

# **MICHIGAN FELONY SENTENCING SEMINAR**

**Circuit Courthouse • 234 W. Baraga • Marquette, MI**

**Friday June 1, 2012**

## **Agenda**

**1:30–1:40 Introductions**

**1:40-2:45 Sentence Law Updates**

Anne Yantus, State Appellate Defender Office

Matt Wiese, Marquette County Prosecutor

**2:45-3:15 Diversion and Alternatives to Conviction/Prison**

Matt Wiese, Marquette County Prosecutor

Anne Yantus, State Appellate Defender Office

**3:15-3:30 BREAK**

**3:30-3:45 Defender Books and Grant Funded Resource Overview**

Marla McCowan, Criminal Defense Resource Center

**3:45-4:30 Everything Else, Q & A Period**

Kevin Ayotte, Field Supervisor, Central and Western U.P.

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of the State Appellate Defender Office with  
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# About our Speakers

**Kevin Ayotte**, MDOC Field Supervisor for the Central and Western U.P. and supervises eight probation/parole offices (Delta, Menominee, Dickinson, Iron, Gogebic, Ontonagon, Houghton and Marquette) with 16 Agents and 6 Clericals in the Central and Western U.P. Mr. Ayotte serves as the Field Operations Administration Co-Chair for the Michigan Prisoner Re-Entry Initiative for the U.P. and on the Bay De Noc Community College Advisory Board. His experience prior to the MDOC was in group homes and residential placements with delinquent/emotionally disturbed juveniles in Wisconsin and Illinois and as a juvenile probation officer, Waukegan (Lake County), IL. He is an adjunct instructor at Bay De Noc Community College teaching Criminal Justice courses in the fall and winter semesters and holds a B.S. in Criminal Justice from Northern Michigan University.

**Marla McCowan**, Manager - Criminal Defense Resource Center. Ms. McCowan has been an Assistant Defender at SADO since 1998 and retains caseload responsibilities as CDRC manager. She previously served as Staff Attorney/Pro Se Clerk in the United States District Court for Michigan's Eastern District, and has authored numerous editions of the Defender Habeas Book. An experienced educator, Ms. McCowan has served as an Adjunct Professor in Appellate Practice Clinics at both Wayne State University Law School and the University of Detroit Mercy School of Law. She also represented the Defendant-Appellee in *Renico v Lett*, a case recently heard in the United States Supreme Court.

**Matthew J. Wiese**, Chief Prosecuting Attorney, Marquette County, Michigan. Mr. Wiese received his BS from Northern Michigan University in 1984, and his JD from Vermont Law School in 1987. He previously served as the Chief Assistant Prosecuting Attorney and has over 20 years of prosecution experience. Throughout his career in prosecution, he has specialized in prosecuting domestic violence, sexual assault, stalking, and other crimes of personal violence. He assisted in developing and promoting a county-wide law enforcement domestic violence policy which has been in effect in Marquette County since 1994. Mr. Wiese is active in the Marquette Community volunteering his time and was recognized by the NMU Alumni Association in 2005 with the Civic Leadership Award. He currently teaches at NMU as an adjunct professor with the criminal justice department and at NMU's Regional Police Academy. He also conducts legal update seminars for law enforcement annually throughout Michigan's Upper Peninsula.

**Anne Yantus**, managing attorney with the State Appellate Defender Office. Ms. Yantus specializes in plea and sentencing appeals in the trial and appellate courts of Michigan. She also teaches a criminal sentencing course at the University of Detroit-Mercy School of Law, and is teaching a corrections law class for Baker College. She is a frequent speaker on plea and sentencing matters, and in 2010 co-authored a chapter on circuit court sentencing for Michigan Criminal Procedure, a book published by the Institute for Continuing Legal Education. She currently serves on the editorial advisory committee to the Michigan Judicial Institute's Felony Sentencing Monograph that is part of their Criminal Procedure Monograph Series.

## **FELONY SENTENCING SEMINAR**

Marquette, MI; June 1, 2012

By: Anne Yantus

### **I. PENDING IN THE UNITED STATES SUPREME COURT**

#### ***Cert Granted:***

Whether the rule of *Apprendi v New Jersey*, 530 US 466 (2011), applies to the imposition of criminal fines? *Southern Union Co. v United States*, (No. 11-94, 11/29/11).

#### ***Cert Granted:***

Whether the Eighth and Fourteenth Amendments preclude a mandatory life sentence without possibility of parole for homicide committed by a juvenile offender (i.e., one under the age of 18)? *Miller v Alabama*, 132 S Ct 548 (2011) (capital murder by 14 year old); *Jackson v Hobbs*, 132 S Ct 548 (2011) (capital murder and aggravated robbery by 14 year old).

*Note:* The Eighth and Fourteenth Amendments prohibit the imposition of a mandatory life sentence for a juvenile offender convicted of a non-homicide offense. *Graham v Florida*, 560 US \_\_\_\_; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

### **II. PENDING IN THE MICHIGAN SUPREME COURT**

Does the defendant have the right to affirm the plea when the court indicates its intention not to follow the **sentence agreement** or must the court reject the plea in its entirety? *People v Franklin*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2010 (Docket No. 292469), *lv gtd* 489 Mich 856; 795 NW2d 8 (2011).

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, was it error to score 100 points under **OV 3** for the death of a "victim"? The Court of Appeals concluded the co-felon was not a "victim" because he was not harmed by the defendant's criminal activity or by the crime committed (and his death resulted from the actions of the homeowner, not the commission of a crime). *People v Laidler*, 291 Mich App 199; 804 NW2d 866 (2010). The Michigan Supreme Court has ordered oral argument on this question. *People v Laidler*, 489 Mich 903 (2011).

Whether MCR 7.101(O) allows **taxation of costs** in criminal cases appealed to the circuit court. *People v Rapp*, 293 Mich App 159; \_\_\_\_ NW2d \_\_\_\_ (2011), *lv gtd* 490 Mich 927; 805 NW2d 502 (2011).

### **III. NEW FROM THE MICHIGAN LEGISLATURE**

#### ***False Statement to a Peace Officer during Criminal Investigation:***

Effective July 20, 2012, there is a new crime of knowingly making a false statement to a peace officer during a criminal investigation. MCL 750.579c; 104 PA 2012. The maximum penalty ranges from 93 days (if the investigation involves a serious misdemeanor), 1 year (investigation of a high-court misdemeanor or felony with a maximum penalty of less than 4 years), 2 years (investigation of a felony punishable by four years or more), and 4 years (investigation of a number of serious crimes listed in the statute).

#### ***False Pretenses Penalties Increased:***

Effective January 1, 2012, there are increased value threshold amounts for the crime of false pretenses. 201 PA 2011, amending MCL 750.218. The new penalties are:

False pretenses \$20,000 to \$49,000 (15 year max, Class C, max fine of \$15,000 or three times the value . . . .)

False pretenses \$50,000 to \$99,999 (15 year max, Class C, max fine of \$25,000 or three times the value . . . .)

False pretenses \$100,000 or more (20 year max, Class B, max fine of \$35,000 or three times the value . . . .)

#### ***Crime Victim Fee and State Costs Now Apply to Ordinance Violations:***

Effective April 1, 2012, the crime victim rights fee and state costs apply to all misdemeanor offenses and ordinance violations (not simply "serious" and "specified" misdemeanors, and also adding ordinance violations to the mix). The crime victim rights fee is \$130 for a felony, \$75 for a misdemeanor or ordinance violation, and \$25 for a juvenile disposition. The state costs are \$68 for a felony (including a juvenile felony), and \$50 for a misdemeanor or ordinance violation (including a juvenile misdemeanor or juvenile ordinance violation). PA 293, 294, 295 and 296 of 2011, amending in particular MCL 780.905 (crime victim rights fee) and MCL 769.1j (state costs), MCL 712A.18m (juvenile state costs).

*Note:* Effective December 16, 2010, the crime victim rights fee was increased to \$130 for felony case, \$75 for misdemeanor cases, and \$25 for juvenile cases (this is per case, not per count). 280 PA 2010; 281 PA 2010, amending MCL 780.904 and 780.905. The assessment was increased in part to fund a new statewide trauma system.

#### ***Expungement:***

Effective June 23, 2011, the expunction statute was amended to allow expunction of one eligible offense even if the individual has two minor offenses in addition to the one eligible offense. "Minor offense" is defined as a misdemeanor or ordinance violation for which the maximum possible sentence is not more than 90 days, for which the maximum possible fine is not more than \$1,000 fine, and committed by an individual not more than 21 years old. MCL 780.621, 2011 PA 64.

### ***Parole Amendments:***

Effective March 31, 2011, inmates with a final deportation order may be paroled after serving one-half of the sentence, although this provision is not available to those serving sentences for first- or second-degree murder, first-, second- or third-degree CSC and those sentenced as an habitual offender. 2010 PA 223, amending MCL 791.234b.

### ***Herbal Marijuana:***

Effective October 1, 2010, it is illegal to possess a substance that mimics the effects of marijuana, such as the herbal substance known as K2. Possession of the substance constitutes a one-year misdemeanor, while use of the substance constitutes a 90-day misdemeanor. 2010 PA 169, 171 (amending MCL 333.7403, 7404 and 7212).

## **IV. NEW CASE LAW – SENTENCING GUIDELINES**

### ***Application to HYTA:***

No case law has yet approved application of the sentencing guidelines to HYTA dispositions. *People v Khanani*, \_\_\_ Mich App \_\_\_ (Docket No. 301138, released for publication April 10, 2012).

### ***Ten Year Gap:***

Zero points should have been scored under PRV 1 where there was a ten-year gap between convictions. *People v Detloff*, 489 Mich 95; 798 NW2d 506 (2011).

### **PRV 2:**

A felony conviction from Indiana remains a felony for purposes of scoring the Michigan sentencing guidelines even if the sentencing peculiarities in Indiana cause the sentence to mimic the sentence for a misdemeanor. *People v Meeks*, 293 Mich App 115; 808 NW2d 825 (2011).

An Indiana felony conviction for purchase of a firearm with a value of \$175 most closely corresponds to the Michigan felony offense of receiving and concealing a stolen firearm rather than the misdemeanor offense of receiving and concealing stolen property under \$200. *People v Meeks, supra*.

### **PRV 5:**

Two points are properly scored under PRV 5 for a conviction of minor operating a vehicle with any bodily alcohol content, i.e., zero tolerance provision under MCL 257.625(6). *People v Bulger*, 291 Mich App 1; 804 NW2d 341 (2010).

### **PRV 6:**

No error in scoring five points for defendant's misdemeanor bond status – although the bond had been revoked – where the misdemeanor was still pending and therefore defendant had a

relationship with the criminal justice system when he committed the instant offense. *People v Johnson*, 293 Mich App 79; 808 NW 2d 815 (2011).

#### **OV 1:**

Trial court committed plain error in scoring OV 1 for methadone that was not used against the child as a weapon. *People v Carr*, 489 Mich 855; 795 NW2d 12 (2011).

Where the weapon was found under the bedcovers at the time of the search warrant, and drugs were found in the bedroom but the defendant was not home, it was error to score five points for an implied or displayed weapon. *People v Nelson*, 491 Mich 869; 809 NW2d 564 (2012).

Fifteen points properly scored under OV 1 where testimony at trial and information in the presentence report indicated defendant pointed gun at victim's face or brandished gun during robbery, even if jury convicted of unarmed robbery rather than armed robbery. *People v Harverson*, 291 Mich App 171; 804 NW2d 757 (2010).

#### **OV 2:**

Five points properly scored under OV 2 for nature of the weapon where testimony at trial and information in presentence report indicated defendant pointed gun at victim's face or brandished gun during robbery, even if jury convicted of unarmed robbery rather than armed robbery. *People v Harverson*, *supra*.

#### **OV 3:**

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, error to score 100 points for death of a "victim" as the co-felon was not a "victim" because he was not harmed by the defendant's criminal activity or by the crime committed (and his death resulted from the actions of the homeowner, not the commission of a crime). *People v Laidler*, 291 Mich App 199; 804 NW2d 866 (2010) (but mini oral argument has been ordered in the Mich Supreme Court, 489 Mich 903 (2011)).

Ten points properly scored where the victim suffered an infection as a result of being raped. *People v McDonald*, 293 Mich App 292; \_\_\_ NW2d \_\_\_ (2011).

#### **OV 4:**

The Court finds error in the scoring of ten points under OV 4 where there was no record evidence of serious psychological injury resulting from the exhibition of a sexually explicit performance to a 12 year old girl. The trial court "may not simply assume that someone in the victim's position would have suffered psychological harm . . . ." *People v Lockett*, 295 Mich App 165; \_\_\_ NW2d \_\_\_ (2012).

#### **OV 7:**

Trial court erred in scoring 50 points where the defendant entered a gas station/party store, struck the clerk in the left side of the head with the butt of an airsoft gun and knocked him to the ground,

struck another clerk on the head with the butt of the airsoft gun, took the money and fled. Neither victim suffered serious physical injuries and neither required medical attention. OV 7 requires “egregious conduct.” To satisfy the requirement that there be “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense,” there must be “conduct designed to cause copious or plentiful amounts of additional fear,” not simply “some fear-producing action beyond the bare minimum necessary to commit the crime . . . .” *People v Glenn*, \_\_\_ Mich App \_\_\_ (Docket No. 302293, 2/28/12).

Where defendant was present and armed during the commission of the offense, but did not commit, take part in, or encourage others to commit acts that amounted to sadism, torture or excessive brutality, it was error to score 50 points. The fact that defendant held a gun during the offense, and may have pointed it (although the evidence was conflicting on this point) was not enough to justify the assessment of 50 points. *People v Hunt*, 290 Mich App 317; \_\_\_ NW2d \_\_\_ (2010).

Fifty points were properly scored where defendant told the sexual assault victim to keep her eyes closed, suggested there were accomplices who knew who she was and had been watching her, and defendant made threats he would find her again in the future. *People v McDonald*, 293 Mich App 292; \_\_\_ NW2d \_\_\_ (2011).

#### **OV 8:**

Movement of the victim from a common area to the bedroom to effectuate the CSC crimes was merely incidental movement on the facts of this case and did not amount to asportation under OV 8. *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010).

#### **OV 9:**

It is proper to count the decedent, a passenger in the decedent’s car and the occupants of another car as victims under OV 9 where the individuals in both cars were part of the collision resulting from defendant’s drunk driving causing death. *People v Lechleitner*, 291 Mich App 56; 804 NW2d 345 (2010).

OV 9 improperly scored at 10 points in a case of first-degree criminal sexual conduct, reflecting 2 to 9 victims placed in danger of physical injury or death, where although two of the complainant’s friends were in the bedroom where the offense took place, nothing in the record suggests that they were ever placed in danger. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010).

#### **OV 10:**

In order to score points under OV 10, there must be a vulnerable victim and the defendant must have exploited that vulnerability. This is true even when scoring for predatory conduct. *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008).

The susceptibility to injury need not be inherent in the victim, and victim vulnerability may arise from the personal characteristics of the victim or out of the victim’s relationships or circumstances. The defendant’s predatory conduct may also create or enhance the victim’s vulnerability. *People v Huston*, 489 Mich 451; 802 NW2d 261 (2011).

Defendant's pre-offense conduct must be directed at "a victim," rather than "the victim," and may include circumstances where the defendant is lying in wait, armed, in a parking lot at night waiting for the first random person to come along. *Id.*

Predatory conduct does not mean any "preoffense conduct," but rather those forms that are predatory such as lying in wait and stalking – as opposed to run-of-the-mill planning to effectuate a crime or escape without detection. *Id.*

Ten points may not be scored under OV 10 for exploitation of a "domestic relationship" where the parties had neither a familial nor cohabitating relationship. The fact that the victim had previously left clothes at the defendant's apartment did not establish a cohabitating relationship. *People v Jamison*, 292 Mich App 440; 807 NW2d 427 (2011).

Error to score 10 points for abuse of domestic relationship when defendant and victim had a past dating relationship only. *People v Brantley*, \_\_\_ Mich App \_\_\_ (Docket No. 298488, 5/17/12) (following *Jamison*).

The Court affirms the scoring of 15 points for predatory conduct based on the defendant's pre-offense conduct of picking up the 12 year old victim in his van during the early morning hours, driving to the store to purchase liquor, and driving to a city park where he parked the van and exhibited a sexually explicit performance to the minor. *People v Lockett*, 295 Mich App 165; \_\_\_ NW2d \_\_\_ (2012).

#### **OV 11:**

The Court of Appeals construes the phrase "same transaction" in the consecutive sentencing portion of the CSC 1 statute as "analogous" to the "arising out of" language found in OV 11, and concludes that "same transaction" refers to something that grows out of a continuous time sequence and the events spring from each other and have a connective relationship that is more than merely incidental. *People v Ryan*, \_\_\_ Mich App \_\_\_ (Docket No. 301787, 2/14/12).

#### **OV 12:**

OV 12 is scored for *acts* that are separate from the sentencing offense; error to score for larceny that was necessarily part of sentencing offense of unarmed robbery. *People v Light*, 290 Mich App 717; 803 NW2d 720 (2010).

The crime group designation given to an offense by the guidelines controls for purposes of scoring OV 12, so when an offense is designated a crime against "public order" by the guidelines, it cannot be counted as a crime against the person under OV 12. *People v Wiggins*, 289 Mich App 126; 795 NW2d 232 (2010).

#### **OV 13:**

The offense categories (crime groups) determine how to score the offense variables and an offense designated a crime against public safety cannot be considered a crime against the person for purposes of scoring OV 13, even if the crime necessarily involved a person (such as assaulting a prison guard). *People v Bonilla-Machado*, 489 Mich 412; 803 NW2d 217 (2011).



Conspiracy is a crime against public safety and cannot be counted under OV 13 as a crime against the person by looking at the nature of the underlying offense. *People v Pearson*, 490 Mich 984; 807 NW2d 45 (2012).

*Note:* The following decision of the Court of Appeals has been overruled by the *Pearson* decision:

For crimes like conspiracy that have special scoring rules under MCL 777.18 and MCL 777.21(4), the court should consider the nature of the underlying offense when determining whether the offense is a crime against the person or property for purposes of scoring OV 13. *People v Jackson*, 291 Mich App 644 (2011) (overruled).

The sentencing offense must be one of the three or more crimes within a five-year period. *People v Nelson*, 491 Mich 869; 809 NW2d 564 (2012).

A juvenile adjudication constitutes “criminal activity” even if there is no “conviction,” and therefore it is proper to score OV 13 for a juvenile adjudication. *People v Harverson*, 291 Mich App 171; 804 NW2d 757 (2010)..

The trial court did not abuse its discretion in scoring OV 13 at 0 points where although the defendant had been convicted of two felonies against a person within the five-year period, the evidence was insufficient to show that he committed a third felonious criminal act against a person where the defendant admitted he had been accused of criminal sexual conduct against another individual but he had not been charged nor convicted of that conduct and the prosecution did not introduce any testimony to support the allegation. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010).

NOTE: Effective 04-1-09 there is a new 25-point category in OV13 for scoring a pattern of felonious criminal activity “directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang.” But there is no longer a 10-point assessment for membership in an organized criminal group. [A gang is defined as a group of 5 or more people that identifies itself with some unifying method of membership identity, defined membership criteria, and an established command structure. MCL 750.411v.]

#### **OV 14:**

The Court finds no clear error in scoring 10 points for a leadership role where the defendant was 35, the co-defendant was 18, the defendant owned and drove the van that was used to pick up the girls and used as the location for the sexual acts, and defendant presumably was the one who purchased the liquor used during the offense. *People v Lockett*, 295 Mich App 165; \_\_\_\_ NW2d \_\_\_\_ (2012)).

#### **OV 19:**

Leave to appeal denied after leave to appeal granted and oral argument heard on whether OV 19 properly scored where defendant threw away evidence and denied guilt. *People v Cooley*, 490 Mich 985; 807 NW2d 46 (2012).

OV 19 may be scored for aggravating conduct that occurs after the sentencing offense is completed; ten points properly scored where defendant threatened witness days after the manslaughter offense was completed. *People v Smith*, 488 Mich 193; 793 NW2d 666 (2011).

OV19 was properly scored on the basis that the defendant asked others to dispose of the knife used to stab the victim and to lie about his whereabouts in an attempt to create a false alibi. *People v Ericksen*, 288 Mich App 192; 793 NW2d 120 (2010).

OV 19 may be scored for the same facts leading to the defendant's perjury conviction. *People v Underwood*, 278 Mich App 334; 750 NW2d 612 (2008).

## **GUIDELINES DEPARTURES:**

The Michigan Supreme Court recently reversed a departure sentence concluding the trial judge had a valid reason to depart following a probation violation, but "failed to articulate any rationale to justify imposition of the longest possible minimum sentence." *People v Harrington*, 490 Mich 876; 803 NW2d 691 (2011).

The trial court properly departed based on the "psychological injury suffered by the victim's family members and the likelihood of the defendant reoffending. . . ." *People v Corrin*, 489 Mich 855; 795 NW2d 13 (2011).

The legislative sentencing guidelines apply when the defendant is sentenced as a second CSC offender under MCL 750.520f (requiring a 5-year mandatory minimum term). Any minimum sentence above five years and also above the guidelines range must be viewed as a departure for which the trial judge must give substantial and compelling reasons. *People v Wilcox*, 486 Mich 60; 781 NW2d 784 (2010).

There was no error in failing to depart downward from the guidelines range where the trial judge sentenced at the bottom of the range, the judge considered the totality of the circumstances, and there was no error in the scoring of the guidelines or reliance on inaccurate information. *People v Roberts*, 292 Mich App 492; 808 NW2d 290 (2011).

## **V. NEW CASE LAW (NON-GUIDELINES)**

### ***CSC 1<sup>st</sup> – 25-Year Mandatory Minimum Term:***

The mandatory minimum term of 25 years for CSC first-degree involving a victim under the age of 13 is not cruel or unusual punishment. *People v Benton*, 294 Mich App 191; \_\_\_ NW2d \_\_\_ (2011). The Court was not persuaded the penalty is unduly harsh as applied to a female schoolteacher with no prior record who engaged in a purportedly consensual sexual relationship with a 12-year old student.

### ***Lifetime Electronic Monitoring:***

Before accepting a guilty or no contest plea, the trial court must advise the defendant of mandatory lifetime electronic monitoring for first- and second-degree CSC where lifetime

monitoring applies. Lifetime monitoring is part of the sentence itself and it is a direct consequence of the plea. *People v Cole*, \_\_\_ Mich \_\_\_ (Docket No. 143046, 5/25/12).

Defendants convicted of first-degree CSC, and defendants convicted of second-degree CSC involving a victim under the age of 13, are subject to mandatory lifetime electronic monitoring if the crime was committed when the defendant was 17 years of age or older. *People v Bradley*, \_\_\_ Mich App \_\_\_ (Docket No. 298488, 5/17/12); MCL 750.520b(2)(d); MCL 750.520c(2)(b) (effective 8-28-06).

Monitoring is not required for a defendant convicted of second-degree CSC with a victim under the age of 13 if the sentence imposed is jail and/or probation. The lifetime monitoring provisions were intended for those released on parole and/or discharged from a prison sentence. *People v Kern*, 288 Mich App 513; 794 NW2d 362 (2010).

### ***Consecutive Sentencing:***

Two consecutive sentences of 25 to 50 years imprisonment, effectively resulting in a 50-year minimum term, found proportionate where the victim suffered “horrific abuse at the hands of her father” due to continued sexual assaults when the victim was 11 years old. *People v Ryan*, \_\_\_ Mich App \_\_\_ (Docket No. 301787, 2/14/12).

Consecutive sentencing is permitted for two CSC first-degree convictions that arose out of the same incident, one involving vaginal penetration and one involving fellatio. The language in the CSC 1 statute permitting consecutive sentencing for “any other criminal offense arising from the same transaction” does not limit the other offense to a non-CSC offense. *People v Ryan*, \_\_\_ Mich App \_\_\_ (Docket No. 301787, 2/14/12).

Under MCL 768.7a(1) (the statute permitting consecutive sentencing for escapes and crimes committed while incarcerated), the phrase “has become liable to serve” does not apply to “sentences arising out of contemporaneous acts giving rise to offenses tried together in one trial.” *People v Williams*, 294 Mich App 461; \_\_\_ NW2d \_\_\_ (2011). In other words, when the defendant, who was serving a jail sentence, has become liable to serve two new sentences for crimes committed during that earlier incarceration, neither new sentence preceded the other and thus consecutive sentencing between these two offenses is not permitted under MCL 768.7a(1) (although the two sentences would be consecutive to the previous jail term). *Id.*

### ***Jail Credit:***

Where the defendant is convicted simultaneously of two offenses and was held in jail for both at the same time, and where both sentences must run concurrently, jail credit is appropriate against both sentences. *People v Williams*, 294 Mich App 461 n. 3; \_\_\_ NW2d \_\_\_ (2011).

Although a defendant who commits a felony offense while on parole must serve a consecutive sentence, once the parole period expires and if the defendant is still unable to post bond for the new offense, credit would be appropriate. *People v Williams, supra.*

Defendant is entitled to credit for time spent incarcerated in the county jail as a condition of probation against a later sentence for probation violation. *People v Oliver*, 489 Mich 923; 797 NW2d 134 (2011).

The Michigan Supreme Court reaffirms that a defendant is entitled to credit for the number of good-time days awarded against an earlier jail sentence when he is later sentenced to prison on the same case following a violation of probation. *People v Lackey*, 490 Mich 1000; 807 NW2d 321 (2012). The Court also remanded to the trial court to determine “whether defendant was awarded credit for ‘trustee days,’ and whether his sentence should be credited for those days as well.”

Where the defendant absconded on bond *after* sentencing (while on bond pending appeal), he was entitled to credit for time served in custody once re-arrested, even if he was being held by federal authorities for a federal charge that ultimately resulted in concurrent sentencing. As the instant sentence began on the date defendant was taken into custody after absconding, it was irrelevant for credit purposes when the federal sentence began. *People v Jones*, \_\_\_ Mich \_\_\_; 792 NW2d 748 (2011).

#### ***Tanner Rule:***

The two-thirds rule of *People v Tanner*, 387 Mich 683 (1972), does not apply when the maximum sentence is life or any term of years. *People v Washington*, 489 Mich 871; 795 NW2d 816 (2011) (court disavows earlier conflicting order in *People v Floyd*, 481 Mich 938 (2008), and affirms earlier statements in *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n. 14 (2006), and *People v Harper*, 479 Mich 599, 617 n 31 (2007). See also, *People v Lewis*, 489 Mich 939; 798 NW2d 15 (2011) (same).

#### ***Holmes Youthful Trainee Act:***

The trial judge should consider the defendant’s age and the seriousness of the crime when determining whether to place an individual on HYTA status. Where the defendant committed a similar offense while on bond pending sentencing for the instant matter, and the trial judge acknowledged feeling “frightened” by the defendant’s actions but granted HYTA because of the defendant’s supportive parents, it was an abuse of discretion to grant HYTA status. *People v Khanani*, \_\_\_ Mich App \_\_\_ (Docket No. 301138, released for publication April 10, 2012).

#### ***Probation Violation Warrant:***

The trial court may not revoke probation based on a warrant filed after the probation period has expired. The “probation period” refers to the actual term set by the court, not the statutory maximum period of probation, and the probation terms expires so long as there is no order extending it. The Court also reaffirms that so long as the warrant is filed within the period of probation, revocation may occur after the term has expired. *People v Glass*, 288 Mich App 399; 794 NW2d 49 (2010).

Defendant-Probationer was not illegally arrested pursuant to an arrest warrant that was signed by the judge and probation agent, but not subscribed under oath and affirmation, because MCL 764.15(1)(g) permits arrest without a warrant when a peace officer has “reasonable cause” to believe there has been a violation of probation, and the Fourth Amendment does not require a search warrant to search a probationer’s home and therefore would not require a warrant to arrest a probationer. *People Glenn-Powers*, \_\_\_ Mich App \_\_\_ (Docket No. 301914, 5/8/12).

### ***Probation Revocation:***

Trial court failed to make sufficient findings of fact of a violation of probation that was premised on a failure to maintain employment “as directed by” the probation officer where the court adduced no evidence regarding how or when the probation officer directed the minor defendant to seek employment and the Michigan Supreme Court questioned whether a condition of probation that the defendant attend high school and maintain employment of 30 hours per week would be legally possible given the restrictions of Michigan’s youth employment law, MCL 409.11. *People v Kumasi*, 489 Mich 863; 795 NW2d 149 (2011).

### ***Financial Penalties:***

The circuit court may not assess costs against the prosecution in a defendant’s criminal appeal from the district court. Court rule and statutory authority for the taxation of costs in civil matters does not apply in criminal cases. *People v Rapp*, 293 Mich App 159; 809 NW2d 665 (2011), *lv gtd* 490 Mich 927; 805 NW2d 502 (2011).

Where there was no record evidence to support the order of costs of prosecution of \$1,235, and there was no way to determine whether the costs (following a jury trial) were based on impermissible charges such as the prosecutor’s wages, the matter was remanded for a hearing to determine the appropriate costs. *People v Dillworth*, 291 Mich App 399; 804 NW2d 788 (2011).

The trial court did not clearly err in ordering restitution to Blue Cross Blue Shield for the loss of its investigator’s time that was spent investigating defendant’s prescription fraud activities even if the BSBS investigator was a salaried employee and Blue Cross would have incurred the cost of the investigator’s salary regardless of the defendant’s misconduct. *People v Allen*, 295 Mich App 277; \_\_\_ NW2d \_\_\_ (2012).

### ***SORA Advice before Plea:***

Defense counsel must provide advice to the defendant prior to the guilty plea that sex offender registration will be a consequence of the plea (if SORA is applicable), and failure to give this advice affects whether the plea is knowingly made. Although not deciding whether SORA consequences are collateral or direct, the Court concluded advice on the consequences of SORA must be given as sex offender registration is a “particularly severe consequence” that is intimately related to the criminal process and because registration is an “automatic result” for certain defendants. *People v Fonville*, 291 Mich App 363; 804 NW2d 878 (2011).

### ***SORA Recapture Provision:***

An individual previously convicted of a listed offense for which he or she was not required to register, but who is convicted of any other felony on or after July 1, 2011, must now register under the new recapture provision of MCL 28.724(5). This includes individuals assigned to youthful trainee status prior to October 1, 2004, if the person is convicted of any other felony on or after July 1, 2011. MCL 28.722(b)(ii)(b).

### ***SORA –Timing of Catch-all Decision:***

The trial court may not amend the sentence (here, the order of probation) to include

sex offender registration under the catch-all provision some 20 months after sentencing. *People v Lee*, 489 Mich 289; 803 NW2d 165 (2011).

### ***Removal from Sex Offender Registry:***

To file a timely petition for removal from the sex offender registry under MCL 28.728(c)(4), a juvenile offender adjudicated prior to October 1, 2004, must file the petition before October 1, 2007, or within three years of discharge from court jurisdiction. Where the instant juvenile was adjudicated in 1999, and the court terminated jurisdiction in 2000, the petition for removal was untimely in 2008. Moreover, with limited exceptions not applicable to this defendant, there is no opportunity for removal from the registry for juveniles convicted of CSC fourth-degree. *In re M.S.*, 291 Mich App 439; 805 NW2d 460 (2011) (formerly *In the Matter of Seligman*).

### ***SORA – Registration of Homeless Offenders:***

Homeless individuals must register under the Sex Offender Registration Act. There is no exception for those who do not have a street address or domicile. SORA requires registration of the individual's residence or domicile, and residence may refer to a park or vacant house. If an individual has difficulty identifying their new residence or domicile (if they are kicked out of a shelter, for example), the person is nevertheless obligated to notify authorities of the change in residence/domicile. Any difficulty verifying the truthful information provided by a homeless person is the responsibility of law enforcement and does not negate the responsibility of the individual to appear and report. Where Dowdy never attempted to report for sixteen quarters after being kicked out of a homeless shelter, prosecution for failure to report and failure to notify was appropriate. *People v Dowdy*, 489 Mich 373; 802 NW2d 239 (2011).

### ***SORA - Cruel and Unusual Punishment:***

It is not cruel and unusual punishment to require sex offender registration for the crime of child enticement, although the crime contains no sexual component, as a) the SORA statutes require registration for some crimes in order to protect the safety and welfare of children even where there is no sexual component, b) because sex offender registration is not punishment, and c) because the *Dipiazza* case is distinguishable. *People v Fonville*, 291 Mich App 363; 804 NW2d 878 (2011).

In *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), the Court of Appeals held that sex offender registration on a public registry for an 18 year old offender who successfully completed HYTA for a Romeo and Juliet relationship violated the Michigan constitutional ban on cruel or unusual punishment.

But in a decision limiting *Dipiazza* to its facts, the Court of Appeals recently held SORA is not punishment, nor cruel or unusual punishment, as applied to a juvenile offender adjudicated of second-degree CSC involving a non-consensual act against an unwilling victim, even if it could be said the defendant had completed all rehabilitated programs and was non-dangerous. The indirect consequences of public registration under SORA such as harassment, assault, job loss eviction and dislocation are not punishment. *In re T.D.*, 292 Mich App 678; \_\_\_ NW2d \_\_\_ (2011).

**Felony Sentencing - Special Topics**  
**Matt Wiese, Marquette County Prosecuting Attorney**

- I. Holmes Youthful Trainee Act, MCL 762.11**
  - a. What sanctions can apply?
  - b. Is it a conviction?
  - c. S.O.R.A. requirements?
  
- II. Standard Delay of Sentence, MCL 771.1**
  - a. What sanctions can apply?
  - b. Is it a conviction?
  - c. S.O.R.A. requirements?
  
- III. Controlled Substance**
  - a. Delay of Sentence, MCL 333.7411
  - b. What sanctions can apply?
  - c. Is it a conviction?
  - d. Controlled Substance Habitual Offender Enhancements
  - e. Attempted Controlled Substance Crime?
  
- IV. Criminal Sexual Conduct Crimes**
  - a. CSC 1<sup>st</sup>
  - b. CSC 2<sup>nd</sup>
  - c. CSC 3<sup>rd</sup>
  - d. CSC 4<sup>th</sup>
  
- V. Habitual Offender Enhancements**
  
- VI. Ineffective Assistance of Counsel Claims**
  - a. Plea Agreements
  - b. S.O.R.A.
  - c. Immigration Status
  
- VII. Consecutive v. Concurrent Sentencing**
  - a. Crimes committed while on bond, probation, or parole.
  - b. Crimes committed while incarcerated.
  - c. When is it discretionary or mandatory?
  - d. Prison Cases: Intermediate sanction – departure?

# ELIGIBILITY COMPARISON CHART

## HYTA INELIGIBLE

All LIFE Max

All Major Controlled Substance  
Offenses

Most CSC (except some CSC  
3<sup>rd</sup> and 4<sup>th</sup> where victim 13-16)

Previously Convicted of Listed  
SORA Offense for which  
Registration Required

All Traffic

## EXPUNCTION INELIGIBLE

All LIFE Max

Most CSC (except CSC 4<sup>th</sup>)

Child Sex Abuse Activity

All Traffic

## BOOT CAMP INELIGIBLE (for prisoners)

All LIFE Max (?)

All CSC

Child Sex Abuse Activity

Manslaughter

OWI Causing Death/Serious  
Injury

Intentional Firearm Death

Most Arson

Gross Indecency/Sodomy

Indecent Exposure

Child Abuse

Escape Jail or Prison

Burglary w/ Explosives

Dog Fighting

Extortion

Incitement to Riot

**ALL HABITUALS**



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## ATTACHMENT B

### INELIGIBLE OFFENSES FOR PRISONERS — Boot Camp

Prisoners who have served or are serving a sentence for an offense listed below, or for an attempt, conspiracy or solicitation to commit that offense, are not eligible for SAI.

<u>MCL</u>	<u>OFFENSE</u>
257.625 (4) or (5)	Person under the influence of intoxicating liquor or controlled substance, driving on highway or parking area prohibited (NOTE: Only if offense occurred on or after 01/01/92)
750.10a	Sexually delinquent person
750.11	Taking a woman and compelling her to marry
750.49	Animals; fighting, baiting, or shooting; dogs trained for fighting
750.72	Burning a dwelling house
750.73	Burning of other real property
750.75	Burning of insured property
750.80	Setting fire to mines and mining material
750.83	Assault with intent to commit murder
750.86	Assault to with intent to maim
750.89	Assault with intent to rob and steal; armed
750.91	Attempt to murder
750.112	Burglary with explosives
750.136	Cruelty to children
750.136b (1), (2), (3) or (4)	Child abuse
750.145a	Accosting, enticing or soliciting child for immoral purposes
750.145b	Accosting, enticing or soliciting child for immoral purposes
750.145c	Child sexually abusive activity or material
750.157b	Solicitation of murder or other felony
750.158	Crime against nature or sodomy
750.193	Breaking prison; escape
750.195	Jail; escape
750.207	Placing explosives with intent to destroy
750.213	Malicious threats to extort money
750.260	Counterfeiting and possession of coins
750.316	First degree murder
750.317	Second degree murder
750.319	Death as a result of fighting a duel
750.321	Manslaughter
750.327	Death due to explosives
750.328	Death due to explosives, placed with intent to destroy building or object
750.329	Death, firearm pointed intentionally, but without malice
750.333	Incest
750.335a	Indecent exposure
750.336	Indecent liberties with a child
750.338	Gross indecency between male persons
750.338a	Gross indecency between female persons
750.338b	Gross indecency between male and female persons
750.339	Debauchery by females of males under 15
750.340	Debauchery by males of males under 15
750.341	Carnal knowledge of state ward
750.342	Carnal knowledge of female state ward
750.349	Kidnaping
750.349a	Prisoner taking another as a hostage

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## ATTACHMENT B - continued

### INELIGIBLE OFFENSES FOR PRISONERS

<u>MCL</u>	<u>OFFENSE</u>
750.350	Kidnaping child under 14
750.397	Mayhem
750.422	Perjury committed in courts
750.436	Poisoning food, drink, medicine, wells, etc.
750.448	Soliciting and accosting
750.455	Pandering
750.511	Railroads; attempt to wreck or endanger safety of passengers
750.520	Rape
750.520b	First degree criminal sexual conduct
750.520c	Second degree criminal sexual conduct
750.520d	Third degree criminal sexual conduct
750.520e	Fourth degree criminal sexual conduct
750.520f	Second or subsequent offenses
750.520g	Assault with intent to commit criminal sexual conduct
750.529	Robbery; aggravated assault
750.529a	Carjacking
750.531	Bank, safe and vault robbery
750.544	Treason
752.542	Incitement to riot

A prisoner who has served or is serving a habitual offender sentence pursuant to MCL 769.10, 769.11, or 769.12 also is ineligible.

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## ATTACHMENT A

### INELIGIBLE OFFENSES FOR PROBATIONERS

Probationers serving a sentence for an offense listed below, or for an attempt to commit that offense, are not eligible for SAI.

<u>MCL</u>	<u>OFFENSE</u>
750.72	Burning a dwelling house
750.73	Burning of other real property
750.75	Burning of insured property
750.145c	Child sexually abusive material
750.520b	First degree criminal sexual conduct
750.520c	Second degree criminal sexual conduct
750.520d	Third degree criminal sexual conduct
750.520g	Assault with intent to commit criminal sexual conduct



MICHIGAN DEPARTMENT OF CORRECTIONS		EFFECTIVE DATE	NUMBER
<b>POLICY DIRECTIVE</b>		12/21/09	05.01.142
SUBJECT		SUPERSEDES	
SPECIAL ALTERNATIVE INCARCERATION PROGRAM		05.01.142 (06/13/08)	
		AUTHORITY	
		MCL 771.3b, 780.751 et seq., 791.234a, 791.236, 791.237, 791.238 et seq., 798.11 et seq., 800.33	
		ACA STANDARDS	
		1-ABC-1E-09, 1-ABC-3D-01, 1-ABC-3D-07, 1-ABC-4A-01, 1-ABC-4A-04, 1-ABC-4B-07, 1-ABC-4G-01 through 03, 1-ABC-5D-08, 1-ABC-5D-11, 3-3219, 3-3222	
		PAGE	1 OF 9

## POLICY STATEMENT:

Offenders shall be reviewed for eligibility in the Special Alternative Incarceration Program (SAI) as set forth in this policy. Upon successful completion of SAI, prisoners shall be placed on parole and probationers shall be released to the jurisdiction of the sentencing court.

## POLICY:

## DEFINITIONS

- A. Qualified Mental Health Professional: A psychiatrist, psychologist, social worker, registered nurse, or other health professional who is trained and experienced in the area of mental illness, developmental disabilities, or cognitive impairments and is licensed by the State of Michigan or, if licensure is not required, certified to practice within the scope of his/her training.

## GENERAL INFORMATION

- B. For purposes of this policy, "offender" means prisoners and probationers unless otherwise specified.
- C. SAI is offered at the SAI facility, which is supervised by the Warden of the Cooper Street Correctional Facility (JCS). It is designed to assist offenders in developing a sense of individual responsibility, self-discipline, and a positive work ethic through physically strenuous work, strict discipline, physical exercise, and programming (e.g., education, substance abuse awareness, basic life skills, anger management). SAI generally takes 90 calendar days to complete; however, it may be extended up to a total of 120 calendar days due to medical reasons as set forth in Paragraph BB or if the offender has not made adequate progress, as determined by the JCS Warden or designee.
- D. After successful completion of SAI, an offender shall either be paroled or placed on probation in the community, as appropriate, or be transferred to residential placement in the community not to exceed 120 calendar days. The latter is required if ordered by the Parole and Commutation Board or the sentencing court, as appropriate.
- E. Only offenders who are eligible for placement in SAI and agree to placement shall be accepted; however, a determination of eligibility does not guarantee SAI placement.
- F. All Department policy directives apply to SAI except those which exempt SAI in their application; however, requirements in policy directives issued prior to July, 2004 that specifically apply to CFA institutions do not apply, unless stated otherwise in the policy directive or as otherwise directed by the CFA Deputy Director. In addition, SAI requirements set forth in this policy directive shall control if in direct conflict with requirements set forth in another policy directive. All SAI staff reporting and authorization requirements in any policy directive shall be through the appropriate CFA chain of command.

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### ELIGIBILITY CRITERIA AND PLACEMENT

- G. Probationers convicted of a felony are eligible to be considered for placement in SAI if they meet all of the following requirements:
1. Have not served a previous sentence in a state prison.
  2. Do not have a verified pending felony or immigration detainer, a pending felony charge, or felony suspect information.
  3. Were not previously placed in SAI unless terminated for medical reasons or due to a pending felony detainer, felony charge, or felony suspect information verified while in SAI which has since been cleared.
  4. Are physically able to participate in SAI.
  5. Have no evidence of a mental handicap that would prevent participation in SAI.
  6. Would likely have been sentenced to imprisonment in a state prison.
  7. Are not being sentenced for an offense listed in Attachment A or an attempt to commit one of those offenses.
  8. The felony sentencing guidelines upper limit for the recommended minimum sentence for the offense is at least 12 months. This criterion does not apply if the offense is not covered by the felony sentencing guidelines or the probationer is being considered for placement in SAI due to probation violation.
- H. Prisoners are eligible to be considered for placement in SAI if they meet all of the following requirements:
1. Have not served a previous sentence in a federal or state prison.
  2. Do not have a verified pending felony or immigration detainer, a pending felony charge, or felony suspect information.
  3. Have not previously been placed in SAI as a prisoner or a probationer unless terminated for medical reasons or due to a pending felony detainer, felony charge, or felony suspect information verified while in SAI which has since been cleared. This does not apply to a prisoner placed in SAI prior to October 1, 2009.
  4. Are physically able to participate in SAI.
  5. Have no evidence of a mental disability that would prevent participation in SAI.
  6. Are serving an indeterminate sentence or sentences with a minimum sentence of 36 months or less, except that a prisoner serving for Breaking and Entering an Occupied Dwelling pursuant to MCL 750.110 or Breaking and Entering a Dwelling (Home Invasion) pursuant to MCL 750.110a is eligible only if the minimum sentence is 24 months or less.
  7. Are not serving a sentence for an offense identified in Attachment B or attempt, conspiracy, or solicitation to commit one of those offenses.
  8. Do not screen very high or potentially very high assault risk according to the most recent Assaultive Risk Screening sheet (CSJ-353).

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9. Do not have a true security level of IV or V.
  10. Do not have a prior or current conviction involving assaultive sexual behavior.
  11. Are not serving a sentence for any offense involving a death, including Negligent Homicide (MCL 750.324).
  12. If serving a sentence for a violation of MCL 333.7401 or 333.7403 of the Controlled Substances Act, must have served statutory minimum if there is a prior conviction for a violation of either MCL 333.7401 or 333.7403(2)(a), (b), or (e).
  13. If serving a sentence under the felony firearm law (MCL 750.227b) followed by an indeterminate sentence, must have served the two year felony firearm sentence and have a total minimum term of 36 months or less, including the felony firearm sentence.
- I. Questionable cases shall be referred to the JCS Warden for resolution. The Warden shall consult with the CFA Deputy Director, as necessary, who may exclude any offender determined not suitable for SAI.

#### SCREENING CASES

- J. As part of the pre-sentence investigation (PSI) and when updating a PSI report due to probation violation, Field Operations Administration (FOA) field agents shall screen offenders for possible placement in SAI, on OMNI if available, in accordance with PD 06.01.140 "Pre-Sentence Investigation and Report", using the eligibility criteria set forth in Paragraphs G and H. The FOA field agent shall indicate in the PSI report whether the offender is eligible to be considered for placement in SAI and, if eligible, recommend that the judge state on the Judgment of Sentence that placement in SAI is permitted or, for probationers, required as a condition of probation; if ineligible, the FOA field agent shall state in the PSI report or on OMNI the reasons for ineligibility.

#### Probationers

- K. Whenever a court orders a probationer to participate in SAI, the FOA field agent shall confirm the starting date with the JCS Warden or designee. SAI staff shall screen each probationer received, using the criteria set forth in Paragraph G to verify each probationer's eligibility.

#### Prisoners

- L. SAI staff shall use the Special Alternative Incarceration Program Eligibility Screen (CAJ-253) and the criteria set forth in Paragraph H to identify prisoners in CFA institutions who are eligible to be considered for placement in SAI, unless the Judgment of Sentence indicates that participation is prohibited. For newly received prisoners in a reception facility, this screening shall be completed prior to the prisoner transferring from the facility.
- M. SAI or other CFA institutional staff, as appropriate, shall review the Special Alternative Incarceration Voluntary Agreement and Waiver (CAJ-263) with each prisoner determined to be eligible for consideration for placement in SAI. The form shall include information on the limitations placed on prisoner privileges, as identified in Paragraph U, that prisoners are required to waive for placement in SAI. The form shall be signed by the prisoner if s/he understands and agrees to the conditions identified on the form for placement in SAI and voluntarily agrees to participate. The reviewing staff member also shall sign the form and distribute it as required.
- N. An eligible prisoner who agrees to placement in SAI shall be placed in SAI only if the sentencing judge or successor permits such placement. If the sentencing judge indicated in the Judgment of Sentence that SAI placement is permitted or if the Judgment of Sentence is silent as to placement, the sentencing judge or successor shall be contacted in writing to determine if the court objects to the placement; appropriate follow-up shall be conducted to ensure a written response is received. After receipt of

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written notification from the sentencing judge or successor that there is no objection to SAI placement, SAI staff shall arrange for the prisoner's transfer to SAI after eligibility is verified.

- O. Whenever a judge is being contacted pursuant to Paragraph N, the JCS Warden shall ensure that the Crime Victim Services Section, Office of the Parole and Commutation Board, is notified of the prisoner's proposed SAI placement date. In such cases, the Manager of the Crime Victim Services Section shall ensure that the prosecutor of the county from which the prisoner was sentenced and all victims of the crime who have submitted a request for notification under the William Van Regenmorter Crime Victim's Rights Act are notified of the proposed placement. The notice shall be sent at least 30 calendar days prior to the proposed placement date; the prisoner shall not be transferred to SAI prior to that date.
- P. The Crime Victim Services Section shall provide victim notification of a prisoner's transfer to SAI in accordance with PD 01.06.120 "Victim Notification".
- Q. A prisoner shall not be transferred to SAI unless s/he has provided a DNA sample. Upon receipt of approval for placement in SAI, the Warden of the sending facility shall ensure that the prisoner is referred to appropriate staff to collect the sample, unless a sample was previously collected. In CFA, the sample shall be taken by health care staff or, if health care staff is not on-site when the sample is required to be collected, by other trained institutional staff as designated in institutional procedures. In FOA, trained staff designated by the FOA Deputy Director shall collect the sample. A DNA Sample - Collection Record (CHJ-269) shall be completed indicating the prisoner's compliance with or refusal to provide the sample. If the prisoner refuses to provide the sample, the Warden of the sending facility or designee shall notify the SAI Deputy Warden immediately. In such cases, the prisoner shall not be transferred to SAI. The Warden of the sending facility shall ensure that the SAI Deputy Warden is notified if the sample is subsequently taken.

#### REQUIRED DOCUMENTATION FOR PROBATIONERS

- R. Each probationer received for placement in SAI shall be accompanied by the following documents:
  - 1. One copy of the probation order specifying placement in SAI.
  - 2. One copy of the completed Offender Health Questionnaire (CFJ-129).
  - 3. One copy of the completed Consent to Routine, Non-Surgical Medical Care of a Minor (CHJ-217) if the probationer is under 18 years of age.
- S. A probationer received without the required documentation shall be accepted if adequate documentation is received to confirm eligibility for SAI and that the court has ordered SAI participation. SAI staff shall contact local probation staff to ensure that the appropriate documentation is provided.
- T. The appropriate FOA field agent shall ensure that a certified copy of the Judgment of Sentence, the PSI report and the Sentencing Information Report are sent to the SAI Deputy Warden or designee within five business days after the probationer's arrival.

#### PRIVILEGES

- U. The following privileges are not afforded offenders in SAI:
  - 1. Access to general and law library.
  - 2. Visits, except from clergy, attorneys, and staff from the Office of the Legislative Corrections Ombudsman.
  - 3. Personal property, except for personal hygiene items issued by SAI and one plain ring or wedding band set. Photographs of family members, religious reading material, and personal



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and legal correspondence also are allowed provided they meet the requirements set forth in PD 05.03.118 "Prisoner Mail".

4. Mailing or receiving any packages with the exception of receiving one package of dress-out clothing within the two weeks prior to completion of SAI.
  5. Correspondence with other incarcerated persons.
  6. Telephone privileges, except for communicating with an attorney upon request of the attorney or with staff of the Office of the Legislative Corrections Ombudsman upon request of that Office. However, one 10 minute collect personal call per week may be permitted after six weeks, as determined by the JCS Warden or designee. Emergency telephone privileges shall be allowed for serious family emergencies as determined necessary by the JCS Warden or designee.
  7. Having beards, mustaches, goatees, or sideburns below the ear. Males shall be given a full haircut (i.e., head shaved with barber clippers) upon arrival and an appropriate haircut as determined by the JCS Warden or designee every two weeks thereafter. Females shall be required to wear their hair in compliance with standards established by the JCS Warden or designee; a full haircut shall not be required.
  8. Funds received from any source, including wages for work assignments, except that each offender shall be credited with a weekly amount for use in the commissary as set by the JCS Warden or designee. Balances shall not be carried forward.
- V. Prior to transfer for placement in SAI, incarcerated offenders must dispose of or mail home at their expense property prohibited in SAI. Pursuant to PD 04.02.105 "Prisoner Funds", prisoners' institutional accounts shall remain with the sending institution until the prisoner has completed or been terminated from SAI. Personal hygiene items shall be issued to offenders upon arrival at SAI and shall be available from the commissary thereafter. All allowable personal property shall be stored in the offender's footlocker in the designated areas. No more than the equivalent of ten first-class metered envelopes shall be allowed in an offender's possession at any time.
- W. SAI staff shall review all SAI rules and regulations with each offender during the SAI orientation process.

#### INTAKE ASSESSMENT

- X. A validated risk and needs assessment (e.g., COMPAS) shall be completed for each offender placed in SAI unless a similar assessment was completed within the preceding 12 months and there has been no change in circumstances warranting a new assessment. A Transition Accountability Plan shall be developed or updated for the offender to address the identified risk and needs, including identifying required programming to be provided the offender while in SAI.

#### IN-REACH SERVICES

- Y. In-reach services shall be provided to both probationers and prisoners while in SAI consistent with the requirements set forth in PD 03.02.101 "In-Reach Services".

#### MEDICAL CARE

- Z. Prisoners in SAI shall be provided access to health care services in accordance with PD 03.04.100 "Health Services". The Bureau of Health Care Services (BHCS), CFA, shall ensure routine outpatient care is provided for probationers in SAI. Probationers in need of inpatient care or with chronic or severe health problems shall be referred to the JCS Warden or designee to determine whether termination from SAI is appropriate. The CFA Deputy Director and/or designees and the Chief Medical Officer, BHCS, shall address issues involving the general health and welfare of SAI offenders as necessary.

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This shall include reviewing SAI procedures involving physical assessments, physical training, and disciplinary actions that include physical labor.

- AA. An offender who is believed to be at risk for suicidal or self-injurious behavior, as defined in PD 04.06.115 "Suicide Prevention", shall be immediately placed in the medical area of the Control Center building and a referral made to a qualified mental health professional. The offender shall remain on one-on-one direct observation until an evaluation is completed by a qualified mental health professional. The evaluation shall be completed as soon as possible but no later than 24 hours after the referral. If it is determined by a qualified mental health professional that an offender is in need of mental health treatment, a mental health management plan shall be developed and implemented pending the offender's removal from SAI. A prisoner in need of mental health treatment shall be transferred to a facility where mental health treatment can be obtained as soon as possible. In the case of a probationer, the probationer shall be terminated from SAI and returned to the custody of authorities from the sentencing court for appropriate follow-up and care as soon as possible. Generally, this shall be done no later than 48 hours after the determination is made.
- BB. If an offender misses more than five calendar days of program participation for medical reasons, including appropriate medical clearance, as verified by appropriate health care staff, the period of placement in SAI shall be increased by the number of days missed up to a maximum of 20 calendar days. However, the total number of days an offender may be in SAI, including days missed due to medical reasons, shall not exceed 120 calendar days. An offender who is medically unable to participate in SAI for more than 25 calendar days shall be terminated from SAI.

#### DISCIPLINARY PROCESS

- CC. Offenders in SAI shall be subject to a progressive disciplinary system developed by the JCS Warden and approved by the CFA Deputy Director or designee. For prisoners, the disciplinary process set forth in PD 03.03.105 "Prisoner Discipline" is required to be used to determine whether the rules of behavior established for SAI have been violated only when other disciplinary measures have been exhausted, the prisoner's behavior may result in termination from SAI or constitutes a non-bondable major misconduct charge as identified in PD 03.03.105, for substance abuse in accordance with Paragraph KK, and as otherwise required under the progressive disciplinary system.

#### TERMINATION FROM THE PROGRAM

- DD. Offenders who voluntarily terminate from SAI, or are terminated for rule violations or for not meeting the eligibility criteria set forth in Paragraphs G or H, shall be reclassified to an appropriate CFA institution or, for probationers, returned to the jurisdiction of the sentencing court. Staff shall ensure that offenders who voluntarily terminate participation either read or have read to them the SAI Voluntary Termination form (CAJ-264) or Probationer Voluntary Termination form (CFJ-308), as appropriate, and that they understand the consequences of voluntarily terminating their participation before signing the form.
- EE. If the prisoner was terminated from SAI due to a finding of guilt on a major misconduct, the JCS Warden shall determine whether earned good time or disciplinary credits shall be forfeited in accordance with PD 03.01.100 "Good Time Credits" and PD 03.01.101 "Disciplinary Credits". Any forfeitures shall be done as soon as possible.
- FF. The Crime Victim Services Section shall provide victim notification in accordance with PD 01.06.120 "Victim Notification" whenever a prisoner is terminated from SAI and is therefore no longer eligible for an SAI parole.

#### GRIEVANCE PROCESS

- GG. SAI staff shall discuss specific problems and complaints with probationers. If the problem cannot be resolved, the probationer may contact the sentencing court. Prisoners shall follow PD 03.02.130 "Prisoner/Parolee Grievances" to resolve grievances.

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### SEARCHES

HH. Prisoners and their possessions, living area, and work area are subject to search at any time, as set forth in PD 04.04.110 "Search and Arrest in Correctional Facilities". Probationers are subject to search in the same manner as prisoners.

### USE OF FORCE

II. SAI staff may use force against an offender in compliance with PD 04.05.110 "Use of Force", except as modified below:

1. Staff may give orders in a loud voice and demand immediate response and compliance.
2. Staff may place their hands on an offender if necessary.
3. Staff may physically move, place, or position an offender during intake, drill, and physical fitness training if necessary.

### CRITICAL INCIDENTS

JJ. Critical incidents at SAI shall be reported as required for CFA institutions pursuant to PD 01.05.120 "Critical Incident Reporting".

### SUBSTANCE ABUSE TESTING

KK. Offenders are subject to regular and random substance abuse testing as directed by staff. A prisoner who refuses to be tested or tests positive shall be charged with major misconduct for substance abuse. Probationers who refuse to be tested or test positive shall be subject to discipline in accordance with the progressive disciplinary system developed pursuant to Paragraph CC.

### PAROLE PROCESS FOR PRISONERS

LL. SAI staff shall interview each prisoner at an interval determined by the JCS Warden for purposes of completing a report detailing the prisoner's parole plans. At a minimum, the report shall contain the following:

1. The prisoner's plan for living arrangements including the address, telephone number, and complete names of each person residing at the residences of the prisoner's first two proposed placements in the community.
2. Potential employment.
3. Any need for additional training and educational services.
4. A substance abuse assessment, including the need for any substance abuse services in the community.
5. The anticipated date of completion of SAI.
6. Whether residential placement is available in the geographic area of the prisoner's proposed planned placement.

MM. The completed report and any recommendations for special conditions of parole shall be sent to the Field Services Section in the Office of the Parole and Commutation Board for processing. The Field Services Section shall ensure that a pre-parole investigation is conducted by an FOA field agent consistent with the requirements set forth in PD 06.05.104 "Parole Process". The FOA field agent may

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recommend additional special conditions of parole, including residential placement. The FOA field agent also shall recommend whether a parole loan is required as set forth in PD 06.02.120 "Parole Loans".

- NN. Prior to the issuance of the Parole and Commutation Board Order for Parole (CAX-119), the Field Services Section shall verify through the Department's computerized database (e.g., CMIS; OMNI) that the prisoner does not have any documented detainers, pending felony charges, or felony suspect information. If a detainer, pending felony charge, or felony suspect information is found, the Field Services Section shall refer the case to the SAI Parole/Probation Manager. The SAI Parole/Probation Manager or designee shall contact the issuing agency to confirm the current status of the detainer, felony charge, or felony suspect information. If not cleared, the prisoner shall be terminated from SAI.
- OO. Upon successful completion of SAI, the JCS Warden shall ensure the following:
1. That the prisoner has provided a DNA sample. If a sample has not been provided, the prisoner shall be referred to appropriate staff to collect the sample. A DNA Sample - Collection record shall be completed indicating the prisoner's compliance with or refusal to provide the sample. If the prisoner refuses to provide the sample, the JCS Warden or designee shall immediately notify the Parole and Commutation Board. In such cases, the prisoner shall not be released on parole. The JCS Warden shall ensure that the Parole and Commutation Board is notified if the sample is subsequently taken.
  2. That arrangements are made for transportation of the prisoner.
  3. That dress out clothing is provided as required by PD 04.07.110 "State-Issued Items and Cell/Room Furnishings".
  4. That any parole loan issued is processed as set forth in PD 06.02.120 "Parole Loans".
  5. That the prisoner has read or has had read to him/her the Prisoner Pre-Release Notice (CSJ-290) and that it has been signed by the prisoner and witnessed by staff.
  6. That verification is obtained through the Department's computerized database and LEIN within 24 hours prior to parole release that the prisoner does not have a personal protection order, pending charge, detainer, or felony suspect information. If a personal protection order is found, the JCS Warden shall consult with the CFA Deputy Director to determine appropriate action to be taken. If a detainer, pending felony charge, or felony suspect information is found and not cleared, the prisoner shall be terminated from SAI and reclassified to an appropriate CFA institution. The prisoner also may be terminated from SAI and reclassified for a verified pending misdemeanor charge that is not cleared, with approval of the JCS Warden or designee.
- PP. Prisoners who have successfully completed SAI shall be placed on parole for not less than 18 months or the balance of the minimum sentence, whichever is greater. However, the parole period shall not extend beyond the prisoner's maximum release date, less applicable credits. The Parole Release Section shall ensure that the prisoner's Parole and Commutation Board Order for Parole (CAX-119) is processed and sent to SAI in a timely manner.
- QQ. The Parole and Commutation Board Order for Parole shall indicate whether residential placement is required prior to release on parole in the community. Prisoners on parole in the community shall be supervised in accordance with Department policy and standards issued by the FOA Deputy Director. The prisoner may be placed on electronic monitoring while on parole in accordance with PD 06.03.105 "Electronic Monitoring of Offenders". Parole may be revoked for a violation of parole as set forth in PD 06.06.100 "Parole Violation Process". If parole is revoked before expiration of the minimum sentence less applicable credits, the Parole and Commutation Board shall order at a minimum forfeiture of all credits accumulated during SAI participation. A prisoner whose parole is revoked shall not be eligible for re-parole until the minimum sentence less applicable credits has been served.

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### RELEASE OF PROBATIONERS

RR. Probationers shall be placed on probation in the community in accordance with the applicable order of probation.

### REQUIRED REPORTS

SS. The JCS Warden shall ensure that a report documenting each probationer's progress in SAI and, if appropriate, a recommendation for residential placement is submitted to the appropriate court and field staff 30 calendar days after placement in SAI. The JCS Warden also shall ensure that a final report is submitted to the appropriate court and field staff documenting whether the probationer successfully completed SAI and whether the probationer provided a DNA sample at least five calendar days before the probationer's expected release date.

TT. The JCS Warden shall ensure reports on the impact of the operation of SAI that are required by MCL 791.234a and the Annual Appropriations Act are prepared and forwarded in a timely manner through the appropriate chain of command to the Administrative Assistant to the Director and the Bureau of Fiscal Management, Operations Support Administration, for submission to the legislature, legislative committees and agencies, and the Department of Management and Budget, as required.

### PROCEDURES

UU. Wardens and the FOA Deputy Director shall ensure that procedures are developed as necessary to implement requirements set forth in this policy directive; this shall be completed within 60 calendar days after the effective date of the policy directive. This requirement includes ensuring that their existing procedures are revised or rescinded, as appropriate, if inconsistent with policy requirements or no longer needed. Facility procedures shall not conflict with procedures issued by the Director.

### AUDIT ELEMENTS

VV. A Primary Audit Elements List has been developed and is available on the Department's Document Access System to assist with self audit of this policy pursuant to PD 01.05.100 "Self Audit of Policies and Procedures".

### ATTACHMENTS

WW. This policy includes the following attachments:

1. Attachment A - Ineligible Offenses for Probationers
2. Attachment B - Ineligible Offenses for Prisoners

APPROVED: PLC 12/15/09