

# ***SENTENCING GUIDELINES UPDATES***

*MCOLES SEMINAR, SAGINAW DECEMBER 2008*

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## **I. STATUTORY AMENDMENTS 2006-2008:**

### ***Prior Record Variables 1, 2, 3, 4 and Out of State/Federal Convictions***

Effective January 9, 2007, the first four prior record variables were amended to permit points to be assessed for Michigan felony convictions or comparable juvenile adjudications that have that have *not* been classified by the legislative sentencing guidelines (i.e., offenses not found in the crime list). Moreover, out of state or federal convictions that do not “correspond” to a crime listed in the guidelines may be counted based on the length of the maximum possible sentence. Offenses punishable by ten years or more are considered high-severity offenses, while offenses punishable by less than ten years are considered low-severity offenses. MCL 777.51-54. 2006 PA 655.

*Note: Applies to Crimes Committed on or after 1-9-07. See MCL 769.34(2).*

### ***Offense Variable 9– Scoring for Victims of Property Loss Authorized***

Effective March 30, 2007, Offense Variable 9 now permits points for victims of property loss. MCL 777.39. 2006 PA 548.

*Note: Applies to Crimes Committed on or after 3-30-07. See MCL 769.34(2).*

### ***Special Offenses– Scoring the Offense Variables***

Effective January 9, 2007, the statute pertaining to the scoring of SPECIAL offenses, MCL 777.21(4)(b), was amended to provide that when scoring these offenses, both the offense variables for the SPECIAL offense and the offense variables for the underlying offense are to be scored.

Note: With this amendment, there is now support for scoring the guidelines for a one-year misdemeanor offense that is enhanced as a second or subsequent controlled substance offense under MCL 333.7413 (e.g., possession of marijuana as a second controlled substance offense). While the enhanced offense would still be considered a misdemeanor under *People v Wryick*, 474 Mich 947; 707 NW2d 188 (2005), it is possible to score the guidelines for this offense because there is a new default crime class (Class G) for cases where the underlying offense is a misdemeanor and the guidelines are being scored for a SPECIAL offense (SPECIAL offenses include second or subsequent controlled substance offenses, conspiracy, delivery to a minor, inducing a minor to

commit a felony, etc.). *See also, People v Rich*, unpublished opinion of the Court of Appeals, issued November 16, 2006 (Docket No. 263442) (legislative guidelines apply to possession of marijuana as a second controlled substance offense).

### ***Sexual Delinquents***

Effective February 1, 2006, the statute pertaining to sexual delinquents, MCL 750.335a, was amended to provide that gross indecency committed by an individual who is at the time a sexually delinquent person “*is punishable* by imprisonment for an indeterminate term, the minimum which is 1 day and the maximum which is life.” The previous statute provided that the court “*may*” sentence a sexually delinquent person to an indeterminate term of one day to life imprisonment. MCL 750.335a. 2005 PA 300.

In *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007), the Supreme Court held that under the previous statutory language (“*may be punishable by*”), the legislative sentencing guidelines applied. The Court expressed no opinion on whether the legislative sentencing guidelines apply to the amended version (“*is punishable by*”). The *Buehler* court also held that when the guidelines provided for a prison cell under the old statute, probation would constitute a departure from the guidelines and is not permitted absent substantial and compelling reasons.

## **II. NEW MICHIGAN SUPREME COURT OPINIONS AND ORDERS:**

**PRVs** -Foreign Convictions cannot be scored under the prior record variables, but may constitute a valid reason to depart from the guidelines range. Justices Cavanagh and Corrigan would further restrict such departures to convictions where the foreign nation affords due process rights. *People v Price*, 477 Mich 1; 723 NW2d 201 (2006).

**PRV 1** – Trial court erroneously scored 25 points for prior high severity felony conviction based on Texas conviction that was labeled “*assault threatening bodily injury.*” *People v Gonzalez*, 480 Mich 1150; 746 NW2d 303 (2008).

**OV 1, OV 2, OV 3** – Multiple offender instruction does not apply where defendant was not convicted of the same offenses as his co-defendants. *People v Quentin Johnston*, 478 Mich 903; 732 NW2d 531 (2007).

**OV 1** – Error to score five points for armed robbery offense. *People v Greene*, 477 Mich 248; 730 NW2d 478 (2007) (five points cannot be assessed when the sentencing offense is either felonious assault or armed robbery, per statutory instruction).

**OV 3** – Error to score five points for bodily injury not requiring medical treatment where the record was insufficient to support the scoring. *People v Woolsey*, 480 Mich 909; 739 NW2d 611 (2007).

**OV 9** – Trial court erred in scoring a second victim of sexual abuse by the defendant where the incident was uncharged and was not part of the offense for which the defendant was being sentenced. *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008).

**OV 10** – In order to score 15 points for predatory conduct, there must be a *vulnerable* victim and *exploitation* of that vulnerability in addition to pre-offense conduct directed at a victim for the primary purpose of victimization. *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008).

*See also, People v Davis*, \_\_\_ Mich \_\_\_ (Docket No. 136073, 9/10/08), *vacating in part* 277 Mich App 676; 747 NW2d 555 (2008) (remanded to trial court for reconsideration of OV 10 post-*Cannon*; Court of Appeals had found no error in scoring 15 points where defendant cased the store and concluded that lone female storeowner posed a suitable victim, although he greatly underestimated her ability to thwart the co-defendant).

*See also, People v Russell*, \_\_\_ Mich \_\_\_; 755 NW2d 663 (9/24/08) (remanding to Court of Appeals to address whether predatory conduct may be assessed where the victim is a **police decoy**). (Oakland County)

*See also People v Kaddis*, \_\_\_ Mich \_\_\_; 755 NW2d 662 (9/24/08) (remanding to Court of Appeals to address whether predatory conduct may be assessed where the victim is a **police decoy**, and whether “a defendant’s course of conduct may be considered as ‘pre-offense’ conduct for purposes of finding predatory conduct under *People v Cannon*, *supra*). (Livingston County)

*See also People v Saif*, \_\_\_ Mich \_\_\_; 755 NW2d 663 (9/24/08) (same as *Kaddis*). (Macomb County)

**OV10** – Trial court did not err in scoring 10 points for exploitation of youth in criminal sexual conduct case where defendant was 20 and victim was 15. *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006).

*But see, People v Aaron Brown*, 480 Mich 1150; 737 NW2d 742 (2007) (remanded to Court of Appeals to decide whether five points properly scored where no physical differences documented in the record “but the defendant is male and the victim is female[.]”)

**OV 11** – Trial court erred in scoring 25 points under OV 11 because “the two penetrations that formed the bases of the two sentencing offenses in this case occurred on different dates and there is no evidence they arose out of each other. . .” *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006).

**OV 11**- Trial court erred in scoring 50 points under OV 11 for “penetrations that did not arise out of the particular sentencing offenses.” *People v Amos*, 480 Mich 852; 737 NW2d 704 (2007).

*See also, People v Van Cleve*, 480 Mich 887; 738 NW2d 709 (2007).

*People v Bell*, 475 Mich 878; 715 NW2d 773 (2006); *People v Minter*, 475 Mich 865; 714 NW2d 296 (2006); *People v Kuroda*, 475 Mich 864; 714 NW2d 295(2006).

**OV 13** – Error to score 50 points where sentencing offense is CSC second degree. *People v Spencer*, 477 Mich 1086; 729 NW2d 225 (2007).

**OV 20** – 100 points improperly scored where defendant’s threat to use explosive device to harm others, communicated via email to 16-year old girl in another state, did not constitute an “act of terrorism,” as defined by MCL 777.543b. *People v Osantowski*, 481 Mich 103; 748 NW2d 799 (2008).

***HARMLESS ERROR AND MISSCORED GUIDELINES:***

March 2007:

In a 7-0 decision issued March 28, 2007, the Supreme Court remanded for resentencing in a case where the prosecutor conceded error in the scoring of Offense Variable 13 and the error reduced the applicable guidelines range. Although the trial court had departed above the guidelines range at the time of sentencing, the Supreme Court noted that the trial court had not stated that it would impose the same sentence despite the scoring error, but rather had based the extent of the departure on the guidelines range. As it was “unclear that the trial court would have departed to the same extent under correctly scored guidelines,” resentencing was required. *People v Horan*, 477 Mich 1062; 728 NW2d 457 (2007).

October 2007:

In 7-0 decision from October 17, 2007, the Supreme Court remanded for resentencing in a case where the sentencing guidelines were scored under OV 3 (bodily injury), finding there was insufficient evidence to support the five point assessment for bodily injury not requiring medical treatment. The Court noted that “[w]hile resentencing would not be required where the trial judge has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range,” the trial court had not provided this statement in response to the challenge to OV 3, and therefore resentencing was required. *People v Woolsey*, 480 Mich 909; 739 NW2d 611 (2007).

January 2008:

In a 7-0 decision issued January 25, 2008, the Supreme Court remanded for resentencing in a case where the sentencing guidelines were misscored under PRV 5 (prior misdemeanor convictions) and the sentencing judge had not indicated that it would have departed to the same extent under the correctly scored guidelines. *People v Lathrop*, 480 Mich 36; 743 NW2d 565 (2008).

Justices Weaver, Young and Corrigan indicated in concurring opinions in the *Lathrop* case that trial judges should state at sentencing, in the appropriate case, their intention that the sentence would remain the same despite a misscoring of the sentencing guidelines. Justice Kelly responded in her own concurring opinion that “[h]armless error review is inapplicable to an invalid sentence” and a “judge exceeds the scope of his authority and issues an invalid sentence when he or she departs from a sentence range that results from incorrect scoring.”

February 2008:

In a unanimous order dated February 1, 2008 (Corrigan, J., not participating), the Supreme Court remanded for resentencing based on a misscoring of Offense Variable 11 (multiple penetrations). The Court did not address harmless error and did not mention whether the trial judge had or had not indicated at sentencing that the error would be harmless. The Court of Appeals originally affirmed the scoring, finding that additional penetrations of the victim resulting from on-going abuse (but apparently on different dates) could be viewed as ‘arising out of’ the sentencing offense for purposes of OV 11 because the penetrations could be “considered part of a pattern of abuse of his [defendant’s] close relationship with the victim’s mother . . . the subsequent penetrations occurred because defendant influenced the victim not to tell his mother by convincing him [the victim] that she would not believe his allegations.” The Supreme Court reversed, concluding “there was no record evidence to support a finding that any charged or uncharged criminal sexual penetration arose out of a sentencing offense.” *People v Goodman*, 480 Mich 1052; 743 NW2d 890 (2008).

May 2008:

In a unanimous order dated May 27, 2008, the Supreme Court remanded for resentencing based on a misscoring of Offense Variable 9 and a reduced guidelines range. The Court noted that the trial judge’s statements on the record denying the post-conviction motion for resentencing “do not clearly indicate whether the court would impose the same sentences regardless of any scoring error.” *People v Whitman*, 481 Mich 874; 748 NW2d 821 (2008).

#### ***DEPARTURES FROM INTERMEDIATE SANCTION CELLS:***

In a unanimous decision, the Supreme Court held that when the sentencing guidelines recommend an intermediate sanction penalty for a crime committed in prison by a prisoner, it is a departure to impose a prison sentence. *People v Muttscheler*, 481 Mich 372; 750 NW2d 159 (2008). The Court left open whether the parties could bargain for such a sentence and whether the trial court could impose a consecutive jail sentence that would be served, per court direction, in the prison setting.

In a short order remanding for resentencing, the Supreme Court held that the trial court improperly relied on the erroneous assumption that defendant would serve additional time in prison on his parole matter as a reason to depart from the guidelines and impose a prison sentence. The Court also noted that “the possibility of a current prisoner or

parolee serving a sentence in the county jail does not relate to the seriousness of the offense or the culpability of the offender, and is not a compelling reason to deny the defendant an intermediate sanction . . . .” *People v Ratliff*, 480 Mich 1108; 745 NW2d 762 (2008).

***DEPARTURES AND PROPORTIONALITY STANDARD:***

In a late July 2008 opinion, the Court held that the trial court must justify the extent of the departure in addition to articulating substantial and compelling reasons for the departure when choosing to sentence above or below the sentencing guidelines range. Justice Markman referred to this as the “two-part burden on the sentencing court” in a concurring opinion. The majority held that it is appropriate to “ground” or “anchor” a departure in the sentencing guidelines (e.g., to compare the departure to other cells within the appropriate sentencing grid). The Court reversed a sentence of 30 to 50 years for first-degree CSC where the guidelines recommended a range of 9 to 15 years imprisonment and the trial judge had not explained the “extreme upward departure.” *People v Gary Smith*, 482 Mich 292; 754 NW2d 284 (2008).

The *Smith* Court voiced concern that without a proportionality test, the goals of sentencing uniformity and meaningful appellate review would be lost. The Court noted that the guidelines “were designed to avoid individual and regional variation in sentencing.”

*Proper to Depart Based on:*

1. Abuse over prolonged period of time (15 months).
2. Defendant’s threat to evict the victim and her family if she told anyone.
3. Frightening gynecological exam for 10-year old.

*Generally Not Proper to Depart Based on:*

1. Exploitation of the position of trust without considering the scoring of OV 10 and whether this factor was given inadequate weight by the guidelines.
2. The heinous nature of the crime (noting that “[a]ll criminal-sexual conduct cases involving young children are heinous.”)
3. Commonplace repercussions of criminal activity (gynecological exams in rape cases- although the exam in *Smith* “added considerably to the victim’s trauma.”)

***OTHER INVALID DEPARTURE REASONS:***

*Defendant’s Sobriety and Ability to Refrain From Crime While Sober:*

In *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007), the Supreme Court agreed with the Court of Appeals that the departure reasons were not objective and verifiable

where the trial court relied on the defendant's continued sobriety and ability to conform his behavior when not inebriated as reasons to depart from the guidelines.

*Factors Already Scored Within Guidelines Without Appropriate Analysis:*

In *People v Jackson*, 474 Mich 996; 707 NW2d 597 (2006), the Supreme Court remanded for resentencing where the trial court relied on the "excessive brutality" of the crime as a departure reason without explaining how the characteristic was given inadequate or disproportionate weight by the guidelines. The Court reversed as well because the trial judge relied on the fact that the defendant did not "step up to the plate" and admit his guilt, as his co-defendant's had, and instead forced the victim to testify at trial.

Corrigan, J., concurring, stated that the "magic language" that the guidelines have "given inadequate or disproportionate weight" to a factor "is now indisputably required" and "sentencing judges need to comply precisely with the *Babcock* requirements so that unnecessary remands may be avoided." 707 NW2d at 598, 599.

### **III. NEW COURT OF APPEALS DECISIONS:**

**Second Controlled Substance Offenses** – Court *may* double the minimum and maximum terms of guidelines range when sentencing for second controlled substance offense, although enhancement is not required. *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005).

**Second CSC Offenses** – the legislative guidelines do apply to offenders sentenced for a second CSC offense even if there is a mandatory minimum term of at least five years under MCL 750.520f. *See People v Wilcox*, 280 Mich App 53; \_\_\_ NW2d \_\_\_ (2008). *See also, People v Walton*, unpublished opinion of the Court of Appeals, issued June 3, 2008 (Docket No. 276161).

**PRV 5** – Error to score based on prior charge of possession of marijuana for which the defendant was assigned 7411 status (MCL 333.7411), where the defendant received discharge and dismissal of proceedings. *People v James*, 267 Mich App 675; 705 NW2d 724 (2005).

**PRV 5** – Failure to stop at the scene of a property damage accident is not a scorable misdemeanor because it is not a crime against the person, property, a controlled substance offense or a weapon offense. "To the extent damage to a vehicle must occur for this misdemeanor to be committed, the damage is complete before the failure to stop, and it is the failure to stop, not the damage, that is proscribed by statute." *People v Glover*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2007 (Docket No. 272993).

**PRV 7** – Possession of marijuana as a second controlled substance offense is a felony for purposes of scoring concurrent felony convictions under PRV 7. While the offense is a misdemeanor under the Public Health Code, it is considered a felony under the Code of

Criminal Procedure (where the statutory sentencing guidelines are found). *People v Pounders*, unpublished opinion per curiam of the Court of Appeals, issued October 30, 2007 (Docket No. 272039).

**OV 1** - HIV-infected blood is “harmful biological substance” and can support scoring of 20 points where defendant spit at officer while bleeding from the mouth. *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007).

**OV 3** - Error to score 5 points for physical injury based on prosecutor’s “file notes” indicating victim suffered rectal pain where no record evidence to support the scoring. *People v Endres*, 269 Mich App 414; 711 NW2d 398 (2006).

*See also, People v Woolsey*, 480 Mich 909; 739 NW2d 611 (2007) (resentencing due to insufficient evidence of bodily injury under OV 3).

**OV 4** – While the trial court reasonably assumed that the victim would have suffered psychological injury from a carjacking in which the victim and her three young children remained in the car, there was no record evidence to support the scoring and the victim, who had made a request for restitution, did not mention psychological injury and did not speak at sentencing; thus, the variable was improperly scored. *People v Perry*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2008 (Docket No. 278484).

*See also, People v Biskner*, unpublished opinion per curiam of the Court of Appeals, issued July 8, 2008 (Docket No. 278006) (error to score OV 4 in case involving serious assault and home invasion where “[a]lthough the prosecutor referred to a victim’s impact statement describing some emotional injury, the statement does not appear to have been presented to the trial court.”

*See also, People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003) (error to score ten points where record reflects no evidence of serious psychological harm as a result of forceful purse snatching).

*But see, People v Wilkens*, 267 Mich App 728; 705 NW2d 737 (2005) (no error in scoring ten points where minor male victim’s attitude took disturbing turn during making of sexually abusive videotape and his demeanor on the stand was rather casual, indicating severe psychological injury that rendered him unable to comprehend the gravity of his actions; no error in scoring variable as to minor female victim where defendant’s actions caused her anxiety, altered her demeanor and caused her to withdraw as well as result of making of sexually abusive videotape).

**OV 9** – Victims of related but uncharged or dismissed crimes cannot be scored under OV 9; the variable is limited to the number of victims endangered during the specific transaction leading to the offense of conviction (i.e., the offense being scored by the guidelines). *People v Gullett*, 277 Mich App 214; 744 NW2d 200 (2007).

*See also, People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008) (error to score second victim of sexual abuse where the incident was uncharged and not part of the instant sentencing offense).

**OV 10** – No error in scoring 15 points for predatory conduct where the defendant cased the store, found a lone female storeowner and concluded that she made a suitable victim for the robbery scheme hatched by him and his co-defendant. The Court noted that the defendant’s “gross miscalculation of his adversary’s capabilities in thwarting [the co-defendant] does not dilute the egregiousness of [defendant’s] actions or lower the score.” *People v Davis*, 277 Mich App 676; 747 NW2d 555 (2008).

**OV 19** – Properly scored for force and threats aimed at store loss prevention officers as they were trying to arrest defendant for shoplifting. Court finds interference with the administration of justice because loss prevention officers are statutorily authorized to make an arrest under MCL 764.16(d), and court notes that the wording of the variable refers to threats used against a “person” rather than police officers. *People v Passage*, 277 Mich App 175; 743 NW2d 746 (2007).

**OV19** – No error in scoring 15 points under OV 19 for using force or threat of force to interfere with the administration of justice where defendant threatened to kill the CSC victim *before* he was charged with the CSC crime. Defendant knew the victim “would be the primary witness” against him if criminal charges were filed. *People v Endres*, 269 Mich App 414; 711 NW2d 398 (2006).

**OV 19** – Ten points properly scored where defendant was convicted of perjury even though the conduct necessarily involved an interference with the administration of justice. *People v Underwood*, 278 Mich App 334; 750 NW2d 612 (2008).

#### ***DEPARTURE FROM THE GUIDELINES:***

The Court of Appeals reversed a downward departure in an armed robbery case, noting that the smaller size of the knife was not an appropriate departure reason where the presence of a weapon did not increase the recommended range of the guidelines at all. The Court also was not impressed by the defendant’s age, work record and lack of a prior record. The Court would not rule out, however, a departure based on age and lack of a prior record, although noting that 22 is not such an old age for lack of a prior record. The Court also noted that an “extraordinary employment history” could support a downward departure. *People v Young*, 276 Mich App 446; 740 NW2d 347 (2007).

The Court of Appeals affirmed an upward departure in a case where defendant received 50 points under OV 7 for aggravated physical abuse, but the guidelines did not account for the *multiple* acts of aggravated physical abuse. Moreover, OV 13 did not adequately account for the 18 crimes against the person. And the defendant’s total offense variable scores were 120 and 135 points, well beyond the upper limit of the applicable grids. The Court noted, however, that the trial court improperly departed based on the defendant’s

age (43) and the need to keep him away from society for a long time until he could be safely returned. *People v Cline*, 276 Mich App 634; 741 NW2d 563 (2007).

While the Court of Appeals questioned a departure based on the need to protect other children from future sexual abuse, the Court affirmed an upward departure based on the objective fact of the defendant's perjury at trial (as he admitted his perjury at the time of sentencing) and the fact that the sentencing guidelines did not address the situation of sexual abuse of extremely young, defenseless children including the defendant's own four year old son. The Court noted that perjury as a departure reason may be subjective in some cases and would be improper where it cannot be confirmed. *People v Kahley*, 277 Mich App 182; 744 NW2d 194 (2007).

The Court of Appeals also affirmed an upward departure in a case where the defendant was convicted of both marijuana and weapons offenses, but also reportedly threatened to kill police officers. The trial judge departed based on the conclusion that defendant was a threat to the community in general and to police officers in particular in light of the threats, noting that the judge did not believe the defendant's denial of the threats and claim that the officers were lying. The Court of Appeals concluded that the trial judge properly departed based on the threat posed to the community and police officers, and disagreed that the trial judge departed based on defendant's lack of remorse or failure to admit the threats. *People v Uphaus (On Remand)*, 278 Mich App 174; 748 NW2d 899 (2008).

In another case involving repeated similar conduct by the defendant, the Court affirmed a departure where the trial judge noted the similar nature of defendant's pattern of felony crimes and the aggravating circumstances of grooming and stalking the 12-year old CSC victim. *People v Petri*, 279 Mich App 407; \_\_\_ NW2d \_\_\_ (2008). The Court found that while the similar nature of the felony crimes was considered within PRV 1 and OV 13, the trial court properly determined that the guidelines did not adequately account for this factor.

In a decision that squarely sets forth the standard for departures based on future dangerousness, the Court of Appeals held that a trial judge may depart from the guidelines based on the anticipatory harm to a victim that is based on an established pattern of escalating violence toward that specific victim. The Court contrasted this type of permissible departure from an impermissible departure based on a generalized concern for future dangerousness that is not based on objective and verifiable factors. The Court also concluded that the ten-year departure was proportionate based on the repetitive and increased severity of defendant's criminal conduct toward his wife which included an attempt to solicit her murder while he was in custody for kidnapping and raping her. *People v Horn*, 279 Mich App 31; \_\_\_ NW2d \_\_\_ (2008).

#### **IV. AREAS TO WATCH:**

##### **DO THE GUIDELINES APPLY TO HYTA?**

Probably "No" as HYTA provides an alternative sentencing scheme with limited sentencing options (no more than 12 months jail, three years probation or three years in

prison) and MCL 762.11 *et seq* cannot be found in the Crime List or the Guidelines Legislation. But note HYTA diversion is considered a “conviction” for scoring PRV 1-5 under MCL 777.50.

*\*\*Still Wise to Score the Guidelines for Discretionary Reference\*\**

### **OFFENSE VARIABLE 13 – Pattern of Offenses over Five Years**

*Can a Pattern be Found Based on Multiple Offenses Committed During the Same Transaction?*

*See People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (defendant's four concurrent convictions for making child sexually abusive material establishes pattern of three or more crimes against a person); *People v Bradley*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2006 (Docket No. 266556) (follows *Harmon*, scoring supported by two instant assault convictions and one prior assault); *People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 272731) (properly scored 25 points for instant convictions of assault with intent to murder, assault with intent to rob armed and felonious assault for conduct involving three separate individuals, following *Harmon*); *People v Murray*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2008 (Docket No. 270983) (defendant properly scored 25 points for three contemporaneous armed robbery convictions arising out of same transaction, relying on *Harmon*); *People v Arnold*, unpublished opinion per curiam of the Court of Appeals, issued September 25, 2007 (Docket No. 271511) (nothing in wording of OV 13 precludes scoring for multiple offenses that are not controlled substance offenses); *People v Mattoon*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2007 (Docket No. 272549) (while panel finds “some merit” to argument that one long assaultive incident did not meet the requirement of a “pattern of felonious criminal activity,” panel is not willing to create an exception for acts committed during same transaction where statute does not provide exception in this situation, but does preclude scoring of multiple acts from same transaction in other settings).

*But see, People v McLaughlin*, 258 Mich App 635, 674 fn.17; 672 NW2d 860 (2003) (in a footnote court notes that OV 13 would be inapplicable to three penetrations that arose out of same incident and formed basis for three concurrent convictions of CSC as “there is no contention or evidence that defendant’s acts constitute a pattern of continuing criminal behavior.”); *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2003 (Docket No. 229137) (distinguishes *Harmon* and finds error in scoring variable based on four concurrent convictions all stemming from one act/incident); *People v Draper*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2004 (Docket No. 243021) (legislature’s use of word “pattern” evinces an intent that only “repeated” conduct may be considered; here, there were no prior convictions and no “repeated conduct,” although the error was harmless because it did not change the recommended range).

**OFFENSE VARIABLE 19 – Interference with the Administration of Justice**

Three Michigan Supreme Court justices (Kelly, Cavanagh and Markman) would grant leave to appeal in a case where the defendant attempted to hide himself and items used to produce methamphetamine when the police arrived at the home to investigate a crime committed by another person. Justice Markman noted that “it would be extraordinary for a criminal perpetrator *not* to attempt to hide evidence of his or her crime or to make such crime less detectable [and] it would seem that OV 19 would almost always be scored under the trial court’s interpretation.” *People v Spangler*, 480 Mich 947; 741 NW2d 25 (2007).

In a recent unpublished decision from the Court of Appeals, the Court held that Offense Variable 19 was miscored where the defendant fled the scene of the crime upon sighting the police, but did not fail to heed a command to stop and did not struggle at the time of arrest. The Court noted:

If merely attempting to evade discovery or capture constituted interference with the administration of justice, OV 19 would have to be scored for virtually every criminal conviction. In this case, the alternative to running away upon sighting the police would have been to stand still and await capture. We do not deem such uncharacteristic submission and surrender necessary to avoid a penalty for interfering with the administration of justice. There is no indication that, in the course of his flight from the police, defendant in fact disobeyed a command to stop. In the absence of a lawful such command, merely running from the police is no more pernicious an activity than running from anyone else, or for any other reason. [*People v Gajos*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2008 (Docket No. 281344).]