when the government knew at the time the notice was sent that the notice was likely to be ineffective." *In re Forfeiture of $19,250*, 209 Mich App 20, 27 (1995) (applying federal law and citing *Sarit v United States Drug Enforcement Admin*, 987 F2d

[415] At the time *Derrick* was decided, the monetary limit was $100,000.

10, 15 (CA 1, 1993)). A bad-faith standard is used to determine the adequacy of notice, and "a court determines the notifying party's knowledge of the likely effectiveness of notice from the moment at which notice is sent." *In re Forfeiture of $19,250*, 209 Mich App at 27. "Courts are reluctant to extend a notifying party's duty beyond the initial notice absent exceptional circumstances." *Id.*

"[W]here the government gives improper notice to the property's owner and the property is forfeited by administrative proceedings, the trial court has jurisdiction to order its return. To hold otherwise would be to deny plaintiffs a forum in which to seek relief. It would deprive them of a remedy for the claim that a defendant wrongfully seized their property without giving notice as due process requires." *Hollins v Detroit Police Dep't*, 225 Mich App 341, 347 (1997).

Several cases have considered whether MCL 333.7523(1)(a)'s notice requirement was satisfied:

- Where the sheriff's department personally served a copy of the notice on the defendant at the county jail, the notice requirement was "unquestionably" satisfied. *In re Return of Forfeited Goods*, 452 Mich 659, 671 (1996).

- Where notice of forfeiture was served on the claimants' son, but not on the claimants, the notice requirement was *not* satisfied. *Hollins*, 225 Mich App at 343, 346.

- Where notice was properly served on the individuals in possession of the money when it was confiscated, the notice requirement was satisfied. *In re Forfeiture of $19,250*, 209 Mich App at 28. The claimant's son and another person were in possession of the money when it was seized, and the Court concluded that neither individual properly identified the claimant as the owner of the money even though the individuals with the money stated they obtained the cash from their mother because at the time of the seizure they were using aliases. *Id.* Further, "United States currency is normally considered to be a bearer instrument." *Id.* at 27. "Possession of such property is prima facie evidence of ownership and the burden of producing evidence regarding ownership rests upon the person disputing such ownership." *Id.* Finally, the prosecutor served interrogatories requesting the identity of all the claimants, but the interrogatories were never answered. *Id.* at 28. The Court held that "[t]here were no exceptional circumstances that would have required the deputies to notify claimant." *Id.*

D. Notice to the Prosecutor

"Unless all criminal proceedings involving or relating to the property have been completed, the seizing agency shall immediately notify the prosecuting attorney for the county in which the property was seized or, if the attorney general is actively handling a case involving or relating to the property, the attorney general of the seizure of the property and the intention to forfeit and dispose of the property." MCL 333.7523(1)(b).

E. Filing a Claim

An administrative forfeiture proceeding becomes a judicial forfeiture when a person claiming an interest in the property files a timely written claim. See MCL 333.7523(1)(c).

Specifically, any person claiming an interest in property that is the subject of a notice under MCL 333.7523(1)(a) may file a claim in connection with that property and an objection to the forfeiture. MCL 333.7523(1)(c). To be valid, the claim/objection must:

- be filed within 20 days after receipt of the notice or within 20 days of the first publication of the notice;
- be in writing;
- be signed by the claimant;
- be filed with the local unit of government or the state;
- express the claimant's interest in the seized property;
- include a detailed description of the property and the property interest asserted;
- express any objection to forfeiture;
- be verified, and the verification must include a certification under the penalty of perjury stating that the undersigned has examined the claim and believes it to be, to the best of the claimant's knowledge, true and complete; and
- be made on SCAO Form MC 311, *Seized-Property Claim and Objection to Forfeiture (Drug-Related Forfeiture)*. *Id*.

Following the filing of a claim, "[t]he local unit of government or, if applicable, this state shall transmit the claim with a list and description of the property seized to the attorney general, the prosecuting attorney for the county, or the city or township attorney

for the local unit of government in which the seizure was made." MCL 333.7523(1)(c).

After the expiration of the 20-day period after receipt of the notice or of the date of the first publication of the notice, "the attorney general, the prosecuting attorney, or the city or township attorney shall promptly institute forfeiture proceedings[.]" MCL 333.7523(1)(c). Forfeiture proceedings must not be instituted without the consent of the prosecuting attorney or the attorney general if criminal proceedings involving or relating to the property have not been completed. *Id.* Further, forfeiture proceedings are subject to the requirements in MCL 333.7521a, discussed in Section 11.11(A).

F. Promptness Requirement

Once the claim filed by the claimant have been forwarded to the prosecuting attorney, the appropriate entity must "promptly institute forfeiture proceedings after the expiration of the 20-day period." MCL 333.7523(1)(c).

Several factors must be considered when determining whether a forfeiture proceeding was instituted promptly:

- the lapse of time between the seizure and the filing of the complaint;
- the reason for the delay;
- the resulting prejudice to the defendant; and
- the nature of the property seized. *In re Forfeiture of $109,901*, 210 Mich App 191, 195 (1995) (citations and quotations omitted).

Any other relevant factors may also be considered. *In re Forfeiture of One 1983 Cadillac*, 176 Mich App 277, 280-281 (1989) (noting that the factors to be considered "include, but are not limited to" the above-listed factors).

Several cases have considered whether an action was promptly instituted:

- Forfeiture proceedings were untimely where there was a 9-month delay before forfeiture proceedings against cash were commenced. *Hollins v Detroit Police Dep't*, 225 Mich App 341, 348-349 (1997). The Court held that "the police failed to provide an acceptable reason for their delay [in providing notice], and there was prejudice to [the claimant]." *Id.* at 348. The police claimed that the delay was

a result of their mistaken belief that the money belonged to a different person; however, the Court rejected this reason because the claimant asserted her ownership interest in the money at the time of the seizure. *Id.* The Court noted that the case was unique because the claimant was not served with notice before raising the timeliness challenge; however, it excused the procedural abnormality because the police ignored the claimant's assertion that the seized money belonged to her and failed to provide the claimant with notice of the forfeiture action. *Id.* at 347-348.

- Although there was no apparent explanation from the record for the government's three-month delay, the Court held that the delay was reasonable because the claimants did not obtain an interest in the property until they filed a lien on the property 13 days before the forfeiture proceeding was commenced. *In re Forfeiture of $109,901*, 210 Mich App at 195-196. Accordingly, the Court concluded that the claimants "did not suffer any prejudice or due process violation by reason of the delay." *Id.* at 196.

- A four-month delay in commencing a forfeiture proceeding against a Cadillac that was used in the illegal sale of prescription drugs was unreasonable where all of the factors weighed in favor of the claimants. *In re Forfeiture of One 1983 Cadillac*, 176 Mich App 277, 278, 283 (1989). First, the prosecution justified the delay because it was investigating the possibility of an additional forfeiture action against one of the claimant's dental practice and building. *Id.* at 282. However, the Court held that the factor weighed in favor of the claimants because "forfeiture proceedings against the practice and building have no real bearing on whether forfeiture proceedings could be instituted against the car." *Id.* Next, the Court found that the claimants were prejudiced by the delay "because the automobile is a wasting asset whose value diminishes when it is impounded and upon which [the claimants] continued to make payments to protect their interest." *Id.* Finally, the Court concluded that the final factor weighed in the claimants' favor because "the automobile was inherently harmless and therefore of little interest to the government[.]" *Id.*

- A forfeiture action was not filed promptly where proceedings were instituted 6-1/2 months after the vehicle was seized, 6 months after the claim of interest was filed, and 4-1/2 months after the final requirement of posting bond was met. *Lenawee Pros v One 1981 Buick 2-Door Riviera*, 165 Mich App 762, 767 (1988). Accordingly, dismissal was proper. *Id.*

- A delay of 2-1/2 months was reasonable where the state sought to forfeit an automobile used to facilitate a drug delivery. *People v One 1979 Honda Auto*, 139 Mich App 651, 653, 657 (1984).

G. Disposition of Forfeited Property

MCL 333.7523(1)(d) provides for the disposition of forfeited property if no timely claim is filed. If no timely claim is filed, the local unit of government or this state must declare the property forfeited and dispose of the property according to the provisions of MCL 333.7524.[416]

11.13 Summary Forfeiture

MCL 333.7525 provides the statutory authority for summary forfeiture:

> "(1) A controlled substance listed in schedule 1 that is possessed, transferred, sold, or offered for sale in violation of [Article 7 of the PHC] is contraband and shall be seized and summarily forfeited to this state. A controlled substance listed in schedule 1 which is seized or comes into the possession of this state, the owner of which is unknown, is contraband and shall be summarily forfeited to this state.
>
> (2) Species of plants from which controlled substances in schedules 1 and 2 may be derived which have been planted or cultivated in violation of [Article 7 of the PHC], or of which the owner or cultivator is unknown, or which are wild growths, may be seized and summarily forfeited to this state.
>
> (3) The failure, upon demand by the administrator or its authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored to produce an appropriate license or proof that he or she is the holder thereof, constitutes authority for the seizure and forfeiture of the plants."

11.14 Defenses and Exceptions

The statutes governing forfeiture provide specific defenses and exceptions to forfeiture. MCL 333.7521, which sets forth property that is subject to forfeiture, includes specific exceptions under which property is not subject to forfeiture. Specifically, MCL 333.7521(1)(d)(*i*)-(*iv*) provides

[416] Disposition of forfeited property is discussed in detail in Section 11.15.

that certain conveyances are not subject to forfeiture, and MCL 333.7521(1)(f) provides an innocent owner defense to forfeiture of property. Similarly, MCL 333.7523(4) protects the rights of secured parties who neither had knowledge of nor consented to the act or omission giving rise to forfeiture proceedings involving real property.

This section will also discuss the applicability of traditional defenses including double jeopardy, collateral estoppel, and the constitutional prohibition against excessive fines.

A. Exceptions to Forfeiture of Conveyances

"[A] conveyance, including an aircraft, vehicle or vessel used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in [MCL 333.7521(1)(a)-(b)]" is subject to forfeiture, "[e]xcept as provided in [MCL 333.7521(1)(d)(*i*)-(*iv*).]" MCL 333.7521(1)(d).

MCL 333.7521(1)(d)(*i*)-(*iv*) provides:

> "(*i*) A conveyance used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of [Article 7 of the PHC].
>
> (*ii*) A conveyance is not subject to forfeiture by reason of any act or omission established by the owner of that conveyance to have been committed or omitted without the owner's knowledge or consent.
>
> (*iii*) A conveyance is not subject to forfeiture for a violation of [MCL 333.7403(2)(c) (possession of lysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5), MCL 333.7403(2)(d) (possession of marihuana), MCL 333.7404 (use of a controlled substance or controlled substance analogue), or MCL 333.7341(4) (use of or possession with intent to use an imitation controlled substance)].
>
> (*iv*) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission."

Accordingly, the four circumstances under which forfeiture is not permitted under MCL 333.7521(1)(d) are:

- innocent common carrier;
- innocent owner;
- Violation of MCL 333.7403(2)(c), MCL 333.7403(2)(d), MCL 333.7404, or MCL 333.7341(4); and
- innocent secured party. MCL 333.7521(1)(d)(*i*)-(*iv*).

1. Co-Owners

There is a split among panels of the Court of Appeals regarding the scope of the innocent owner defense for conveyances.[417] In *People v One 1979 Honda Auto*, 139 Mich App 651, 655-656 (1984), the Court of Appeals held that where property subject to forfeiture as a conveyance under MCL 333.7521(1)(d) is owned by more than one person, "the guilty knowledge of one co-owner that the conveyance or vehicle is involved in a prohibited transaction subject to forfeiture is sufficient to provide a basis for [forfeiture under MCL 333.7521(1)(d)]."

Conversely, in *In re Forfeiture of $53*, 178 Mich App 480, 495-496 (1989), the Court of Appeals held that where property subject to forfeiture as a conveyance under MCL 333.7521(1)(d) is owned by more than one person, "the forfeiture of the [property] is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied. The state may only forfeit the ownership interest of the noninnocent owner."

See also *In re Forfeiture of $1,159,420*, 194 Mich App 134, 148 (1992), a case involving the innocent owner defense in the context of "any thing of value" under MCL 333.7521(1)(f) rather than a "conveyance," under MCL 333.7521(1)(d), the Court of Appeals held that in cases of joint ownership a court may only forfeit the ownership interest of the noninnocent owner.

2. Exempted Violation—Use

The complaint for forfeiture of a vehicle was frivolous where the owner of the vehicle was originally charged with possession of less than 25 grams of cocaine in violation of MCL 333.7403(1)(a)(*v*), but pleaded to a reduced charge of using cocaine in violation of MCL 333.7404 and was sentenced under

[417] Cases decided before November 1, 1990 are not binding precedent. MCR 7.215(J)(1).

MCL 333.7411 because MCL 333.7521(1)(d)(*iii*) specifically provides that a conveyance is not subject to forfeiture for a violation of MCL 333.7404. *In re Forfeiture of $2,124*, 342 Mich App 569, 578-579 (2022). The Court rejected the plaintiff's argument that forfeiture was appropriate because the vehicle owner's conduct "constituted a *violation* of the possession statute" despite the fact that she pleaded to a lesser charge. *Id.* at 579. Specifically, the Court explained that while MCL 333.7521a(1) states that property may be seized for violation of Article 7 of the PHC, that section goes on to state in relevant part that "property is not subject to forfeiture unless a criminal proceeding involving or relating to the property has been competed and the defendant *pleads guilty to or is convicted of a violation of this article*." *In re Forfeiture of $2,124*, 342 Mich App at 579 (cleaned up).[418] Accordingly, the vehicle was not subject to forfeiture because "[t]he only possible guilty plea or conviction at the time that plaintiff filed the forfeiture complaint was under MCL 333.7404," and under MCL 333.7521(1)(d)(*iii*), violation of MCL 333.7404 does not subject the vehicle to forfeiture. *In re Forfeiture of $2,124*, 342 Mich App at 579.

B. "Any Thing of Value" Innocent Property Owner Defense

The innocent owner defense to forfeiture of "a thing of value" states: "To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent." MCL 333.7521(1)(f).[419]

1. Burden of Proof

"The burden is on the owner of the property to establish [the innocent owner] affirmative defense." *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 250 (2011). "The statute's requirement that the claimant lack 'knowledge or consent' of the acts or omission forming the basis for forfeiture means the innocent owner defense is defeated if the claimant has either knowledge of 'or' consented to the illegal activity." *Id.* at 252. As used in MCL 333.7521(1)(f), "the word 'knowledge' does not include the concept of constructive knowledge." *In re Forfeiture of a Quantity of Marijuana*, 291 Mich

[418] See Section 11.11(A) for a discussion of MCL 333.7521a.

[419] "Michigan's innocent owner defense to a forfeiture action is purely statutory and not governed by federal common law or federal statute." *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 251 (2011).

App at 252. However, "[a] claimant's consent[] . . . might be implied from the circumstances even without [actual] knowledge." *Id*. at 253.

The claimants presented sufficient evidence to support the innocent owner defense where they submitted affidavits that they lacked knowledge of and did not consent to the illegal activity forming the basis for the forfeiture action. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 254. The burden then "shifted back to plaintiff to produce clear and decisive evidence to negate the defense." *Id*. at 253. Where the plaintiff relied on inadmissible hearsay evidence (police reports) to show the claimants' guilty knowledge, the trial court abused its discretion in granting summary disposition in favor of the plaintiff, because material questions of fact remained regarding the claimants' innocent owner affirmative defense. *Id*. at 253-254, 256-257.

2. Co-owners

Where property subject to forfeiture as "any thing of value" under MCL 333.7521(1)(f) is owned by more than one person, "the state may forfeit only the ownership interest of the noninnocent owner." *In re Forfeiture of $1,159,420*, 194 Mich App 134, 147-148 (1992).

"The trial court clearly erred in finding that claimant did not have an ownership interest in [seized vehicles]" where "title to the vehicles was in claimant's name[; a]lthough claimant signed the title of the [vehicles] with the intent of transferring them to [her husband, he] was required [under MCL 257.233(9)] to sign the title in order to complete the transfer of title[,]" and "[t]he record [was] devoid of any evidence that [he] signed the title." *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 586 (2016). However, the trial court correctly concluded that the claimant was not an innocent owner. *Id.* Specifically, the Court held that the trial court did not clearly err by finding that the "claimant had actual knowledge of [the defendant's] criminal activity[]" where "[e]vidence was presented that the claimant admitted to officers that she knew marijuana plants were being grown in the basement of her house, and that she had seen defendant mixing cocaine and baking soda in the kitchen (to make crack cocaine)." *Id.* Further, the claimant "also admitted that she knew [the defendant, who is her husband] was 'hanging out in the streets[,]'" and when the defendant called her from jail the claimant asked about the bag of pills without prompting, "indicating that she had knowledge of the pills[,]" and the

defendant asked the claimant to check the kitchen cabinet for crack cocaine and the claimant said she would check it. *Id.* at 586-587.

C. Real Property Defenses

MCL 333.7523(4) authorizes the forfeiture of real property through judicial forfeiture proceedings, but provides a defense to secured creditors. MCL 333.7523(4) states:

> "Title to real property forfeited under [Article 7 of the PHC] must be determined by a court of competent jurisdiction. A forfeiture of real property encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission."

D. Double Jeopardy

Civil forfeiture of property resulting from the same criminal transaction for which the defendant was convicted and sentenced does not ordinarily violate a defendant's double jeopardy protection against multiple punishments because civil in rem forfeitures are not generally punishment. *People v Acoff*, 220 Mich App 396, 398 (1997), citing *United States v Ursery*, 518 US 267 (1996). However, "in rem civil forfeitures are not per se exempt from the scope of the Double Jeopardy Clause[.]" *Acoff*, 220 Mich App at 398. There is a rebuttable presumption that double jeopardy analysis does not apply to civil in rem forfeiture proceedings. *Id.* at 399. "This presumption can be rebutted only by the 'clearest proof' of an excessive punitive purpose or effect." *Id.* (finding the defendant's double jeopardy claims to be without merit where the defendant was convicted of possession of less than 25 grams of cocaine after the civil forfeiture of his car, $32, $17 in food stamps, and a wristwatch because there was "no evidence, let alone the 'clearest proof,' indicating that the instant forfeiture was so punitive in form or effect as to render it criminal[]").

See also *United States v One Assortment of 89 Firearms*, 465 US 354, 361 (1984) (holding that double jeopardy does not bar a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges).

E. Collateral Estoppel

Collateral estoppel does not bar a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges. *United States v One Assortment of 89 Firearms*, 465 US 354,

361 (1984). "[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to [the defendant's] guilt." *Id.*

However, crossover estoppel was properly applied to prevent the claimants from challenging the validity of a search warrant where a federal court previously decided that the search warrant was valid. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 145-146 (1992). "Crossover estoppel involves issue preclusion in a civil proceeding following a criminal proceeding and vice versa." *Id.* at 145. Crossover estoppel barred the relitigation of the validity of the search warrant because the prior proceeding resulted in a final judgment, the same parties were involved,[420] and the claimants had a full and fair opportunity to litigate the issue even though only one of the claimants was a party in the prior proceeding. *Id.* at 145-146. The Court explained that the claimant, who was a party to the prior proceedings, had a sufficient interest in the issue to protect the interests of the other claimants, and the issue was actually litigated and necessarily determined because the trial court in the federal action ruled on the merits of the challenge to the search warrant. *Id.* at 146 (holding that the trial court properly applied collateral estoppel in regard to the search warrant issue).

F. Excessive Fines

Both US Const, Am VIII and Const 1963, art 1, § 16 provide that excessive fines shall not be imposed. Civil forfeiture cases brought in Michigan courts are subject to the protection afforded by both excessive fines clauses. *Timbs v Indiana*, 586 US ___, ___ (2019) (holding the Eighth Amendment's Excessive Fines Clause is "incorporated by the Due Process Clause of the Fourteenth Amendment"); *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App 255, 258 (2002).

"[A] punitive forfeiture is unconstitutional if 'the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense[.]'" *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 259, quoting *United States v Bajakajian*, 524 US 321, 337 (1998).

The following factors should be considered in determining whether a fine authorized by statute is excessive:

- the object designed to be accomplished;

[420]The Court held that a federal prosecutor and a state prosecutor were "essentially the same party, albeit of different governments." *In re Forfeiture of $1,159,420*, 194 Mich App at 145-146.

- the importance and magnitude of the public interest sought to be protected;
- the circumstances and nature of the act for which the fine is imposed;
- the preventive effect upon the commission of the particular kind of crime; and
- the ability of the accused to pay the fine. *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 258-259, citing *People v Antolovich*, 207 Mich App 714, 717 (1994).

In *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 259-260, the Court applied the factors to conclude that the forfeiture of the claimant's home did not violate the bar against excessive fines. The Court explained:

> "[T]he forfeiture of a home associated with drug trafficking serves as a strong deterrence measure. 'Moreover, public sentiment places great importance on confronting illegal drug trafficking . . . .' *Antolovich*, [207 Mich App] at 718. In addition, the nature of [the claimant's] illegal activity in the home in this case was severe, given the quantity of marijuana found. A witness testified that the street value of the drugs seized ranged from $30,000 to $65,000, depending on how the drugs were sold, and the records found in [the claimant's] bedroom demonstrated that he was owed an additional $20,000 from drug customers. The home was valued between $100,000 and $200,000, and [the claimant's] attorney valued the home at the low end of this scale. Given the amount of drugs involved, the value of the drugs and the home, and the societal harm imposed by [the claimant's] actions, we conclude that the forfeiture of the home did not constitute an unconstitutionally excessive fine." *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 259-260.

In the context of the forfeiture of cash, the Court held that "a legitimate forfeiture of drug proceeds will by definition be proportional to the amount of drugs sold and the harm inflicted by the drug sale. Accordingly, forfeitures of drug proceeds do not implicate the excessive fines provision of [Const 1963, art 1, § 16]." *In re Forfeiture of $25,505*, 220 Mich App at 584.

G. Homestead Exemption

The homestead exemption[, Const 1963, art 10, § 3,] does not apply to forfeiture proceedings. *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 262.

Const 1963, art 10, § 3 provides:

> "A homestead in the amount of not less than $3,500 and personal property of every resident of this state in the amount of not less than $750, *as defined by law*, shall be exempt from forced sale on execution or other process of any court. Such exemptions shall not extend to any lien thereon excluded from exemption by law." (Emphasis added.)

The homestead exemption is defined in MCL 600.6023. *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 261. MCL 600.6023(1)(g) provides:

> "(1) The following property of a judgment debtor and the judgment debtor's dependents is exempt from levy and sale under an execution:
>
> * * *
>
> (g) A homestead of not more than 40 acres of land and the dwelling house and appurtenances on that homestead that is not included in a recorded plat, city, or village, or, at the option of the owner, a quantity of land that consists of not more than 1 lot that is within a recorded town plat, city, or village, and the dwelling house and appurtenances on that land, owned and occupied by any resident of this state, not exceeding in value $3,500.00. This exemption applies to any house that is owned, occupied, and claimed as a homestead by a person but that is on land not owned by the person. However, this exemption does not apply to a mortgage on the homestead that is lawfully obtained. A mortgage is not valid for purposes of this subdivision without the signature of a married judgment debtor's spouse unless either of the following occurs . . . ."

The homestead exemption is inapplicable to forfeiture proceedings because MCL 333.7521 does not provide for a homestead exemption and the constitutional exemption provides that the exemption shall be defined "by law . . . ." *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 260-261. MCL 600.6023(1)(g), the statute providing "by law" for the constitutional homestead exemption, clearly deals with

debtors, and a claimant cannot be considered a debtor in a forfeiture proceeding. *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App at 261. Further, a forfeiture of property cannot be considered a "forced sale on execution or other process of any court" because the forfeiture did not occur so that the proceeds could be used to satisfy a debt or money judgment. *Id.* The Court explained that "the homestead exemption was designed to provide a secure place for a householder to 'live beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot avoid.' Here, [the claimant] is losing his home not because of financial misfortunes but because he used the house to further his criminal enterprise. We conclude that the homestead exemption should not apply in such a circumstance." *Id.* at 262, quoting *Kleinert v Lefkowitz*, 271 Mich 79, 87 (1935) (additional quotation marks and citation omitted).

11.15 Postjudgment Proceedings

MCL 333.7524 governs the disposition of property forfeited under Article 7 of the PHC. The seizing agency or this state may do any of the following with forfeited property, subject to MCL 333.7521a[421] and MCL 333.7523(1)(d):[422]

- "Retain the property for official use." MCL 333.7524(1)(a).
- "Sell the property that is not required to be destroyed by law and that is not harmful to the public." MCL 333.7524(1)(b).
- "Require the administrator to take custody of the property and remove it for disposition in accordance with law." MCL 333.7524(1)(c).
- "Forward [the property] to the bureau for disposition." MCL 333.7524(1)(d).

A. Sale of Forfeited Property

Property may be sold as long as it "is not required to be destroyed by law and . . . is not harmful to the public." MCL 333.7524(1)(b).

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[421] MCL 333.7521a provides that certain property seized as provided in MCL 333.7522 for a violation of Article 7 of the PHC may not be disposed under MCL 333.7524 "unless a criminal proceeding involving or relating to the property has been completed and the defendant pleads guilty to or is convicted of a violation of [Article 7 of the PHC]." For a detailed discussed of MCL 333.7521a, see Section 11.11(A).

[422] MCL 333.7523(1)(d) limits the disposition of forfeited property when all criminal proceedings involving or relating to the property have [not] been completed[.]" In that situation, the seizing agency or the state must not dispose of the property without the prosecutor's or attorney general's written consent. *Id.*

Distribution and use of the proceeds from any sale is governed by statute:

> "The proceeds and any money, negotiable instruments, securities, or any other thing of value as described in [MCL 333.7521(1)(f)] that are forfeited under [Article 7 of the PHC] shall be deposited with the treasurer of the entity having budgetary authority over the seizing agency and applied as follows:
>
> > (*i*) For the payment of proper expenses of the proceedings for forfeiture and sale, including expenses incurred during the seizure process, maintenance of custody, advertising, and court costs, except as otherwise provided in [MCL 333.7524(4)].
> >
> > (*ii*) The balance remaining after the payment of expenses shall be distributed by the court having jurisdiction over the forfeiture proceedings to the treasurer of the entity having budgetary authority over the seizing agency. If more than 1 agency was substantially involved in effecting the forfeiture, the court having jurisdiction over the forfeiture proceeding shall equitably distribute the money among the treasurers of the entities having budgetary authority over the seizing agencies. A seizing agency may direct that the funds or a portion of the funds it would otherwise have received under this subsection be paid to nonprofit organizations whose primary activity is to assist law enforcement agencies with drug-related criminal investigations and obtaining information for solving crimes. The money received by a seizing agency under this subparagraph and all interest and other earnings on money received by the seizing agency under this subparagraph shall be used only for law enforcement purposes, as appropriated by the entity having budgetary authority over the seizing agency. A distribution made under this subparagraph shall serve as a supplement to, and not a replacement for, funds otherwise budgeted for law enforcement purposes." MCL 333.7524(1)(b)(*i*)-(*ii*).

Because MCL 333.7524(1)(b)(*ii*) provides that "[i]f more than 1 agency was substantially involved in effecting the forfeiture, the court having jurisdiction over the forfeiture proceeding shall equitably distribute the money among the treasurers of the

entities[,]" the agency that files first does not guarantee itself a greater share of the proceeds simply because it filed first. *In re Forfeiture of Certain Personal Prop*, 441 Mich 77, 87-88 (1992) (noting that MCL 333.7524 "provides for equitable distribution of the proceeds of forfeiture actions among the law enforcement agencies who were substantially involved in effecting the forfeiture[] and "[t]hus, the agency able to file first does not guarantee itself a greater share of the proceeds[]").

B. Disposition of Lights for Plant Growth and Scales

MCL 333.7524(2) provides an additional disposition option for lights for plant growth and scales that have been forfeited under Article 7 of the PHC:

> "Notwithstanding [MCL 333.7524(1)], this state or local units of government may donate lights for plant growth or scales forfeited under [Article 7 of the PHC] to elementary or secondary schools or institutions of higher education that request in writing to receive those lights or scales this subsection, for educational purposes. This state or local units of government shall donate lights and scales under this subsection to elementary or secondary schools or institutions of higher education in the order in which the written requests are received. This state or local units of government may limit the number of lights and scales available to each requestor." MCL 333.7524(2).

C. Disposition of Real Property

"In the course of selling real property under [MCL 333.7524(1)(b)], the court that has entered an order of forfeiture may, on motion of the agency to whom the property has been forfeited, appoint a receiver to dispose of the real property forfeited. The receiver is entitled to reasonable compensation. The receiver has authority to do all of the following:

> (a) List the forfeited real property for sale.
>
> (b) Make whatever arrangements are necessary for the maintenance and preservation of the forfeited real property.
>
> (c) Accept offers to purchase the forfeited real property.
>
> (d) Execute instruments transferring title to the forfeited real property." MCL 333.7524(3).

D. Recovery of Costs and Expenses

"If a court enters an order of forfeiture, the court may order a person who claimed an interest in the forfeited property under [MCL 333.7523(1)(c)] to pay the expenses of the proceedings of forfeiture to the entity having budgetary authority over the seizing agency." MCL 333.7524(4).

E. Return of Property to Claimant

Where the seizing agency loses a forfeiture case, the claimant is entitled to the return of the seized property. See *In re Forfeiture of $176,598*, 465 Mich 382, 384-385 (2001); *Hollins v Detroit Police Dep't*, 225 Mich App 341, 347 (1997).

A claimant entitled to the return of seized currency is not entitled to statutory interest pursuant to MCL 600.6013.[423] *In re Forfeiture of $176,598*, 465 Mich at 389. Statutory interest is only recoverable on a "money judgment," and "an order returning seized currency following a drug forfeiture trial is not a money judgment, but rather an order for the return of specific personal property." *Id.* at 386.

However, where the property seized was currency and the seizing agency earned interest on that currency during the time it had control of the currency, a circuit court ordering the return of the currency to the claimant may also order the seizing agency to disgorge any interest earned on the currency even where at the time the money was seized the claimant did not have it in an interest-bearing account. *In re Forfeiture of $30,632.41*, 184 Mich App 677, 678-680 (1990) (noting that "circuit courts possess the traditional power of equity courts[]" and that "[i]t is a well-recognized principle of equity that no one may be made richer through another's loss[]").

11.16 Uniform Forfeiture Reporting Act

"Subject to [MCL 28.112(2) and MCL 28.112(3)], before February 1 of each year, each reporting agency shall submit a report to the department of state police summarizing the reporting agency's activities for the preceding calendar year regarding the forfeiture of property under [MCL 333.7521 to MCL 333.7533 of the PHC.]" MCL 28.112(1).[424] See also MCL 333.7524b (requiring reporting agencies to report all seizure and forfeiture activities under Article 7 of the PHC as required under the Uniform Forfeiture Reporting Act).

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[423] MCL 600.6013(1) provides that "[i]nterest is allowed on a money judgment recovered in a civil action[.]"

[424] The act also applies to forfeiture of property under sections of the Identity Theft Protection Act and the Revised Judicature Act. MCL 28.112(1).

MCL 28.112(1) applies only to proceedings commenced on or after February 1, 2016. MCL 28.112(2).

A. Report Requirements

"The annual report shall be made on a form as prescribed by the department and shall contain the following information, as applicable:

(a) The number of forfeiture proceedings that were instituted in the circuit court by the reporting agency.

(b) The number of forfeiture proceedings instituted by the reporting agency that were concluded in the circuit court.

(c) The number of all forfeiture proceedings instituted by the reporting agency that were pending in the circuit court at the end of the year.

(d) The number of forfeitures effectuated by the reporting agency without a forfeiture proceeding in the circuit court.

(e) The number of forfeiture proceedings subject to a consent judgment, settlement, or any other similar agreement involving the property owner and reporting agency.

(f) The number of public nuisance proceedings instituted by the reporting agency in the circuit court that concluded in an order of abatement involving the forfeiture of property.

(g) An inventory of property received by the reporting agency. Property shall be reported in accordance with each of the following categories:

(*i*) Residential real property.

(*ii*) Industrial or commercial real property.

(*iii*) Agricultural real property.

(*iv*) Money, negotiable instruments, and securities.

(*v*) Weapons.

(*vi*) Motor vehicles and other conveyances.

(*vii*) Other personal property of value.

(h) Each property inventoried under subdivision (g) shall include a description that contains the following information, as applicable:

(*i*) The date the property was seized.

(*ii*) The final disposition of the property, including the date the property was ordered forfeited or disposed of.

(*iii*) The estimated value of the property.

(*iv*) The violation or nuisance alleged to have been committed for which forfeiture is authorized.

(*v*) Whether any person was charged with the violation for which forfeiture is authorized and whether that person was ultimately convicted of that violation.

(*vi*) Whether any person claimed an interest in the property and the number of claimants to the property.

(*vii*) Whether the forfeiture resulted from an adoptive seizure. As used in this subdivision, "adoptive seizure" means that all of the following apply:

(A) The seizure resulted from a violation of state law and there is a federal basis for the forfeiture action.

(B) All of the preseizure activity and related investigations were performed by this state or the local reporting agency before a request was made to the federal government for adoption.

(C) The seizure did not result from a joint investigation or task force case.

(*viii*) Whether the property was seized pursuant to a search or arrest warrant or incident to arrest.

(*ix*) Whether a controlled substance was found in the course of the investigation that resulted in the forfeiture of the property.

(i) The net total proceeds of all property forfeited through actions instituted by the reporting agency that the reporting agency is required to account for and

report to the state treasurer under either of the following, as applicable:

(*i*) [MCL 21.41 to MCL 21.55].

(*ii*) The uniform budgeting and accounting act, . . . MCL 141.421 to [MCL] 141.440a.

(j) For forfeiture proceedings instituted under the [PHC]:

(*i*) A statement explaining how any money received by the reporting agency under [MCL 333.7524(1)(b)(*ii*)], has been used or is being used for law enforcement purposes.

(*ii*) A statement of the number of lights for plant growth or scales donated under [MCL 333.7524(2)], the total value of those lights or scales, and the elementary or secondary schools or institutions of higher education to which they were donated." MCL 28.112(1)(a)-(j).[425]

MCL 28.112(1)(h), MCL 28.112(1)(i), and MCL 28.112(1)(j) apply only to proceedings that have been finalized for purposes of appeal. MCL 28.112(3).

1. Null Reports

"A null report shall be filed under [the Uniform Forfeiture Reporting Act] by a reporting agency that did not engage in any forfeitures during the reporting period." MCL 28.113.

2. Compilation of Reported Information

"The department of state police shall compile the information reported to the department under [MCL 28.112 and MCL 28.113]. Beginning January 1, 2017, the department shall file an annual report of its findings under this section with the secretary of the senate and with the clerk of the house of representatives and shall place a copy of the report on its departmental website. The report shall be filed not later than July 1 of each year. The report shall identify any state departments or agencies or local units of government that have failed to properly report the information required under [MCL

[425] The last two subdivisions in MCL 28.112(1) were purposely omitted because they are not relevant to the scope of this benchbook.

28.112 and MCL 28.113] with the department of state police." MCL 28.116.

B. Forfeiture Proceeds

"A reporting agency may use forfeiture proceeds to pay the reasonable costs associated with compiling, analyzing, and reporting data under [the Uniform Forfeiture Reporting Act]." MCL 28.114.

C. Audit

"The records of a reporting agency regarding the forfeiture of any property that is required to be reported under [the Uniform Forfeiture Reporting Act] shall be audited in accordance with 1 of the following, as applicable:

(a) [MCL 21.41 to MCL 21.55].

(b) The uniform budgeting and accounting act, . . . MCL 141.421 to [MCL] 141.440a." MCL 28.115(1).

"The records of a reporting agency regarding the forfeiture of any property required to be reported under [the Uniform Forfeiture Reporting Act] may be audited by an auditor of the local unit of government." MCL 28.115(2).

Glossary

A

Absconding

- For purposes of MCL 771.4b, *absconding* "means the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCL 771.4b(9)(a).

Administer

- For purposes of Article 7 of the PHC, *administer* "means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or other means, to the body of a patient or research subject by a practitioner, or in the practitioner's presence by his or her authorized agent, or the patient or research subject at the direction and in the presence of the practitioner." MCL 333.7103(1).

Administrator

- For purposes of Article 7 of the PHC, *administrator* "means the Michigan board of pharmacy or its designated or established authority." MCL 333.7103(2).

Adulterated marihuana

- For purposes of MCL 333.27961a, *adulterated marihuana* "means a product sold as marihuana that contains any unintended substance or chemical or biological matter other than marihuana that causes adverse reaction after ingestion or consumption." MCL 333.27961a(13)(a).

Affiliate

- For purposes of the Medical Marihuana Facilities Licensing Act, *affiliate* "means any person that controls, is controlled by, or is under common control with; is in a partnership or joint venture relationship with; or is a co-shareholder of a corporation, a co-member of a limited liability company, or a co-partner in a limited liability partnership with a licensee or applicant." MCL 333.27102(b).

Agent

- For purposes of Article 7 of the PHC, *agent* "means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, dispenser, or prescriber. It does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman." MCL 333.7103(3).

Alcoholic liquor

- For purposes of MCL 800.281, MCL 800.282, MCL 800.285, MCL 801.263, MCL 801.264, and MCL 801.265,[1] *alcoholic liquor* "means any spirituous, vinous, malt, or fermented liquor, liquid, or compound whether or not medicated, containing 1/2 of 1% or more of alcohol by volume and which is or readily can be made suitable for beverage purposes." MCL 800.281a(a); MCL 801.261(a).

- For purposes of MCL 8.9(10)(c) and MCL 768.37, *alcoholic liquor* "means that term as defined in [MCL 436.1105]." MCL 768.37(3)(a); MCL 8.9(1)(c)(*i*). MCL 436.1105(3) defines *alcoholic liquor* as "any spirituous, vinous, malt, or fermented liquor, powder, liquids, and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1% or more of alcohol by volume that are fit for use for food purposes or beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in this chapter."

Allow

- For purposes of MCL 750.141a, *allow* "means to give permission for, or approval of, possession or consumption

[1]The definition of *alcoholic liquor* for MCL 801.263, MCL 801.264, and MCL 801.265 is slightly different in that the final few words read ". . . can be made suitable as a beverage." MCL 801.261(a).

of an alcoholic beverage or a controlled substance, by any of the following means:

(*i*) In writing.

(*ii*) By 1 or more oral statements.

(*iii*) By any form of conduct, including a failure to take corrective action, that would cause a reasonable person to believe that permission or approval has been given." MCL 750.141a(1)(b).

Applicant

- For purposes of the Medical Marihuana Facilities Licensing Act, *applicant* "means a person who applies for a state operating license. Applicant includes, with respect to disclosures in an application, for purposes of ineligibility for a license under [MCL 333.27402], or for purposes of prior marijuana regulatory agency[2] approval of a transfer of interest under [MCL 333.27406], and only for applications submitted on or after January 1, 2019, a managerial employee of the applicant, a person holding a direct or indirect ownership interest of more than 10% in the applicant, and the following for each type of applicant:

  (*i*) For an individual or sole proprietorship: the proprietor and the proprietor's spouse.

  (*ii*) For a partnership and limited liability partnership: all partners and their spouses. For a limited partnership and limited liability limited partnership: all general and limited partners, not including a limited partner holding a direct or indirect ownership interest of 10% or less and who does not exercise control over or participate in the management of the partnership, and their spouses. For a limited liability company: all members and managers, not including a member holding a direct or indirect ownership interest of 10% or less and who does not exercise control over or participate in the management of the company, and their spouses.

  (*iii*) For a privately held corporation: all corporate officers or persons with equivalent titles and their

[2] MCL 333.27102 refers to the "marijuana regulatory agency"; however, the marijuana regulatory agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

spouses, all directors and their spouses, and all stockholders, not including those holding a direct or indirect ownership interest of 10% or less, and their spouses.

(*iv*) For a publicly held corporation: all corporate officers or persons with equivalent titles and their spouses, all directors and their spouses, and all stockholders, not including those holding a direct or indirect ownership interest of 10% or less, and their spouses.

(*v*) For a multilevel ownership enterprise: any entity or person that receives or has the right to receive more than 10% of the gross or net profit from the enterprise during any full or partial calendar or fiscal year.

(*vi*) For a nonprofit corporation: all individuals and entities with membership or shareholder rights in accordance with the articles of incorporation or the bylaws and the spouses of the individuals." MCL 333.27102(c).

Article 7 of the PHC

- Article 7 of the PHC means Article 7 of the Public Health Code, MCL 333.7101 *et seq.* Article 7 is the controlled substances article.

B

Bona fide physician-patient relationship

- For purposes of the Michigan Medical Marihuana Act, *bona fide physician-patient relationship* "means a treatment or counseling relationship between a physician and patient in which all of the following are present:

  (1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant medical evaluation of the patient.

  (2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.

(3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marihuana as a treatment of the patient's debilitating medical condition.

(4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the medical use of marihuana to treat that condition." MCL 333.26423(a).

Bureau

- For purposes of Article 7 of the PHC, *bureau* "means the Drug Enforcement Administration, United States Department of Justice, or its successor agency." MCL 333.7104(2).

C

Cannabis Regulatory Agency

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *Cannabis Regulatory Agency* "means the marijuana regulatory agency created under Executive Reorganization Order No. 2019-2, MCL 333.27001, renamed the cannabis regulatory agency under Executive Reorganization Order No. 2022-1, MCL 333.27002." MCL 333.27953(a).

Case or court proceeding

- For purposes of MCR 1.111, *case or court proceeding* "means any hearing, trial, or other appearance before any court in this state in an action, appeal, or other proceeding, including any matter conducted by a judge, magistrate, referee, or other hearing officer." MCR 1.111(A)(1).

Certified drug recognition expert

- For purposes of MCL 257.43b, MCL 257.625r, and MCL 257.625t, *certified drug recognition expert* "means a law enforcement officer trained to recognize impairment in a driver under the influence of a controlled substance rather than, or in addition to, alcohol." MCL 257.43b; MCL 257.625r(1); MCL 257.625t(6)(a).

Chemical agent

- For purposes of MCL 752.272, *chemical agent* "means any substance containing a toxic chemical or organic solvent or both, having the property of releasing toxic vapors. The term includes, but is not limited to, glue, acetone, toluene, carbon tetrachloride, hydrocarbons and hydrocarbon derivatives." MCL 752.271.

Chief administrator

- For purposes of MCL 800.281, MCL 800.282, and MCL 800.285, *chief administrator* "means the warden, superintendent, or other employee approved or designated by the department of corrections as the chief administrative officer of a correctional facility." MCL 800.281a(b).

Circuit court

- For purposes of the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, *circuit court* "includes a unified trial court having jurisdiction over probationers." MCL 771A.2(a).

Commercial application

- For purposes of MCL 333.7401b, *commercial application* "means as an ingredient in a lawful product, for use in the process of manufacturing a lawful product, or for lawful use as a solvent." MCL 333.7401b(4)(a).

Consumed

- For purposes of MCL 768.37, *consumed* "means to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." MCL 768.37(3)(b).

Control over any premises, residence, or other real property

- For purposes of MCL 750.141a, *control over any premises, residence, or other real property* "means the authority to regulate, direct, restrain, superintend, control, or govern the conduct of other individuals on or within that premises, residence, or other real property, and includes, but is not limited to, a possessory right." MCL 750.141a(1)(c).

Controlled substance

- For purposes of Article 7 of the PHC, MCL 8.9(10)(c), MCL 257.43b, MCL 257.625t, MCL 750.141a, MCL 766.11b, and MCL 768.37, *controlled substance* "means that term as defined in [MCL 333.7104]. See MCL 8.9(10)(c)(*ii*); MCL 257.43b; MCL 257.625t(6)(b); MCL 750.141a(1)(d); MCL 800.281a(c); MCL 801.261(b). MCL 333.7104(3) defines *controlled substance* as "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]"

- For purposes of MCL 800.281, MCL 800.282, MCL 800.285, MCL 801.263, MCL 801.264, and MCL 801.265, *controlled substance* means "a drug, substance, or immediate precursor included in schedules 1 to 5 of [MCL 333.7201 *et seq*.]" MCL 800.281a(c); MCL 801.261(b).

Controlled substance analogue

- For purposes of Article 7 of the PHC, *controlled substance analogue* "means a substance the chemical structure of which is substantially similar to that of a controlled substance in schedule 1 or 2 and that has a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2 or, with respect to a particular individual, that the individual represents or intends to have a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2. Controlled substance analogue does not include 1 or more of the following:

  (a) A controlled substance.

  (b) A substance for which there is an approved new drug application.

  (c) A substance with respect to which an exemption is in effect for investigational use by a particular person under 21 USC 355, to the extent conduct with respect to the substance is pursuant to the exemption.

(d) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance." MCL 333.7104(4).

Correctional facility

- For purposes of MCL 800.281, MCL 800.282, and MCL 800.285, *correctional facility* "means any of the following:

  (*i*) A state prison, reformatory, work camp, or community corrections center.

  (*ii*) A youth correctional facility operated by the department or a private vendor under section 20g of 1953 PA 232, MCL 791.232.[3]

  (*iii*) A privately operated community corrections center or resident home which houses prisoners committed to the jurisdiction of the department.

  (*iv*) The land on which a facility described in subparagraph (*i*), (*ii*), or (*iii*) is located." MCL 800.281a(e).

- For purposes of the Corrections Code, including MCL 791.240, *correctional facility* "means a facility or institution which is maintained and operated by this department." MCL 791.215.

Corrective action

- For purposes of MCL 750.141a, *corrective action* "means any of the following:

  (*i*) Making a prompt demand that the minor or other individual depart from the premises, residence, or other real property, or refrain from the unlawful possession or consumption of the alcoholic beverage or controlled substance on or within that premises, residence, or other real property, and taking additional action described in subparagraph (*ii*) or (*iii*) if the minor or other individual does not comply with the request.

  (*ii*) Making a prompt report of the unlawful possession or consumption of alcoholic liquor or a controlled substance to a law enforcement agency having jurisdiction over the violation.

[3] MCL 791.232 was repealed effective November 15, 1992. See 1992 PA 181.

(*iii*) Making a prompt report of the unlawful possession or consumption of alcoholic liquor or a controlled substance to another person having a greater degree of authority or control over the conduct of persons on or within the premises, residence, or other real property." MCL 750.141a(1)(e).

Counterfeit prescription form

- For purposes of Article 7 of the PHC, *counterfeit prescription form* "means a printed form that is the same or similar to a prescription form and that was manufactured, printed, duplicated, forged, electronically transmitted, or altered without the knowledge or permission of a prescriber." MCL 333.7104(5).

Counterfeit substance

- For purposes of Article 7 of the PHC, *counterfeit substance* "means a controlled substance that, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance." MCL 333.7104(6).

Cultivate

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *cultivate* "means to propagate, breed, grow, harvest, dry, cure, or separate parts of a marihuana plant by manual or mechanical means." MCL 333.27953(b).

Cutting

- For purposes of the Medical Marihuana Facilities Licensing Act, *cutting* "means a section of a lead stem or root stock that is used for vegetative asexual propagation." MCL 333.27102(e).

D

Dating relationship

- For purposes of Chapter 10A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (drug treatment courts), *dating relationship* "means that term as defined in [MCL 600.2950]." MCL 600.1060(a). MCL 600.2950(30)(a) defines *dating relationship* as "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context."

Debilitating medical condition

- For purposes of the Michigan Medical Marihuana Act, *debilitating medical condition* "means 1 or more of the following:

  (1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, nail patella, or the treatment of these conditions.

  (2) A chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.

  (3) Any other medical condition or its treatment approved by the marijuana regulatory agency,[4] as provided for in [MCL 333.26426(k)]." MCL 333.26423(b).

Delegation

- For purposes of Article 15 of the PHC, *delegation* "means an authorization granted by a licensee to a licensed or unlicensed individual to perform selected acts, tasks, or functions that fall within the scope of practice of the

[4] MCL 333.26423 refers to the "marijuana regulatory agency"; however, the marijuana regulatory agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

delegator and that are not within the scope of practice of the delegatee and that, in the absence of the authorization, would constitute illegal practice of a licensed profession." MCL 333.16104(2).

Deleterious drug

- For purposes of Article 7 of the PHC, *deleterious drug* "means a drug, other than a proprietary medicine, likely to be destructive to adult human life in quantities of 3.88 grams or less." MCL 333.7104(7).

Deliver(y)

- For purposes of Article 7 of the PHC, *deliver* or *delivery* "means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1). See also M Crim JI 12.2(2), defining *delivery* for use in controlled substances violations under MCL 333.7401, *delivery* "means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was a controlled substance and intending to transfer it to that person."

- For purposes of MCL 333.7401b, *deliver* "means the actual, constructive, or attempted transfer from 1 person to another of gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone, whether or not there is an agency relationship." MCL 333.7401b(4)(b).

- For purposes of MCL 777.45, *deliver* "means the actual or constructive transfer of a controlled substance from 1 individual to another regardless of remuneration." MCL 777.45(2)(a).

Department

- For purposes of the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, *department* "means the department of state police." MCL 28.122(a).

- For purposes of MCL 800.281 *et seq.*, *department* "means the department of corrections." MCL 800.281a(d).

- For purposes of Chapter 10D of the Revised Judicature Act, MCL 600.1099aa *et seq.*, *department* "means the department of health and human services." MCL 600.1099aa(a).

Dispense

- For purposes of Article 7 of the PHC, *dispense* "means to deliver or issue a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, or compounding necessary to prepare the substance for the delivery or issuance." MCL 333.7105(3).

- For purposes of Part 177 of the PHC,[5] *dispense* "means to issue 1 or more doses of a drug for subsequent administration to, or use by, a patient." MCL 333.17703(2).

Dispenser

- For purposes of Article 7 of the PHC, *dispenser* means a practitioner who dispenses. MCL 333.7105(4).

Distribute

- For purposes of Article 7 of the PHC (but not MCL 333.7341, see MCL 333.7101 and next definition below), *distribute* "means to deliver other than by administering or dispensing a controlled substance." MCL 333.7105(5).

- For offenses involving imitation controlled substances, *distribute* "means the actual, constructive, or attempted transfer, sale, delivery, or dispensing from one person to another of an imitation controlled substance." MCL 333.7341(1)(a).

Distributor

- For purposes of Article 7 of the PHC, *distributor* "means a person who distributes." MCL 333.7105(6).

Domestic violence offense

- For purposes of Chapter 10A (drug treatment courts) of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, *domestic violence offense* "means any crime alleged to have been committed by an individual against his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or an individual who resides or has resided in the same household." MCL 600.1060(b); MCL 600.1090(d); MCL 600.1200(b).

[5]Part 177 of the PHC is in Article 15 and covers MCL 333.17701 to MCL 333.17780.

Drug

- For purposes of Article 7 of the PHC, *drug* "means a substance recognized as a drug in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them; a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals; a substance other than food intended to affect the structure or any function of the body of human beings or animals; or, a substance intended for use as a component of any article specified in this subsection. It does not include a device or its components, parts, or accessories." MCL 333.7105(7).

- For purposes of Part 177 of the PHC,[6] *drug* "means any of the following:

  (a) A substance recognized or for which the standards or specifications are prescribed in the official compendium.

  (b) A substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or other animals.

  (c) A substance, other than food, intended to affect the structure or a function of the body of human beings or other animals.

  (d) A substance intended for use as a component of a substance specified in subdivision (a), (b), or (c), but not including a device or its components, parts, or accessories." MCL 333.17703(4).

Drug overdose

- For purposes of MCL 333.7403 and MCL 333.7404, *drug overdose* "means a condition including, but not limited to, extreme physical illness, decreased level of consciousness, respiratory depression, coma, mania, or death, that is the result of consumption or use of a controlled substance or a controlled substance analogue or a substance with which the controlled substance or controlled substance analogue was combined, or that a layperson would reasonably believe to be a drug overdose that requires medical assistance." MCL 333.7403(7)(a); MCL 333.7404(6)(a).

[6] Part 177 of the PHC is in Article 15 and covers MCL 333.17701 to MCL 333.17780.

Drug paraphernalia

- For purposes of MCL 333.7453 to MCL 333.7461, and MCL 333.7521, *drug paraphernalia* "means any equipment, product, material, or combination of equipment, products, or materials, which is specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance; including, but not limited to, all of the following:

  (a) An isomerization device specifically designed for use in increasing the potency of any species of plant which plant is a controlled substance.

  (b) Testing equipment specifically designed for use in identifying or in analyzing the strength, effectiveness, or purity of a controlled substance.

  (c) A weight scale or balance specifically designed for use in weighing or measuring a controlled substance.

  (d) A diluent or adulterant, including, but not limited to, quinine hydrochloride, mannitol, mannite, dextrose, and lactose, specifically designed for use with a controlled substance.

  (e) A separation gin or sifter specifically designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana.

  (f) An object specifically designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body.

  (g) A kit specifically designed for use in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived.

  (h) A kit specifically designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

  (i) A device, commonly known as a cocaine kit, that is specifically designed for use in ingesting, inhaling, or otherwise introducing controlled substances into the

human body, and which consists of at least a razor blade and a mirror.

(j) A device, commonly known as a bullet, that is specifically designed to deliver a measured amount of controlled substances to the user.

(k) A device, commonly known as a snorter, that is specifically designed to carry a small amount of controlled substances to the user's nose.

(l) A device, commonly known as an automotive safe, that is specifically designed to carry and conceal a controlled substance in an automobile, including, but not limited to, a can used for brake fluid, oil, or carburetor cleaner which contains a compartment for carrying and concealing controlled substances.

(m) A spoon, with or without a chain attached, that has a small diameter bowl and that is specifically designed for use in ingesting, inhaling, or otherwise introducing controlled substances into the human body." MCL 333.7451.

Drug treatment court

- For purposes of Chapter 10A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (drug treatment courts), *drug treatment court* "means a court supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol. A drug treatment court shall comply with the 10 key components promulgated by the national association of drug court professionals, which include all of the following essential characteristics:

  (*i*) Integration of alcohol and other drug treatment services with justice system case processing.

  (*ii*) Use of a nonadversarial approach by prosecution and defense that promotes public safety while protecting any participant's due process rights.

  (*iii*) Identification of eligible participants early with prompt placement in the program.

  (*iv*) Access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

  (*v*) Monitoring of participants effectively by frequent alcohol and other drug testing to ensure abstinence from drugs or alcohol.

(*vi*) Use of a coordinated strategy with a regimen of graduated sanctions and rewards to govern the court's responses to participants' compliance.

(*vii*) Ongoing close judicial interaction with each participant and supervision of progress for each participant.

(*viii*) Monitoring and evaluation of the achievement of program goals and the program's effectiveness.

(*ix*) Continued interdisciplinary education in order to promote effective drug court planning, implementation, and operation.

(*x*) The forging of partnerships among other drug courts, public agencies, and community-based organizations to generate local support." MCL 600.1060(c).

DWI/sobriety court

- For purposes of MCL 600.1084, *DWI/sobriety court* "means the specialized court docket and programs established within judicial circuits and districts throughout this state that are designed to reduce recidivism among alcohol offenders and that comply with the 10 guiding principles of DWI courts as promulgated by the National Center for DWI Courts." MCL 600.1084(9)(a).

E

Electronic signature

- For purposes of Article 7 of the PHC, *electronic signature* "means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." MCL 333.7104(8).

Enclosed, locked facility

- For purposes of the Michigan Medical Marihuana Act, *enclosed, locked facility* "means a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient. Marihuana plants grown

outdoors are considered to be in an enclosed, locked facility if they are not visible to the unaided eye from an adjacent property when viewed by an individual at ground level or from a permanent structure and are grown within a stationary structure that is enclosed on all sides, except for the base, by chain-link fencing, wooden slats, or a similar material that prevents access by the general public and that is anchored, attached, or affixed to the ground; located on land that is owned, leased, or rented by either the registered qualifying patient or a person designated through the marijuana regulatory agency's[7] registration process as the primary caregiver for the registered qualifying patient or patients for whom the marihuana plants are grown; and equipped with functioning locks or other security devices that restrict access to only the registered qualifying patient or the registered primary caregiver who owns, leases, or rents the property on which the structure is located. Enclosed, locked facility includes a motor vehicle if both of the following conditions are met:

(1) The vehicle is being used temporarily to transport living marihuana plants from 1 location to another with the intent to permanently retain those plants at the second location.

(2) An individual is not inside the vehicle unless he or she is either the registered qualifying patient to whom the living marihuana plants belong or the individual designated through the marijuana regulatory agency's[8] registration process as the primary caregiver for the registered qualifying patient." MCL 333.26423(d).

Ephedrine

- For purposes of MCL 333.7340c, *ephedrine* "includes the salts and isomers and salts of isomers of ephedrine." MCL 333.7340c(6)(a).

[7] MCL 333.26423 refers to the "marijuana regulatory agency"; however, the marijuana regulatory agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

[8] MCL 333.26423 refers to the "marijuana regulatory agency"; however, the marijuana regulatory agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

F

Family-centered

- For purposes of Chapter 10D of the Revised Judicature Act, *family-centered* "means a treatment approach that is designed to meet the needs of each member of a family, not just the individual diagnosed with a substance abuse disorder, and recognizes that families are diverse and can be made up of nuclear family members, extended family members, fictive kin, and nonblood relations." MCL 600.1099aa(b). As used in MCL 600.1099aa(b), *family* "means all individuals whom the child and parent define as family." MCL 600.1099aa(b).

Family treatment court

- For purposes of Chapter 10D of the Revised Judicature Act, *family treatment court* "means either of the following:

  (*i*) A court-supervised treatment program for individuals with a civil child abuse or neglect case and who are diagnosed with a substance use disorder.

  (*ii*) A program designed to adhere to the family treatment court best practice standards promulgated by a national organization representing the interest of drug and specialty court treatment programs and the Center for Children and Family Futures, which include all of the following:

    (A) Early identification, screening, and assessment of eligible participants, with prompt placement in the program.

    (B) Integration of timely, high-quality, and appropriate substance use disorder treatment services with justice system case processing.

    (C) Access to comprehensive case management, services, and supports for families.

    (D) Valid, reliable, random, and frequent drug testing.

    (E) Therapeutic responses to improve parent, child, and family functioning, ensure children's safety, permanency, and well-being, support participant

behavior change, and promote participant accountability.

(F) Ongoing close judicial interaction with each participant.

(G) Collecting and reviewing data to monitor participant progress, engage in a process of continuous quality improvement, monitor adherence to best practice standards, and evaluate outcomes using scientifically reliable and valid procedures.

(H) Continued interdisciplinary education in order to promote effective family treatment court planning, implementation, and operation.

(I) The forging of partnerships among other family treatment courts, public agencies, and community-based organizations to generate local support.

(J) A family-centered, culturally relevant, and trauma-informed approach.

(K) Ensuring equity and inclusion." MCL 600.1099aa(c).

Final judgment/final order

- *Final judgment* or *final order* in a civil case means:

  "(i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order;

  (ii) an order designated as final under MCR 2.604(B);

  (iii) in a domestic relations action, a post-judgment order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile;

  (iv) a postjudgment order awarding or denying attorney fees and costs under court rule or other law;

  (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR

2.116(C)(10) based on a claim of governmental immunity; or

(vi) in a foreclosure action involving a claim for remaining proceeds under MCL 211.78t, a postjudgment order deciding the claim." MCR 7.202(6)(a).

- *Final judgment* or *final order* in a criminal case means:

"(i) an order dismissing the case;

(ii) the original sentence imposed following conviction;

(iii) a sentence imposed following the granting of a motion for resentencing;

(iv) a sentence imposed, or order entered, by the trial court following a remand from an appellate court in a prior appeal of right; or

(v) a sentence imposed following revocation of probation." MCR 7.202(6)(b).

Financial institution

- For purposes of MCL 333.7523(2), *financial institution* "means a state or nationally chartered bank or a state or federally chartered savings and loan association, savings bank, or credit union whose deposits are insured by an agency of the United States government and that maintains a principal office or branch office located in this state under the laws of [Michigan] or the United States." MCL 333.7523(2)(d).

- For purposes of MCL 333.27201, *financial institution* "means any of the following:

(*i*) A state or national bank.

(*ii*) A state or federally chartered savings and loan association.

(*iii*) A state or federally chartered savings bank.

(*iv*) A state or federally chartered credit union.

(*v*) An insurance company.

(*vi*) An entity that offers any of the following to a resident of this state:

(A) A mutual fund account.

(B) A securities brokerage account.

(C) A money market account.

(D) A retail investment account.

(*vii*) An entity regulated by the Securities and Exchange Commission that collects funds from the public.

(*viii*) An entity that is a member of the National Association of Securities Dealers and that collects funds from the public.

(*ix*) Another entity that collects funds from the public." MCL 333.27201(7)(a).

Financial service

- For purposes of MCL 333.27201, *financial service* "means a deposit; withdrawal; transfer between accounts; exchange of currency; loan; extension of credit; purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument; or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected." MCL 333.27201(7)(b).

G

Good faith

- For purposes of MCL 333.7333, *good faith* "means the prescribing or dispensing of a controlled substance by a practitioner licensed under [MCL 333.7303] in the regular course of professional treatment to or for an individual who is under treatment by the practitioner for a pathology or condition other than that individual's physical or psychological dependence on or addiction to a controlled substance, except as provided in this article. Application of good faith to a pharmacist means the dispensing of a controlled substance pursuant to a prescriber's order which, in the professional judgment of the pharmacist, is lawful. The pharmacist shall be guided by nationally accepted professional standards including, but not limited to, all of the following, in making the judgment:

(a) Lack of consistency in the doctor-patient relationship.

(b) Frequency of prescriptions for the same drug by 1 prescriber for larger numbers of patients.

(c) Quantities beyond those normally prescribed for the same drug.

(d) Unusual dosages.

(e) Unusual geographic distances between patient, pharmacist, and prescriber." MCL 333.7333(1).

Grower

- For purposes of the Medical Marihuana Facilities Licensing Act, *grower* "means a licensee that is a commercial entity located in this state that cultivates, dries, trims, or cures and packages marihuana for sale to a processor, provisioning center, or another grower." MCL 333.27102(g).

H

Hazardous waste

- For purposes of MCL 333.7401c, *hazardous waste* "means that term as defined in . . . MCL 324.11103." MCL 333.7401c(7)(a). MCL 324.11103(3) defines *hazardous waste* as "waste or a combination of waste and other discarded material including solid, liquid, semisolid, or contained gaseous material that because of its quantity, quality, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible illness or serious incapacitating but reversible illness, or may pose a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed. Hazardous waste does not include material that is solid or dissolved material in domestic sewage discharge, solid or dissolved material in an irrigation return flow discharge, industrial discharge that is a point source subject to permits under . . . 33 U.S.C. 1342, or is a source, special nuclear, or by-product material as defined by the atomic energy act of 1954, chapter 1073, 68 Stat. 919."

Health care provider

- For purposes of MCL 333.7403a, *health care provider* "means that term as defined in [MCL 333.9206]." MCL 333.7403a(8). MCL 333.9206(5) defines *health care provider* as "a health professional, health facility, or local health department."

Human consumption

- For purposes of Article 7 of the PHC, *human consumption* "means application, injection, inhalation, or ingestion by a human being." MCL 333.7105(8).

I

Ignition interlock device

- For purposes of MCL 600.1084, *ignition interlock device* "means that term as defined in [MCL 257.20d]. MCL 600.1084(9)(b). MCL 257.20d defines *ignition interlock device* as "an alcohol concentration measuring device that prevents a motor vehicle from being started at any time without first determining through a deep lung sample the operator's alcohol level, calibrated so that the motor vehicle cannot be started if the breath alcohol level of the operator, as measured by the test, reaches a level of 0.025 grams per 210 liters of breath, and to which all of the following apply:

  (a) The device meets or exceeds the model specifications for breath alcohol ignition interlock devices (BAIID), 78 FR 26849 – 26867 (May 8, 2013) or any subsequent model specifications.

  (b) The device utilizes alcohol-specific electrochemical fuel sensor technology.

  (c) As its anticircumvention method, the device installation uses a positive-negative-positive air pressure test requirement, a midtest hum tone requirement, or any other anticircumvention method or technology that first becomes commercially available after July 31, 2007 and that is approved by the department as equally or more effective."

Imitation controlled substance

- For purposes of MCL 333.7341 and MCL 333.7521, *imitation controlled substance*, "means a substance that is not a

controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. However, this subsection does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles. An imitation controlled substance does not include a placebo or registered investigational drug that was manufactured, distributed, possessed, or delivered in the ordinary course of professional practice or research. All of the following factors shall be considered in determining whether a substance is an imitation controlled substance:

(*i*) Whether the substance was approved by the federal food and drug administration for over-the-counter sales and was sold in the federal food and drug administration approved packaging along with the federal food and drug administration approved labeling information.

(*ii*) Any statements made by an owner or another person in control of the substance concerning the nature, use, or effect of the substance.

(*iii*) Whether the substance is packaged in a manner normally used for illicit controlled substances.

(*iv*) Whether the owner or another person in control of the substance has any prior convictions under state or federal law related to controlled substances or fraud.

(*v*) The proximity of the substance to controlled substances.

(*vi*) Whether the consideration tendered in exchange for the substance substantially exceeds the reasonable value of the substance considering the actual chemical composition of the substance and, if applicable, the price at which the over-the-counter substances of like chemical composition sell." MCL 333.7341(1)(b); MCL 333.7521(3).

Immediate precursor

- For purposes of Article 7 of the PHC, *immediate precursor* "means a substance that the administrator has found to be and by rule designates as being the principal compound commonly used or produced primarily for use and that is

an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture." MCL 333.7106(1).

Imminent danger

- For purposes of MCL 333.7202, *imminent danger* means the term as defined in MCL 333.2251. MCL 333.7202(2). MCL 333.2251 defines *imminent danger* as "a condition or practice exists that could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided." MCL 333.2251(5)(b).

Indian child's tribe

- For purposes of Chapter 10D of the Revised Judicature Act, MCL 600.1099aa *et seq*., Indian child's tribe "means that term as defined in . . . MCL 712B.3."

Indian lands

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *Indian lands* "means any of the following:

  (*i*) All lands within the limits of an Indian reservation.

  (*ii*) Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." MCL 333.27953(d).

Indian tribe

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *Indian tribe* "means any Indian tribe, band, nation, or other organized group or community of Indians which is recognized as eligible by the United States Secretary of the Interior for the special programs and services provided by the United States to Indians because of their status as Indians, and is recognized as possessing powers of self-government." MCL 333.27953(e).

Industrial hemp

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), Article 7 of the PHC, and the Medical Marihuana Facilities Licensing Act (MMFLA), *industrial hemp* "means any of the following:

  (*i*) A plant of the genus Cannabis, whether growing or not, with a THC concentration of 0.3% or less on a dry-weight basis.

  (*ii*) A part of a plant of the genus Cannabis, whether growing or not, with a THC concentration of 0.3% or less on a dry-weight basis.

  (*iii*) The seeds of a plant of the genus Cannabis with a THC concentration of 0.3% or less on a dry-weight basis.

  (*iv*) If it has a THC concentration of 0.3% or less on a dry-weight basis, a compound, manufacture, derivative, mixture, preparation, extract, cannabinoid, acid, salt, isomer, or salt of an isomer of any of the following:

    (A) A plant of the genus Cannabis.

    (B) A part of a plant of the genus Cannabis.

  (*v*) A product to which 1 of the following applies:

    (A) If the product is intended for human or animal consumption, the product, in the form in which it is intended for sale to a consumer, meets both of the following requirements:

      (I) Has a THC concentration of 0.3% or less on a dry-weight or per volume basis.

      (II) Contains a total amount of THC that is less than or equal to the limit established by the cannabis regulatory agency under [MCL 333.27958(1)(n)].

    (B) If the product is not intended for human or animal consumption, the product meets both of the following requirements:

      (I) Contains a substance listed in subparagraph (*i*), (*ii*), (*iii*), or (*iv*).

      (II) Has a THC concentration of 0.3% or less on a dry-weight basis." MCL 333.27953(f)

(MRTMA); MCL 333.7106(2) (Article 7 of the PHC); MCL 333.27102(h) (MMFLA).

Industrial Hemp Research and Development Act

- For purposes of the Medical Marihuana Facilities Licensing Act (MMFLA), *industrial hemp research and development act* "means the Industrial Hemp Research and Development Act, 2014 PA 547, MCL 286.841 to [MCL] 286.859." MCL 333.27102(i).

Ingestion

- For purposes of MCL 8.9(10)(c), *ingestion* "means to have eaten, drunk, ingested, inhaled, injected, or topically applied, or to have performed any combination of those actions, or otherwise introduced into the body." MCL 8.9(10)(c)(*iii*).

Intoxicated or impaired

- For purposes of MCL 8.9, *intoxicated or impaired* "includes, but is not limited to, a condition of intoxication resulting from the ingestion or alcoholic liquor, a controlled substance, or alcoholic liquor and a controlled substance." MCL 8.9(10)(c).

J

Jail

- For purposes of MCL 801.263, MCL 801.264, and MCL 801.265, *jail* "means a municipal or county jail, work-camp, lockup, holding center, half-way house, community corrections center, house of correction, or any other facility maintained by a municipality or county which houses prisoners." MCL 801.261(c).

Juvenile disposition

- For purposes of MCL 333.7408a, *juvenile disposition* "means either of the following:

  (*i*) A finding of juvenile delinquency under 18 USC 5031 to [18 USC 5043].[9]

  (*ii*) The entry of a judgment or order of disposition by a court of another state that states or is based on a finding

that a juvenile violated a law of another state that would have been a criminal offense if committed by an adult in that state." MCL 333.7408a(4)(a).

Juvenile mental health court

- For purposes of Chapter 10C of the Revised Judicature Act, MCL 600.1099b *et seq.*, *juvenile mental health court* "means all of the following:

  (*i*) A court-supervised treatment program for juveniles who are diagnosed by a mental health professional with having a serious emotional disturbance, co-occurring disorder, or developmental disability.

  (*ii*) Programs designed to adhere to the 7 common characteristics of a juvenile mental health court as described under [MCL 600.1099c(3)].

  (*iii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the Bureau of Justice Assistance, or amended, that include all of the following characteristics:

    (A) A broad-based group of stakeholders representing the criminal justice system, the juvenile justice system, the mental health system, the substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

    (B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for juveniles with mental illnesses, and that take into account the relationship between mental illness and a juvenile's offenses, while allowing the individual circumstances of each case to be considered.

    (C) Participants are identified, referred, and accepted into mental health courts, and then linked

[9]Note that the Governor submitted a certification to the United States Secretary of Transportation stating that the Governor is opposed to the enactment or enforcement of a law requiring driver license suspension for drug offenses as set forth in 23 USC 159(a)(3)(A), and the Governor also certified that both houses of the Legislature have adopted a concurrent resolution expressing their opposition to the enactment or enforcement of this federal mandate in accordance with 23 USC 159. See Enacting section 2 of 2020 PA 380, effective October 1, 2021.

to community-based service providers as quickly as possible.

(D) Terms of participation are clear, promote public safety, facilitate the juvenile's engagement in treatment, are individualized to correspond to the level of risk that each juvenile presents to the community, and provide for positive legal outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, 2013 PA 93, MCL 780.981 to [MCL] 780.1003, provide legal counsel to juvenile respondents to explain program requirements, including voluntary participation, and guide juveniles in decisions about program involvement. Procedures exist in the juvenile mental health court to address, in a timely fashion, concerns about a juvenile's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights. Information gathered as part of the participants' court-ordered treatment program or services is safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice, if applicable, juvenile justice, and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants to achieve treatment and criminal and juvenile justice goals by regularly reviewing and revising the court process.

(I) Criminal and juvenile justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify

treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the juvenile mental health court, its performance is assessed periodically, procedures are modified accordingly, court processes are institutionalized, and support for the court in the community is cultivated and expanded." MCL 600.1099b(e).

L

Laboratory equipment

- For purposes of MCL 333.7401c, *laboratory equipment* "means any equipment, device, or container used or intended to be used in the process of manufacturing a controlled substance, counterfeit substance, or controlled substance analogue." MCL 333.7401c(7)(b).

Law of another state

- For purposes of MCL 333.7408a, *law of another state*, "means a law or ordinance enacted by another state or by a local unit of government in another state." MCL 333.7408a(4)(b).

Lawyer-guardian ad litem

- For purposes of Chapter 10D of the Revised Judicature Act, *lawyer-guardian ad litem* "means that term as defined in . . . MCL 712A.13a." MCL 600.1099aa(e).

Library

- For purposes of MCL 333.7410, *library* "means a library that is established by the state; a county, city, township, village, school district, or other local unit of government or authority or combination of local units of government and authorities; a community college district; a college or university; or any private library open to the public."MCL 333.7410(8)(a).

Licensed health care professional

- For purposes of MCL 750.430, *licensed health care professional* "means an individual licensed or registered under [Article 15 of the PHC.]" MCL 750.430(10).

Licensee

- For purposes of the Medical Marihuana Facilities Licensing Act and the Marihuana Tracking Act, *licensee* "means a person holding a state operating license." MCL 333.27102(j); MCL 333.27902(c).

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *licensee* "means a person holding a state license." MCL 333.27953(g).

Listed offense

- For purposes of the Sex Offenders Registration Act (SORA), MCL 762.11, MCL 771.2, and MCL 771.2a, *listed offense* "means a tier I, tier II, or tier III offense." MCL 28.722(j); MCL 762.11(6)(a); MCL 771.2(15); MCL 771.2a(13)(a).

Local unit of government

- For purposes of the Uniform Forfeiture Reporting Act, MCL 28.111 *et seq.*, *local unit of government* "means a village, city, township, or county." MCL 28.117(a).

M

Major controlled substance offense

- *Major controlled substance offense* means either or both of the following offenses: a violation of MCL 333.7401(2)(a), a violation of MCL 333.7403(2)(a)(*i*)-(*iv*), or conspiracy to commit a violation of either MCL 333.7401(2)(a) or MCL 333.7403(2)(a)(*i*)-(*iv*). MCL 761.2.

Manufacture

- For purposes of Article 7 of the PHC (but not applicable to MCL 333.7341, see MCL 333.7101(1) and next definition below), *manufacture* "means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction

from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that it does not include either of the following:

(a) The preparation or compounding of a controlled substance by an individual for his or her own use.

(b) The preparation, compounding packaging, or labeling of a controlled substance by either of the following:

(*i*) A practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.

(*ii*) A practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis, and not for sale." MCL 333.7106(3).

- For purposes of MCL 333.7341 (imitation controlled substances), *manufacture* "means the production, preparation, compounding, conversion, encapsulating, packaging, repackaging, labeling, relabeling, or processing of an imitation controlled substance, directly or indirectly. MCL 333.7341(1)(c).

- For purposes of MCL 333.7401b, *manufacture* "means the production, preparation, propagation, compounding, conversion, or processing of gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone, directly or indirectly, by extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container." MCL 333.7401b(4)(c).

- For purposes of MCL 333.7401c, *manufacture* "means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or

by a combination of extraction and chemical synthesis. manufacture does not include any of the following:

- The packaging or repackaging of the substance or labeling or relabeling of its container.
- The preparation or compounding of a controlled substance by any of the following:
  - A practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.
  - A practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." MCL 333.7401c(7)(c).

Marijuana/Marihuana

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), Article 7 of the PHC, the Michigan Medical Marihuana Act (MMMA), the Medical Marihuana Facilities Licensing Act (MMFLA), and the Marihuana Tracking Act (MTA), *marijuana* or *marihuana* "means any of the following:

  (*i*) A plant of the genus Cannabis, whether growing or not.

  (*ii*) A part of a plant of the genus Cannabis, whether growing or not.

  (*iii*) The seeds of a plant of the genus Cannabis.

  (*iv*) Marihuana concentrate.

  (*v*) A compound, manufacture, salt, derivative, mixture, extract, acid, isomer, salt of an isomer, or preparation of any of the following:

    (A) A plant of the genus Cannabis.

    (B) A part of a plant of the genus Cannabis.

    (C) The seeds of a plant of the genus Cannabis.

    (D) Marihuana concentrate.

  (*vi*) A marihuana-infused product.

(*vii*) A product with a THC concentration of more than 0.3% on a dry-weight or per volume basis in the form in which it is intended for sale to a consumer.

(*viii*) A product that is intended for human or animal consumption and that contains, in the form in which it is intended for sale to a consumer, a total amount of THC that is greater than the limit established by the cannabis regulatory agency under [MCL 333.27958(1)(n)]." MCL 333.27953(h) (MRTMA); MCL 333.7106(4) (Article 7of the PHC); MCL 333.26423(e) (MMMA); MCL 333.27102(k) (MMFLA); MCL 333.27902(d) (MTA).

- "Except for marihuana concentrate extracted from the following, 'marihuana' does not include any of the following:

  (*i*) The mature stalks of a plant of the genus Cannabis.

  (*ii*) Fiber produced from the mature stalks of a plant of the genus Cannabis.

  (*iii*) Oil or cake made from the seeds of a plant of the genus Cannabis.

  (*iv*) A compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks of a plant of the genus Cannabis.

  (*v*) Industrial hemp.

  (*vi*) An ingredient combined with marihuana to prepare topical or oral administrations, food, drink, or other products.

  (*vii*) A dug for which an application filed in accordance with 21 USC 355 is approved by the Food and Drug Administration." MCL 333.27953(i).

Marihuana accessories

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marijuana accessories* "means any equipment, product, material, or combination of equipment, products, or materials, that is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing,

ingesting, inhaling, or otherwise introducing marihuana into the human body." MCL 333.27953(j).

Marihuana concentrate

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marijuana concentrate* "means the resin extracted from any part of a plant of the genus *Cannabis*." MCL 333.27953(k).

Marihuana establishment

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marijuana establishment* "means a marihuana grower, marihuana safety compliance facility, marihuana processor, marihuana microbusiness, marihuana retailer, marihuana secure transporter, or any other type of marihuana-related business licensed by the cannabis regulatory agency." MCL 333.27953(*l*).

Marihuana facility

- For purposes of the Medical Marihuana Facilities Licensing Act, *marihuana facility* "means a location at which a licensee is licensed to operated under [the Medical Marihuana Facilities Licensing Act]." MCL 333.27102(*l*).

Marihuana grower

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marijuana grower* "means a person licensed to cultivate marihuana and sell or otherwise transfer marihuana to marihuana establishments." MCL 333.27953(m).

Marihuana-infused product

- For purposes of the Michigan Medical Marihuana Act (MMMA), *marihuana-infused product* "means a topical formulation, tincture, beverage, edible substance, or similar product containing any usable marihuana that is intended for human consumption in a manner other than smoke inhalation. Marihuana-infused product shall not be considered a food for purposes of the food law, 2000 PA 92, MCL 289.1101 to [MCL] 289.8111." MCL 333.26423(f).

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA) and the Medical Marihuana Facilities Licensing Act (MMFLA), *marihuana-infused*

product "means a topical formulation, tincture, beverage, edible substance, or similar product containing marihuana and other ingredients and that is intended for human consumption." MCL 333.27953(n) (MRTMA); MCL 333.27102(n) (MMFLA).

Marihuana microbusiness

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marihuana microbusiness* "means a person licensed to cultivate not more than 150 marihuana plants; process and package marihuana; and sell or otherwise transfer marihuana to individuals who are 21 years of age or older or to a marihuana safety compliance facility, but not to other marihuana establishments." MCL 333.27953(o).

Marihuana plant

- For purposes of the Michigan Medical Marihuana Act (MMMA) and the Medical Marihuana Facilities Licensing Act (MMFLA), *marihuana plant* "means any plant of the species *Cannabis sativa* L." MCL 333.26423(g); MCL 333.27102(m). For purposes of the MMFLA, *marihuana plant* "does not include industrial hemp." MCL 333.27102(m).

Marihuana processor

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marihuana processor* "means a person licensed to obtain marihuana from marihuana establishments; process and package marihuana; and sell or otherwise transfer marihuana to marihuana establishments." MCL 333.27953(p).

Marihuana retailer

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marihuana retailer* "means a person licensed to obtain marihuana from marihuana establishments and to sell or otherwise transfer marihuana to marihuana establishments and to individuals who are 21 years of age or older." MCL 333.27953(q).

Marihuana safety compliance facility

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marihuana safety compliance facility* "means a person licensed to test marihuana,

including certification for potency and the presence of contaminants." MCL 333.27953(r).

Marihuana secure transporter

- For purposes of the Michigan Regulation and Taxation of Marihuana Act (MRTMA), *marihuana secure transporter* "means a person licensed to obtain marihuana from marihuana establishments in order to transport marihuana to marihuana establishments." MCL 333.27953(s).

Marijuana Regulatory Agency

- For purposes of the Medical Marihuana Facilities Licensing Act (MMFLA), the Michigan Regulatory and Taxation of Marihuana Act (MRTMA), and the Michigan Medical Marihuana Act (MMMA), *marijuana regulatory agency* means the Cannabis Regulatory Agency, unless the context dictates otherwise. See MCL 333.27102(p); MCL 333.27953(t); MCL 333.26423(h); Executive Order No. 2022-1 (executive reorganization order effective April 13, 2022, stating references to the Marijuana Regulatory Agency will be deemed to be references to the Cannabis Regulatory Agency).

Medically frail

- For purposes of MCL 791.235, *medically frail* "describes an individual who is a minimal threat to society as a result of the individual's medical condition, whose recent conduct in prison indicates the individual is unlikely to engage in assaultive conduct, and who has 1 or more of the following:

  (*i*) A permanent physical disability or serious and complex medical condition resulting in the inability to walk, stand, or sit without personal assistance:

  (*ii*) A terminal medical or neurological condition resulting in a life expectancy of under 18 months.

  (*iii*) A permanent disabling mental disorder, including dementia, Alzheimer's, or a similar degenerative brain disorder that results in the need for nursing home level of care, and a significantly impaired ability to perform 2 or more activities of daily living." MCL 791.235(22)(d).

Medical use of marihuana

- For purposes of the Michigan Medical Marihuana Act, *medical use of marihuana* "means the acquisition, possession,

cultivation, manufacture, extraction, use, internal possession, delivery, transfer, or transportation of marihuana, marihuana-infused products, or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(i).

Mental health court

- For purposes of Chapter 10B of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (mental health courts), *mental health court* "means any of the following:

  (*i*) A court-supervised treatment program for individuals who are diagnosed by a mental health professional with having a serious mental illness, serious emotional disturbance, co-occurring disorder, or developmental disability.

  (*ii*) Programs designed to adhere to the 10 essential elements of a mental health court promulgated by the bureau of justice assistance that include all of the following characteristics:

    (A) A broad-based group of stakeholders representing the criminal justice system, mental health system, substance abuse treatment system, any related systems, and the community guide the planning and administration of the court.

    (B) Eligibility criteria that address public safety and a community's treatment capacity, in addition to the availability of alternatives to pretrial detention for defendants with mental illnesses, and that take into account the relationship between mental illness and a defendant's offenses, while allowing the individual circumstances of each case to be considered.

    (C) Participants are identified, referred, and accepted into mental health courts, and then linked to community-based service providers as quickly as possible.

    (D) Terms of participation are clear, promote public safety, facilitate the defendant's engagement in treatment, are individualized to correspond to the level of risk that each defendant presents to the community, and provide for positive legal

outcomes for those individuals who successfully complete the program.

(E) In accordance with the Michigan indigent defense commission act, 2013 PA 93, MCL 780.981 to [MCL] 780.1003, provide legal counsel to indigent defendants to explain program requirements, including voluntary participation, and guides defendants in decisions about program involvement. Procedures exist in the mental health court to address, in a timely fashion, concerns about a defendant's competency whenever they arise.

(F) Connect participants to comprehensive and individualized treatment supports and services in the community and strive to use, and increase the availability of, treatment and services that are evidence based.

(G) Health and legal information are shared in a manner that protects potential participants' confidentiality rights as mental health consumers and their constitutional rights as defendants. Information gathered as part of the participants' court-ordered treatment program or services are safeguarded from public disclosure in the event that participants are returned to traditional court processing.

(H) A team of criminal justice and mental health staff and treatment providers receives special, ongoing training and assists mental health court participants achieve treatment and criminal justice goals by regularly reviewing and revising the court process.

(I) Criminal justice and mental health staff collaboratively monitor participants' adherence to court conditions, offer individualized graduated incentives and sanctions, and modify treatment as necessary to promote public safety and participants' recovery.

(J) Data are collected and analyzed to demonstrate the impact of the mental health court, its performance is assessed periodically, and procedures are modified accordingly, court processes are institutionalized, and support for the

court in the community is cultivated and expanded." MCL 600.1090(e).

Methamphetamine-related offense

- For purposes of the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, *methamphetamine-related offense* "means 1 or more of the following offenses under Michigan law:

  (*i*) A violation or attempted violation of [Article 7 of the PHC] involving methamphetamine.

  (*ii*) A violation or attempted violation of [MCL 333.17766c or MCL 333.17766f].

  (*iii*) Conspiracy to commit an offense described in subparagraph (*i*) or (*ii*)." MCL 28.122(b).

Minor

- For purposes of MCL 333.7401c, *minor* "means an individual less than 18 years of age." MCL 333.7401c(7)(d).

- For purposes of MCL 777.45, *minor* "means an individual 17 years of age or less." MCL 777.45(2)(b).

- For purposes of MCL 333.27961a, *minor* "means an individual who is younger than 21 years of age." MCL 333.27961a(13)(b).

Misdemeanor marihuana offense

- For purposes of MCL 780.621e (setting aside certain convictions), *eanor marihuana offense* "means a violation of [MCL 333.7403(2)(d), MCL 333.7404(2)(d)], or a marihuana paraphernalia violation of [MCL 333.7453] . . . or a violation of a local ordinance substantially corresponding to [MCL 333.7403(2)(d), MCL 333.7404(2)(d)], or the prohibition regarding marihuana paraphernalia of [MCL 333.7453]." MCL 780.621e(7).

Municipal license

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *municipal license* "means a license issued by a municipality pursuant to section 16 that allows a person to operate a marihuana establishment in that municipality." MCL 333.27953(u).

Municipality

- For purposes of the Medical Marihuana Facilities Licensing Act and the Michigan Regulation and Taxation of Marihuana Act, *municipality* means a city, township, or village. MCL 333.27102(r); MCL 333.27953(v).

N

NADDI

- For purposes of the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, *NADDI* "means the national association of drug diversion investigators." MCL 28.122(c).

Named product

- For purposes of MCL 333.7417, *named product* "means either of the following:

  (a) A product having a designated brand name.

  (b) A product having a street or common name with application sufficient to identify the product as a specific product within this state or within a local unit of government." MCL 333.7417(3).

Narcotic drug

- For purposes of Article 7 of the PHC, *narcotic drug* "means 1 or more of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

  (a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

  (b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in [MCL 333.7107(a)], but not including the isoquinoline alkaloids of opium." MCL 333.7107.

NPLEx

- For purposes of the Methamphetamine Abuse Reporting Act, MCL 28.121 *et seq.*, *NPLEx* "means the national precursor log exchange." MCL 28.122(d).

O

Operate

- For purposes of the MVC, *operate* or *operating* means:

"1 or more of the following:

> "(a) Being in actual physical control of a vehicle. [MCL 257.35a(a)] applies regardless of whether or not the person is licensed under [the MVC] as an operator or chauffeur.
>
> (b) Causing an automated motor vehicle to move under its own power in automatic mode upon a highway or street regardless of whether the person is physically present in that automated motor vehicle at that time. [MCL 257.35a(b)] applies regardless of whether the person is licensed under [the MVC] as an operator or chauffeur." MCL 257.35a.

Opiate

- For purposes of Article 7 of the PHC, *opiate* "means a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under [MCL 333.7212], the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms." MCL 333.7108(1).

P

Paraphernalia

- For purposes of the Medical Marihuana Facilities Licensing Act, *paraphernalia* "means any equipment, product, or material of any kind that is designed for or used in growing, cultivating, producing, manufacturing, compounding, converting, storing, processing, preparing, transporting, injecting, smoking, ingesting, inhaling, or otherwise introducing into the human body, marihuana." MCL 333.27102(s).

Participant

- For purposes of Chapter 10A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (drug treatment courts), *participant* "means an individual who is admitted into a drug treatment court." MCL 600.1060(d).

- For purposes of Chapter 10D of the Revised Judicature Act, *participant* "means an individual who is admitted into a family treatment court." MCL 600.1099aa(f).

Party

- For purposes of MCR 1.111, *party* "means a person named as a party or a person with legal decision-making authority in the case or court proceeding." MCR 1.111(A)(2).

Patient/qualifying patient

- For purposes of the Michigan Medical Marihuana Act, *patient* or *qualifying patient* "means a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(m).

Person

- For purposes of Article 7 of the PHC, *person* "means a person as defined in [MCL 333.1106] or a governmental entity." MCL 333.7109(1). MCL 333.1106(4) provides in relevant part that *person* "means an individual, partnership, cooperative, association, private corporation, personal representative, receiver, trustee, assignee, or other legal entity." MCL 333.1106(4).

- For purposes of the Medical Marihuana Facilities Licensing Act, *person* "means an individual, corporation, limited

liability company, partnership, limited partnership, limited liability partnership, limited liability limited partnership, trust, or other legal entity." MCL 333.27102(t).

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *person* "means an individual, corporation, limited liability company, partnership of any type, trust, or other legal entity." MCL 333.27953(w).

Pharmacist

- For purposes of part 177 of the PHC,[10] *pharmacist* "means an individual licensed under [Article 15] to engage in the practice of pharmacy." MCL 333.17707(3).

Pharmacist in charge

- For purposes of part 177 of the PHC,[11] *pharmacist in charge* or *PIC* "means the pharmacist who is designated by a pharmacy, manufacturer, or wholesale distributor as its pharmacist in charge under [MCL 333.17748(2)]." MCL 333.17707(4).

PHC

- For purposes of this benchbook, PHC means the Public Health Code, MCL 333.1101 *et seq.*

Physician

- For purposes of the Michigan Medical Marihuana Act, *physician* "means an individual licensed as a physician under part 170 of the public health code, 1978 PA 368, MCL 333.17001 to [MCL] 333.17084, or an osteopathic physician under part 175 of the public health code, 1978 PA 368, MCL 333.17501 to [MCL] 333.17556." MCL 333.26423(j).

Plant

- For purposes of MCL 333.7401, *plant* "means a marihuana plant that has produced cotyledons or a cutting of a marihuana plant that has produced cotyledons." MCL 333.7401(5).

- For purposes of the Michigan Medial Marihuana Act and the Medical Marihuana Facilities Licensing Act, *plant*

[10]Part 177 of the PHC is in Article 15 and covers MCL 333.17701 to MCL 333.17780.

[11]Part 177 of the PHC is in Article 15 and covers MCL 333.17701 to MCL 333.17780.

"means any living organism that produces its own food through photosynthesis and has observable root formation or is in growth material." MCL 333.26423(k); MCL 333.27102(u).

Practitioner

- For purposes of Article 7 of the PHC, *practitioner* "means any of the following:

  (a) A prescriber or pharmacist, a scientific investigator as defined by rule of the administrator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state, including an individual in charge of a dog pound or animal shelter licensed or registered by the department of agriculture and rural development . . . or a class B dealer licensed by the United States department of agriculture . . . and the [Michigan] department of agriculture and rural development[,] . . . for the limited purpose of buying, possessing, and administering a commercially prepared, premixed solution of sodium pentobarbital to practice euthanasia on animals.

  (b) A pharmacy, hospital, or other institution or place of professional practice licensed, registered, or otherwise permitted to distribute, prescribe, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state." MCL 333.7109(3).

Preliminary oral fluid analysis

- For purposes of the Michigan Vehicle Code, *preliminary oral fluid analysis* "means the on-site taking of a preliminary oral fluid test, performed by a certified drug recognition expert, . . . from the oral fluid of a person for the purpose of detecting the presence of a controlled substance[.]" MCL 257.43b.

Premises

- For purposes of MCL 750.141a, *premises* "means a permanent or temporary place of assembly, other than a residence, including, but not limited to, any of the following:

(*i*) A meeting hall, meeting room, or conference room.

(*ii*) A public or private park." MCL 750.141a(1)(g).

Prescriber

- For purposes of Article 7 of the PHC and Part 177 of the PHC,[12] *prescriber* "means a licensed dentist; a licensed doctor of medicine; a licensed doctor of osteopathic medicine and surgery; a licensed doctor of podiatric medicine and surgery; a licensed physician's assistant; subject to part 174 [of the Public Health Code], a licensed optometrist; subject to [MCL 333.17211a], an advanced practice registered nurse; a licensed veterinarian; subject to [MCL 333.17708(7)], a registered professional nurse who holds a specialty certification as a nurse anesthetist under [MCL 333.17210] when he or she is engaging in the practice of nursing and providing the anesthesia and analgesia services described in [MCL 333.17210(3)]; or any other licensed health professional acting under the delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery. As used in this subsection:

  (a) 'Advanced practice registered nurse' means that term as defined in [MCL 333.17201] and includes a licensed advanced practice registered nurse.

  (b) 'License' means that term as defined in [MCL 333.16106] and includes an authorization issued under the laws of another state or province of Canada to practice a profession described in this subsection in that state or province of Canada where practice would otherwise be unlawful." MCL 333.17708(2); MCL 333.7109(4).

Prescription

- For purposes of Part 177 of the PHC,[13] *prescription* "means an order by a prescriber to fill, compound, or dispense a drug or device written and signed; written or created in an electronic format, signed, and transmitted by facsimile; or transmitted electronically or by other means of communication. An order transmitted in other than written or hard-copy form shall be electronically recorded, printed,

[12]Part 177 of the PHC is in Article 15 and covers MCL 333.17701 to MCL 333.17780.

[13]Part 177 of the PHC is in Article 15 and covers MCL 333.17701 to MCL 333.17780.

or written and immediately dated by the pharmacist, and that record is considered the original prescription. In a health facility or agency licensed under article 17 or other medical institution, an order for a drug or device in the patient's chart is considered for the purposes of this definition the original prescription. For purposes of this part, prescription also includes a standing order issued under [MCL 333.17744e]. Subject to [MCL 333.17751(2) and MCL 333.17751(5)], prescription includes, but is not limited to, an order for a drug, not including a controlled substance except under circumstances described in [MCL 333.17763(e)], written and signed; written or created in an electronic format, signed, and transmitted by facsimile; or transmitted electronically or by other means of communication by a prescriber in another state or province of Canada." MCL 333.17708(3).

Prescription drug

- For purposes of MCL 333.7302a, MCL 800.281, MCL 800.282, MCL 800.285, and Part 177 of the PHC,[14] *prescription drug* means a prescription drug as defined in MCL 333.17708(4). MCL 333.7302a(7); MCL 800.281a(f). MCL 333.17708(4) defines *prescription drug* as one or more of the following: "(a) [a] drug dispensed pursuant to a prescription[;] (b) [a] drug bearing the federal legend 'CAUTION: federal law prohibits dispensing without prescription' or 'Rx only'[; or] (c) [a] drug designated by the board as a drug that may only be dispensed pursuant to a prescription." "[P]rescription drug also includes a drug dispensed pursuant to [MCL 333.17744f]." MCL 333.17708(5).

Prescription form

- For purposes of Article 7 of the PHC, *prescription form* "means a printed form, that is authorized and intended for use by a prescribing practitioner to prescribe controlled substances or other prescription drugs and that meets the requirements of rules promulgated by the administrator, and all of the following requirements:

  (a) Bears the preprinted, stamped, typed, or manually printed name, address, and telephone number or pager number of the prescribing practitioner.

[14]Part 177 of the PHC is in Article 15 and covers MCL 333.17701 to MCL 333.17780.

(b) Includes the manually printed name of the patient, the address of the patient, the prescribing practitioner's signature, and the prescribing practitioner's drug enforcement administration registration number.

(c) Includes the quantity of the prescription drug prescribed, in both written and numerical terms.

(d) Includes the date the prescription drug was prescribed.

(e) Complies with any rules promulgated by the department under [MCL 333.7333a(6)]." MCL 333.7109(5).

Primary caregiver/caregiver

- For purposes of the Michigan Medical Marihuana Act, *primary caregiver* or *caregiver* "means a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime as defined in . . . MCL 770.9a." MCL 333.26423(*l*).

Prior conviction

- For purposes of MCL 752.272a, *prior conviction*, "means a previous violation of [MCL 752.272a] or a law of another state, a law of a local unit of government of this state or another state, or a law of the United States substantially corresponding to [MCL 752.272a]." MCL 752.272a(3).

Prisoner

- For purposes of MCL 800.281, MCL 800.282, and MCL 800.285, *prisoner* "means a person committed to the jurisdiction of the department [of corrections] who has not been released on parole or discharged." MCL 800.281a(g).

- For purposes of MCL 801.263, MCL 801.264, and MCL 801.265, *prisoner* "means a person incarcerated in a jail or a person committed to a jail for incarceration who is a participant in a work release or vocational or educational study release program." MCL 801.261(d).

- For purposes of MCL 771.3g and MCL 771.3h, *prisoner* "means an individual committed or sentenced to imprisonment under [MCL 769.28]." MCL 771.3g(7)(c).

Private park

- For purposes of MCL 333.7410a, *private park* "means real property owned or maintained by a private individual or entity and that is open to the general public or local residents for recreation or amusement." MCL 333.7410a(3)(a).

Probationer

- For purposes of the Probation Swift and Sure Sanctions Act, MCL 771A.1 *et seq.*, *probationer* "means an individual placed on probation for committing a felony." MCL 771A.2(b).

Process or processing

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *process* "means to separate or otherwise prepare parts of the marihuana plant and to compound, blend, extract, infuse, or otherwise make or prepare marihuana concentrate or marihuana-infused products." MCL 333.27953(x).

Processor

- For purposes of the Medical Marihuana Facilities Licensing Act, *processor* "means a licensee that is a commercial entity located in this state that purchases marihuana from a grower and that extracts resin from the marihuana or creates a marihuana-infused product for sale and transfer in packaged form to a provisioning center or another processor." MCL 333.27102(v).

Production

- For purposes of Article 7 of the PHC, *production* means "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." MCL 333.7109(6).

Program

- For purposes of MCL 600.1084, *program* "means the specialty court interlock program created under [MCL 600.1084]." MCL 600.1084(9)(c).

Prosecutor

- For purposes of Chapter 10A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (drug treatment courts), *prosecutor* "means the prosecuting attorney of the county,

the city attorney, the village attorney, or the township attorney." MCL 600.1060(e).

- For purposes of Chapter 10D of the Revised Judicature Act, *prosecutor* "means the prosecuting attorney of the county, attorney general, or attorney retained by the [DHHS]." MCL 600.1099aa(g).

Provisioning center

- For purposes of the Medical Marihuana Facilities Licensing Act, *provisioning center* "means a licensee that is a commercial entity located in this state that purchases marihuana from a grower or processor and sells, supplies, or provides marihuana to registered qualifying patients, directly or through the patients' registered primary caregivers. Provisioning center includes any commercial property where marihuana is sold at retail to registered qualifying patients or registered primary caregivers. A noncommercial location used by a registered primary caregiver to assist a qualifying patient connected to the caregiver through the department's marihuana registration process in accordance with the Michigan Medical Marihuana Act is not a provisioning center for purposes of [the Medical Marihuana Facilities Licensing Act]." MCL 333.27102(w).

Pseudoephedrine

- For purposes of MCL 333.7340c, *pseudoephedrine* "includes the salts and isomers and salts of isomers of pseudoephedrine." MCL 333.7340c(6)(b).

Public park

- For purposes of MCL 333.7410a, *public park* "means real property owned or maintained by this state or a political subdivision of this state that is designated by this state or by that political subdivision as a public park." MCL 333.7410a(3)(b).

Q

Qualifying Indian tribe

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *qualifying Indian tribe* "means an Indian tribe that meets all of the following conditions:

  (*i*) The Indian tribe has entered into an agreement with the cannabis regulatory agency under [MCL 333.27957(2)(b)] that is in effect.

  (*ii*) The Indian tribe has entered into an agreement with the department of treasury that is in effect and that does all of the following:

    (A) States that the revenue collected from the tax or fee described in [MCL 333.27953(y)(*iii*)] is not state money, and requires that this revenue be retained by and used as determined by only the Indian tribe, if the marihuana subject to the tax or fee was grown and processed on only the Indian tribe's Indian lands.

    (B) States whether the revenue collected from the tax or fee described in [MCL 333.27953(y)(*iii*)] from marihuana not described in [MCL 333.27953(y)(*ii*)(A)] is subject to revenue sharing between the Indian tribe and this state and, if so, the details of the revenue sharing arrangement.

  (*iii*) The Indian tribe imposes a tax or fee on each sale or transfer of marihuana from a tribal marihuana business located in the Indian tribe's Indian lands to a person other than a tribal marihuana business or marihuana establishment. This subparagraph does not prohibit a qualifying Indian tribe from imposing the tax or fee on sales or transfers of marihuana that are not described in this subparagraph. The tax or fee must be based on the sales price of the marihuana and the rate of the tax or fee must be equal to or greater than the rate established under [MCL 333.27963]." MCL 333.27953(y).

Qualifying patient/patient

- For purposes of the Michigan Medical Marihuana Act, *qualifying patient* or *patient* "means a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(m).

R

Registered primary caregiver

- For purposes of the Medical Marihuana Facilities Licensing Act and the Marihuana Tracking Act, *registered primary caregiver* "means a primary caregiver who has been issued a current registry identification card under the Michigan Medical Marihuana Act." MCL 333.27102(x); MCL 333.27902(f).

Registered qualifying patient

- For purposes of the Medical Marihuana Facilities Licensing Act and the Marihuana Tracking Act, *registered qualifying patient* "means a qualifying patient who has been issued a current registry identification card under the Michigan Medical Marihuana Act or a visiting qualifying patient as that term is defined in . . . MCL 333.26423." MCL 333.27102(y); MCL 333.27902(g).

Registry identification card

- For purposes of the Michigan Medical Marihuana Act, the Medical Marihuana Facilities Licensing Act, and the Marihuana Tracking Act, *registry identification card* "means a document issued by the marijuana regulatory agency[15] that identifies a person as a registered qualifying patient or registered primary caregiver." MCL 333.26423(n); MCL 333.27102(z); MCL 333.27902(h).

Reporting agency

- For purposes of the Uniform Forfeiture Reporting Act, MCL 28.111 *et seq.* and MCL 333.7524b, *reporting agency* means one of the following:

  "(*i*) If property is seized by or forfeited to a local unit of government, that local unit of government.

  (*ii*) If property is seized by or forfeited to [the state of Michigan], the state department or agency effectuating the seizure or forfeiture." MCL 28.117(b). See also MCL

[15]The cited statutes refer to the "marijuana regulatory agency"; however, the marijuana regulatory agency was renamed the Cannabis Regulatory Agency by Executive Order No. 2022-1, which provides that "a reference to the Marijuana Regulatory Agency will be deemed to be a reference to the [Cannabis Regulatory] Agency."

333.7524b(3) (*reporting agency* "means that term as defined in [MCL 28.117]").

Representations made

- In addition to other logically relevant factors, the following factors must be considered in regard to "representations made" when determining whether a substance is an imitation controlled substance:

  "(a) Any express or implied representation made that the nature of the substance or its use or effect is similar to that of a controlled substance.

  (b) Any express or implied representation made that the substance may be resold for an amount considerably in excess of the reasonable value of the composite ingredients and the cost of processing.

  (c) Any express or implied representation made that the substance is a controlled substance.

  (d) Any express or implied representation that the substance is of a nature or appearance that the recipient of the substance will be able to distribute the substance as a controlled substance.

  (e) That the substance's package, label, or name is substantially similar to that of a controlled substance.

  (f) The proximity of the substance to a controlled substance.

  (g) That the physical appearance of the substance is substantially identical to a specific controlled substance, including any numbers or codes thereon, and the shape, size, markings, or color." MCL 333.7341(2).

Residence

- For purposes of MCL 750.141a, *residence* "means a permanent or temporary place of dwelling, included but not limited to, any of the following:

  (*i*) A house, apartment, condominium, or mobile home.

  (*ii*) A cottage, cabin, trailer, or tent.

  (*iii*) A motel unit, hotel unit, or bed and breakfast unit." MCL 750.141a(1)(h).

Response activity costs

- For purposes of MCL 333.7401c, *response activity costs* "means that term as defined in . . . MCL 324.20101." MCL 333.7401c(7)(e). MCL 324.20101(1)(ww) defines *response activity costs* as "all costs incurred in taking or conducting a response activity, including enforcement costs."

Rules

- For purposes of the Medical Marihuana Facilities Licensing Act, *rules* "means rules promulgated under the [A]dministrative [P]rocedures [A]ct . . . by the [M]arijuana [R]egulatory [A]gency to implement [the Medical Marihuana Facilities Licensing Act]." MCL 333.27102(aa).

S

Safety compliance facility

- For purposes of the Medical Marihuana Facilities Licensing Act, *safety compliance facility* "means a licensee that is a commercial entity that takes marihuana from a marihuana facility or receives marihuana from a registered primary caregiver, tests the marihuana for contaminants and for tetrahydrocannabinol and other cannabinoids, returns the test results, and may return the marihuana to the marihuana facility." MCL 333.27102(bb).

School property

- For purposes of MCL 333.7410 and MCL 333.7401c, *school property* "means a building, playing field, or property used for school purposes to impart instruction to children in grades kindergarten through 12, when provided by a public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses." MCL 333.7410(8)(b). See MCL 333.7401c(7)(f).

Second or subsequent offense

- For purposes of MCL 333.7413(1), "an offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under [Article 7 of the PHC] or under any statute of the United States or of any state relating to a narcotic drug, marihuana,

depressant, stimulant, or hallucinogenic drug." MCL 333.7413(4).

Secure transporter

- For purposes of the Medical Marihuana Facilities Licensing Act, *secure transporter* "means a licensee that is a commercial entity located in this state that stores marihuana and transports marihuana between marihuana facilities for a fee." MCL 333.27102(cc).

Seed

- For purposes of the Medical Marihuana Facilities Licensing Act, *seed* "means the fertilized, ungerminated, matured ovule, containing an embryo or rudimentary plant, of a marihuana plant that is flowering." MCL 333.27102(dd).

Seedling

- For purposes of the Medical Marihuana Facilities Licensing Act, *seedling* "means a marihuana plant that has germinated and has not flowered and is not harvestable." MCL 333.27102(ee).

Seeks medical assistance

- For purposes of MCL 333.7403 and MCL 333.7404, *seeks medical assistance* "means reporting a drug overdose or other medical emergency to law enforcement, the 9-1-1 system, a poison control center, or a medical provider, or assisting someone in reporting a drug overdose or other medical emergency." MCL 333.7403(7)(b); MCL 333.7404(6)(b).

Serious crime

- For purposes of MCL 791.234, *serious crime* "means violating or conspiring to violate [Article 7 of the PHC], that is punishable by imprisonment for more than 4 years, or an offense against a person in violation of . . . MCL 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.87, [MCL] 750.88, [MCL] 750.89, [MCL] 750.316, [MCL] 750.317, [MCL] 750.321, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, and [MCL] 750.530." MCL 791.234(18)(a).

Serious impairment of a body function

- For purposes of MCL 333.17764(5), MCL 750.16, and MCL 750.18, *serious impairment of a body function* means that phrase as defined in MCL 257.58c. MCL 333.17764(5); MCL 750.16(6); MCL 750.18(8). MCL 257.58c provides: "'Serious impairment of a body function' includes, but is not limited to, 1 or more of the following:

  (a) Loss of a limb or loss of use of a limb.

  (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.

  (c) Loss of an eye or ear or loss of use of an eye or ear.

  (d) Loss or substantial impairment of a bodily function.

  (e) Serious visible disfigurement.

  (f) A comatose state that lasts for more than 3 days.

  (g) Measurable brain or mental impairment.

  (h) A skull fracture or other serious bone fracture.

  (i) Subdural hemorrhage or subdural hematoma.

  (j) Loss of an organ."

Serious misdemeanor

- For purposes of MCL 769.5, *serious misdemeanor* "means that term as defined in . . . MCL 780.811." MCL 769.5(7). MCL 780.811(1)(a) defines *serious misdemeanor* as "1 or more of the following:

  (*i*) A violation of [MCL 750.81], assault and battery, including domestic violence.

  (*ii*) A violation of [MCL 750.81a], assault; infliction of serious injury, including aggravated domestic violence.

  (*iii*) Beginning January 1, 2024, a violation of [MCL 750.81c(1)], threatening a department of health and human services' employee with physical harm.

  (*iv*) A violation of [MCL 750.115], breaking and entering or illegal entry.

  (*v*) A violation of [MCL 750.136b(7)], child abuse in the fourth degree.

(*vi*) A violation of [MCL 750.145], contributing to the neglect or delinquency of a minor.

(*vii*) A misdemeanor violation of [MCL 750.145d], using the internet or a computer to make a prohibited communication.

(*viii*) Beginning January 1, 2024, a violation of [MCL 750.147a(2) or MCL 750.174a(3)(b)], embezzlement from a vulnerable adult of an amount of less than $200.00.

(*ix*) Beginning January 1, 2024, a violation of [MCL 750.174a(3)(a)], embezzlement from a vulnerable adult of an amount of $200.00 to $1,000.00.

(*x*) A violation of [MCL 750.233], intentionally aiming a firearm without malice.

(*xi*) A violation of [MCL 750.234], discharge of a firearm intentionally aimed at a person.

(*xii*) A violation of [MCL 750.235], discharge of an intentionally aimed firearm resulting in injury.

(*xiii*) A violation of [MCL 750.335a], indecent exposure.

(*xiv*) A violation of [MCL 750.411h], stalking.

(*xv*) A violation of [MCL 257.601b(2)], injuring a worker in a work zone.

(*xvi*) Beginning January 1, 2024, a violation of [MCL 257.601d(1)], moving violation causing death.

(*xvii*) Beginning January 1, 2024, a violation of [MCL 257.601d(2)], moving violation causing serious impairment of a body function.

(*xviii*) A violation of [MCL 257.617a], leaving the scene of a personal injury accident.

(*xix*) A violation of [MCL 257.625], operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

(*xx*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of [MCL 436.1701], if the violation results in physical injury or death to any individual.

(*xxi*) A violation of [MCL 324.80176(1) or MCL 324.80176(3)], operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.

(*xxii*) A violation of a local ordinance substantially corresponding to a violation enumerated in subparagraphs (*i*) to (*xxi*).

(*xxiii*) A violation charged as a crime or serious misdemeanor enumerated in subparagraphs (*i*) to (*xxii*) but subsequently reduced to or pleaded to as a misdemeanor. As used in this subparagraph, 'crime' means that term as defined in [MCL 780.752(1)(b)]."

Sign

- For purposes of Article 7 of the PHC, *sign* "means to affix one's signature manually to a document or to use an electronic signature." MCL 333.7109(7).

Social gathering

- For purposes of MCL 750.141a, *social gathering* "means an assembly of 2 or more individuals for any purposes, unless all of the individuals attending the assembly are members of the same household or immediate family." MCL 750.141a(1)(i).

Specialty court

- For purposes of MCL 600.1084, *specialty court* "means any of the following:

  (*i*) A drug treatment court.

  (*ii*) A DWI/sobriety court.

  (*iii*) A hybrid of the programs under subparagraphs (*i*) and (*ii*).

  (*iv*) A mental health court, as that term is defined in [MCL 600.1090)].

  (*v*) A veterans treatment court, as that term is defined in [MCL 600.1200)]. MCL 600.1084(9)(d).

State-certified treatment court

- For purposes of MCL 600.1088, *state-certified treatment court* "includes the treatment courts certified by the state court administrative office as provided in [MCL 600.1062 (drug treatment courts), MCL 600.1084 (DWI/sobriety courts), MCL 600.1091 (mental health courts), MCL 600.1099c (juvenile mental health courts), or MCL 600.1201 (veterans treatment courts)]." MCL 600.1088(2).

State license

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *state license* "means a license issued by the cannabis regulatory agency that allows a person to operate a marihuana establishment." MCL 333.27953(z).

State operating license

- For purposes of the Medical Marihuana Facilities Licensing Act, "*state operating license* or, unless the context requires a different meaning, *license* means a license that is issued under [the Medical Marihuana Facilities Licensing Act] that allows the licensee to operate as 1 of the following, specified in the license:

  (*i*) A grower.

  (*ii*) A processor.

  (*iii*) A secure transporter.

  (*iv*) A provisioning center.

  (*v*) A safety compliance facility." MCL 333.27102(ff).

Statewide monitoring system/system

- For purposes of the Marihuana Tracking Act and the Medical Marihuana Facilities Licensing Act (MMFLA),[16] *statewide monitoring system* or *system* "means an internet-based, statewide database established, implemented, and maintained directly or indirectly by the department that is available to licensees, law enforcement agencies, and authorized state departments and agencies on a 24-hour basis for all of the following:

[16] Unlike the Marihuana Tracking Act, the MMFLA states that the definition applies "unless the context requires a different meaning[.]" MCL 333.27102(gg). In addition, the MMFLA contains a slightly different definition, but otherwise appears to be substantively the same.

(*i*) Verifying registry identification cards.

(*ii*) Tracking marihuana transfer and transportation by licensees, including transferee, date, quantity, and price.

(*iii*) Verifying in a commercially reasonable time that a transfer will not exceed the limit that the registered qualifying patient or registered primary caregiver is authorized to receive under . . . MCL 333.26424." MCL 333.27902(i); see MCL 333.27102(gg).

Substance abuse

- For purposes of MCL 791.240, *substance abuse* "means the taking of alcohol or other drugs at dosages that place an individual's social, economic, psychological, and physical welfare in potential hazard or to the extent that an individual loses the power of self-control as a result of the use of alcohol or drugs, or while habitually under the influence of alcohol or drugs, endangers public health, morals, safety, or welfare, or a combination thereof." MCL 791.240(5)(b).

T

Technical probation violation

- For purposes of MCL 771.4b, *technical probation violation* "means a violation of the terms of a probationer's probation order that is not listed below, including missing or failing a drug test, [MCL 771.4b(9)(b)(*ii*)] notwithstanding. Technical probation violations do not include the following:

  (*i*) A violation of an order of the court requiring that the probationer have no contact with a named individual.

  (*ii*) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

  (*iii*) The consumption of alcohol by a probationer who is on probation for a felony violation of . . . MCL 257.625.

  (*iv*) Absconding." MCL 771.4b(9)(b).

Termination

- For purposes of Chapter 10D of the Revised Judicature Act, *termination* "means removal from the family treatment court due to a new offense, noncompliance, absconding, voluntary withdrawal, medical discharge, or death." MCL 600.1099aa(h).

THC

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *THC* "means any of the following:

  (*i*) Tetrahydrocannabinolic acid.

  (*ii*) Unless excluded by the cannabis regulatory agency under [MCL 333.27958(2)(c)], a tetrahydrocannabinol, regardless of whether it is artificially or naturally derived.

  (*iii*) A tetrahydrocannabinol that is a structural, optical, or geometric isomer of a tetrahydrocannabinol described in subparagraph (*ii*)." MCL 333.27953(aa).

Tier I offense

- For purposes of the Sex Offenders Registration Act (SORA), *tier I offense* "means 1 or more of the following:

  (*i*) A violation of [MCL 750.145c(4)].

  (*ii*) A violation of [MCL 750.335a(2)(b)], if a victim is a minor.

  (*iii*) A violation of . . . MCL 750.349b, if the victim is a minor.

  (*iv*) A violation of [MCL 750.449a(2)].

  (*v*) A violation of [MCL 750.520e or MCL 750.520g(2)], if the victim is 18 years or older.

  (*vi*) A violation of . . . MCL 750.539j, if a victim is a minor.

  (*vii*) Any other violation of a law of this state or a local ordinance of a municipality, other than a tier II or tier III offense, that by its nature constitutes a sexual offense against an individual who is a minor.

  (*viii*) An offense committed by a person who was, at the time of the offense, a sexually delinquent person[.]

  (*ix*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*viii*).

(*x*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*ix*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law." MCL 28.722(s).

Tier II offense

- For purposes of the Sex Offenders Registration Act (SORA), *tier II offense* "means 1 or more of the following:

  (*i*) A violation of . . . MCL 750.145a.

  (*ii*) A violation of . . . MCL 750.145b.

  (*iii*) A violation of [MCL 750.145c(2) or MCL 750.145c(3)].

  (*iv*) A violation of [MCL 750.145d(1)(a)], except for a violation arising out of a violation of . . . MCL 750.157c.

  (*v*) A violation of . . . MCL 750.158, committed against a minor unless either of the following applies:

    (A) All of the following:

      (I) The victim consented to the conduct constituting the violation.

      (II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

      (III) The individual is not more than 4 years older than the victim.

    (B) All of the following:

      (I) The victim consented to the conduct constituting the violation.

      (II) The victim was 16 or 17 years of age at the time of the violation.

      (III) The victim was not under the custodial authority of the individual at the time of the violation.

  (*vi*) A violation of . . . MCL 750.338, [MCL] 750.338a, and [MCL] 750.338b, committed against an individual 13 years of age or older but less than 18 years of age. This subparagraph does not apply if the court determines that either of the following applies:

(A) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was at least 13 years of age but less than 16 years of age at the time of the violation.

(III) The individual is not more than 4 years older than the victim.

(B) All of the following:

(I) The victim consented to the conduct constituting the violation.

(II) The victim was 16 or 17 years of age at the time of the violation.

(III) The victim was not under the custodial authority of the individual at the time of the violation.

(*vii*) A violation of [MCL 750.462e(a)].

(*viii*) A violation of . . . MCL 750.448, if the victim is a minor.

(*ix*) A violation of . . . MCL 750.455.

(*x*) A violation of [MCL 750.520c, MCL 750.520e, or MCL 750.520g(2)], committed against an individual 13 years of age or older but less than 18 years of age.

(*xi*) A violation of [MCL 750.520c] committed against an individual 18 years of age or older.

(*xii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*xi*).

(*xiii*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*xii*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law." MCL 28.722(u).

Tier III offense

- For purposes of the Sex Offenders Registration Act (SORA), *tier III offense* "means 1 or more of the following:

(*i*) A violation of . . . MCL 750.338, [MCL] 750.338a, and [MCL] 750.338b, committed against an individual less than 13 years of age.

(*ii*) A violation of . . . MCL 750.349, committed against a minor.

(*iii*) A violation of . . . MCL 750.350.

(*iv*) A violation of [MCL 750.520b, MCL 750.520d, or MCL 750.520g(1)]. This subparagraph does not apply if the court determines that the victim consented to the conduct constituting the violation, that the victim was at least 13 years of age but less than 16 years of age at the time of the offense, and that the individual is not more than 4 years older than the victim.

(*v*) A violation of [MCL 750.520c or MCL 750.520g(2)], committed against an individual less than 13 years of age.

(*vi*) A violation of . . . MCL 750.520e, committed by an individual 17 years of age or older against an individual less than 13 years of age.

(*vii*) An attempt or conspiracy to commit an offense described in subparagraphs (*i*) to (*vi*).

(*viii*) An offense substantially similar to an offense described in subparagraphs (*i*) to (*vii*) under a law of the United States that is specifically enumerated in 42 USC 16911, under a law of any state or any country, or under tribal or military law." MCL 28.722(w).

Tissue culture

- For purposes of the Medical Marihuana Facilities Licensing Act, *tissue culture* "means a marihuana plant cell, cutting, tissue, or organ, that is kept under a sterile condition on a nutrient culture medium of known composition and that does not have visible root formation. A tissue culture is not a marihuana plant for purposes of a grower." MCL 333.27102(hh).

Trafficking

- For purposes of MCL 777.45, *trafficking* "means the sale or delivery of controlled substances or counterfeit controlled substances on a continuing basis to 1 or more other individuals for further distribution." MCL 777.45(2)(c).

Traffic offense

- For purposes of Chapter 10A (drug treatment courts) of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, *traffic offense* "means a violation of the Michigan vehicle code, 1949 PA 300, MCL 257.1 to [MCL] 257.923, or a violation of a local ordinance substantially corresponding to a violation of that act, that involves the operation of a vehicle and, at the time of the violation, is a felony or misdemeanor." MCL 600.1060(f).

Tribal marihuana business

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *tribal marihuana business* "means a business that meets all of the following conditions:

  (*i*) The business engages in the type of activities licensed under this act.

  (*ii*) The business is not a marihuana establishment.

  (*iii*) The business is wholly owned by a qualifying Indian tribe, the enrolled members of a qualifying Indian tribe, or a combination of a qualifying Indian tribe and the members of that qualifying Indian tribe.

  (*iv*) The business is located in this state and in the Indian lands of the qualifying Indian tribe described in [MCL 333.27953(bb)(*iii*)].

  (*v*) The business is subject to a tax or fee described in [MCL 333.27953(y)(*iii*)]." MCL 333.27953(bb).

U

Ultimate user

- For purposes of Article 7 of the PHC, *ultimate user* "means an individual who lawfully possesses a controlled substance for personal use or for the use of a member of the individual's household, or for administering to an animal owned by the individual or by a member of the individual's household." MCL 333.7109(8).

Unreasonably impracticable

- For purposes of the Michigan Regulation and Taxation of Marihuana Act, *unreasonably impracticable* "means that the measures necessary to comply with the rules or ordinances adopted pursuant to this act subject licensees to unreasonable risk or require such a high investment of money, time, or any other resource or asset that a reasonably prudent businessperson would not operate the marihuana establishment." MCL 333.27953(cc).

Usable marihuana

- For purposes of MCL 750.474, the Michigan Medical Marihuana Act, and the Medical Marihuana Facilities Licensing Act, *usable marihuana* "means the dried leaves, flowers, plant resin, or extract of the marihuana plant, but does not include the seeds, stalks, and roots of the plant."MCL 333.26423(o); MCL 333.27102(ii); MCL 750.474(1).

Usable marihuana equivalent

- For purposes of the Michigan Medical Marihuana Act, *usable marihuana equivalent* "means the amount of usable marihuana in a marihuana-infused product that is calculated as provided in [MCL 333.26424(c)]." MCL 333.26423(p).

V

Vehicle

- For purposes of MCL 333.7401c and the Michigan Vehicle Code (MVC), *vehicle* means "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks and except, only for the purpose of titling and registration under [the MVC], a mobile home as defined in [MCL 125.2302.]" MCL 257.79. MCL 333.7401c(7)(g).

Veteran

- For purposes of Chapter 12 of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (veterans treatment courts),

veteran "means an individual who meets both of the following:

(*i*) Is a veteran as defined in . . . MCL 35.61.[17]

(*ii*) Served at least 180 days of active duty in the armed forces of the united states." MCL 600.1200(h).[18]

Veterans treatment court

- For purposes of Chapter 12 of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (veterans treatment courts), *veterans treatment court* "means a court adopted or instituted under [MCL 600.1201] that provides a supervised treatment program for individuals who are veterans and who abuse or are dependent upon any controlled substance or alcohol or suffer from a mental illness."MCL 600.1200(j).

Violent felony

- For purposes of MCL 791.236, *violent felony* "means an offense against a person in violation of . . . MCL 750.82, [MCL] 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.87, [MCL] 750.88, [MCL] 750.89, [MCL] 750.316, [MCL] 750.317, [MCL] 750.321, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, and [MCL] 750.530." MCL 791.236(20).

Violent offender

- For purposes of Chapter 10A of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (drug treatment courts), *violent offender* "means an individual who is currently charged with or has pled guilty to, or, if the individual is a juvenile, is currently alleged to have committed or has admitted responsibility for, an offense involving the death of or serious bodily injury to any individual, whether or not any of the circumstances are an element of the offense, or an offense that is criminal sexual conduct of any degree." MCL 600.1060(g).

---

[17] MCL 35.61 defines *veteran* as "an individual who served in the United States Armed Forces, including the reserve components, and was discharged or released under conditions other than dishonorable. Veteran includes an individual who died while on active duty in the United States Armed Forces."

[18] "Veterans who served in more than 1 period of war service may combine their active duty days of service to satisfy the length of active duty service required by veteran benefit statutes or acts." MCL 35.62.

- For purposes of Chapter 10B of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (mental health courts), *violent offender* "means an individual who is currently charged with, or has been convicted of, an offense involving the death of, or a serious bodily injury to, any individual, whether or not any of these circumstances are an element of the offense, or with criminal sexual conduct in any degree." MCL 600.1090(i).

- For purposes of Chapter 10C of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (juvenile mental health courts), *violent offender* "means a juvenile who is adjudicated on or has been, within the preceding 5 years, adjudicated on 1 or more of the following offenses:

  (*i*) First degree murder.

  (*ii*) Second degree murder.

  (*iii*) Criminal sexual conduct in the first, second, or third degree.

  (*iv*) Assault with intent to do great bodily harm less than murder in violation of . . . MCL 750.84." MCL 600.1099b(j).

- For purposes of Chapter 12 of the Revised Judicature Act of 1961, MCL 600.101 *et seq.*, (veterans treatment courts), *violent offender* "means an individual who is currently charged with or has pled guilty to an offense involving the death of, or a serious bodily injury to, any individual, whether or not any of these circumstances are an element of the offense, or an offense that is criminal sexual conduct in any degree." MCL 600.1200(k).

- For purposes of Chapter 10D of the Revised Judicature Act, *violent offender* "means an individual who is currently charged with or has pled guilty to an offense involving the death of or serious bodily injury to any individual, whether or not death or serious bodily injury is an element of the offense, or an offense that is criminal sexual conduct of any degree." MCL 600.1099aa(i).

Visibly intoxicated

- For purposes of MCL 333.27961a, *visibly intoxicated* "means displaying obvious, objective, and visible evidence of intoxication that would be apparent to an ordinary observer." MCL 333.27961a(13)(c).

Visiting qualifying patient

- For purposes of the Michigan Medical Marihuana Act, *visiting qualifying patient* "means a patient who is not a resident of this state or who has been a resident of this state for less than 30 days." MCL 333.26423(q).

W

Written certification

- For purposes of the Michigan Medical Marihuana Act, *written certification* "means a document signed by a physician, stating all of the following:

  (1) The patient's debilitating medical condition.

  (2) The physician has completed a full assessment of the patient's medical history and current medical condition, including a relevant medical evaluation.

  (3) In the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(r).

Written notice

- For purposes of MCL 333.27961a, *written notice* "means a communication in writing that does all of the following:

  (*i*) Identifies the minor or alleged visibly intoxicated person by name and address.

  (*ii*) States all of the following:

    (A) The date of the alleged violation of [MCL 333.27961a(1)].

    (B) The name and address of the injured or killed individual.

    (C) The location and circumstances of the accident or event that caused injury or death.

    (D) The date of retention of the person or law firm giving the notice." MCL 333.27961a(13)(d).

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