

Advanced Felony Sentencing Seminar

Friday, December 28, 2012

12:00 p.m. to 3:00 p.m.

**Board of Commissioners Conference Room
Monroe County Courthouse
125 E. Second St.
Monroe, MI 48161
(734) 240-7046**

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&
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**Presented by the Monroe County Criminal Defense Bar Association and the
Criminal Defense Resource Center of the
State Appellate Defender Office with
support through a generous grant from the
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About the Speaker

Jacqueline J. McCann is the current author of the Defender Sentencing Book. She has been an Assistant Defender for over 10 years with the State Appellate Defender Office. Her extensive experience on appeals, particularly sentencing issues, comes from having argued hundreds of cases in the Michigan Court of Appeals and numerous cases in the Michigan Supreme Court. She is currently counsel in *People v. Scott Bennett Harris*, ___ Mich. ___, (#141513, decided July 31, 2012) and has argued several cases about the interpretation of the statutory sentencing guidelines, including *People v. Peltola*, 489 Mich. 174 (2011), *People v. Francisco*, 474 Mich. 82 (2006), and *People v. Smith*, 482 Mich. 292 (2008).

FELONY SENTENCING LAW UPDATES

DECEMBER 2012

By Jacqueline J. McCann

(w/some materials previously prepared by Anne M. Yantus)

NEW SUPER HABITUAL OFFENDER – 4TH: 25-YEAR MANDATORY MINIMUM

Effective October 1, 2012, the habitual offender – 4th statute was amended to provide for a mandatory minimum term of twenty-five years when the current sentencing conviction is a “serious” crime, and one of the three prior convictions is a “listed” felony offense. 2012 PA 319, amending MCL 769.12.

MCL 769.12:

(1) If a person has been convicted of any combination of 3 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:

(a) If the subsequent felony is a serious crime or a conspiracy to commit a serious crime, and 1 or more of the prior felony convictions are listed prior felonies, the court shall sentence the person to imprisonment for not less than 25 years. Not more than 1 conviction arising out of the same transaction shall be considered a prior felony conviction for the purposes of this subsection only.

To qualify for the new 25-year mandatory minimum:

*The **CURRENT CONVICTION** must be a “serious” crime. The Legislature has classified the following crimes as “serious”: [MCL 769.12(6)(c)]*

Murder, second degree
Manslaughter
Assault with intent to commit murder
Assault with intent to do great bodily harm
Assault with intent to maim
Assault with intent to rob, unarmed
Assault with intent to rob, armed
Armed robbery
Carjacking
Kidnapping

Kidnapping, child under 15 years of age
Prisoner taking hostage
Mayhem
CSC first-degree
CSC second-degree
CSC third-degree
Assault with intent to CSC penetration (CSC 1st or 3rd)
Conspiracy to commit any of the above offenses

AND

One of the PRIOR CONVICTIONS must have been a "listed" offense. The Legislature has classified the following offenses as "listed": [MCL 769.12(6)(a)(i)-(iii)]

Murder, second degree
Manslaughter
Death, firearm pointed without malice
Felonious assault
Assault with intent to murder
Assault with intent to do great bodily harm
Torture
Assault with intent to maim
Assault with intent to commit felony
Assault with intent to rob, unarmed
Assault with intent to rob, armed
Attempted murder
Solicitation to commit murder
Kidnapping
Kidnapping, child under 15 years
Prisoner taking hostage
Mayhem
Aggravated stalking
Felony stalking, victim under 18
Resisting and obstructing, death
Resisting and obstructing, serious impairment
CSC first-degree
CSC second-degree
CSC third-degree
Assault with intent CSC
Armed robbery
Unarmed robbery
Carjacking
Rioting in state correctional facility
Any drug offense punishable by more than four years
Home invasion first-degree
Home invasion second-degree

- Child abuse first-degree
- Child abuse second-degree
- Vulnerable adult abuse first-degree
- Vulnerable adult abuse second-degree
- Assault of employee during escape
- Fleeing and eluding first-degree (death)
- Fleeing and eluding second-degree (injury)
- Impaired driving causing death
- Arson of dwelling
- Carrying weapon unlawful intent
- Carrying concealed weapon
- Felony-firearm (second or subsequent offense)
- Intentional discharge firearm at vehicle
- Intentional discharge firearm at dwelling
- Intentional discharge firearm at emergency or law enforcement vehicle
- Attempt to commit any of the above offenses***

Note: The three prior convictions must be based on offenses that did NOT occur during the same transaction. MCL 769.12(1)(a) (in effect reviving the old *Stoudemire* rule in this one particular setting).

Note: Application of the 25-year mandatory minimum term to an offense committed before the effective date of the law would constitute an ex post facto violation. *See Lindsey v Washington*, 301 US 397 (1937) (application of revised statute that earlier provided for 15 year max and one year minimum to new penalty of mandatory 15 years violates ex post facto clause); *United States v Moon*, 926 F 2d 204, 210 (CA 2, 1991) (application of mandatory minimum term to offense that occurred before requirement of mandatory minimum term violates ex post facto clause).

HYPOS: In which of the following situations would the defendant be subject to the 25-year mandatory minimum?

	<u>Scenario 1</u>	<u>Scenario 2</u>	<u>Scenario 3</u>
Sent offense:	Unarmed Robbery	CSC-1 st deg	Conspiracy to Kidnap
Priors:	Carjacking Felony Assault Armed Robbery	Unarmed Robbery Home Inv. – 3 rd deg OUIL – 3 rd offense	Arson of Insured Prop Felony Firearm (1 st) Conspiracy to Kidnap

HABITUAL OFFENDER ENHANCEMENT - GENERALLY

If the current sentencing offense is not a “serious” crime or if none of the prior convictions is a “listed” felony offense, then the old familiar habitual offender – 4th discretionary penalties apply: life or any term of years where the underlying felony offense is punishable by 5 years or more; or a maximum of 15 years where the underlying felony offense is punishable by less than 5 years. MCL 769.12(1)(b) & (c).

A prior adult conviction for which the offender received a juvenile sentence (he was 16 years old at the time of the offense and the trial court had discretion to impose an adult or juvenile sentence following waiver to the circuit court) could be used to support enhancement under the habitual offender statutes. *People v Jones*, 297 Mich App 80 (Docket No. 303753, 6/19/12).

Court may enhance with one-year misdemeanor that constitutes *attempt* to commit a felony (i.e., attempted resisting and obstructing a police officer). *People v Slocum*, 156 Mich App 198; 401 NW2d 271 (1987).

MANDATORY MINIMUMS AND THE SENTENCING GUIDELINES

The statutory sentencing guidelines apply to sentencing for a repeat criminal sexual conduct offender who is subject to a mandatory minimum term of at least 5 years imprisonment under MCL 750.520f, in the sense that a trial judge who wants to impose a minimum term above the mandatory minimum must provide substantial and compelling reasons to do so if that higher minimum would also exceed the sentencing guidelines range. *People v Wilcox*, 486 Mich 60 (2010)(reversing where the trial court had imposed a sentence of 10 years to 40 years without articulating departure reasons, when the mandatory minimum only required a 5-year minimum term and the sentencing guidelines range was only 27 to 56 months).

NOTE: The *Wilcox* holding would also apply to the 25-year mandatory minimums for 1st degree CSC and the new super Habitual Offender – 4th: a trial court would need to provide substantial and compelling reasons to support a minimum term above 25 years if such a minimum term would also exceed the sentencing guidelines range.

NEW CASE LAW ON SCORING THE SENTENCING GUIDELINES

PRIOR RECORD VARIABLES

10-Year Gap Rule - Reminder

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).

A prior traffic misdemeanor conviction that cannot be scored pursuant to PRV 5 of the sentencing guidelines will nevertheless be considered in determining whether the defendant had a conviction free period in his history longer than 10 years which would preclude the scoring of any convictions prior to such a 10 year period. *People v Patino*, unpublished opinion of 06-23-09 (Court of Appeals #284128).

PRVs Are Scored for Repeat Drug Offender subject to enhancement under MCL 333.7413

Despite dicta in *People v Lowe*, 484 Mich 718 (2009), the prior record variables are still to be scored when the sentencing court intends to double the range provided by the calculation of the sentencing guidelines under MCL 333.7413(2), for repeat drug offenders. *People v Peltola*, 489 Mich 174 (2011)

PRV 2 – Prior Low Severity Convictions

The defendant's Indiana state conviction for receiving stolen property, i.e. a gun with a fair market value of \$175, is properly scored as a prior low level felony conviction under Michigan's sentencing guidelines because though the monetary value would constitute misdemeanor receiving and concealing, under MCL 750.535(5), the more specific statute for receiving and concealing a stolen firearm, MCL 750.535b, which is a Class E felony, controls over the more general statute. *People v Meeks*, 293 Mich App 115 (#297030, 6-16-11).

PRV 5 - Prior Misdemeanors

The trial court properly scored the defendant's prior conviction for operating a vehicle as a minor with any body alcohol content (the "zero tolerance provision") under PRV5. While the defendant's prior conviction did not require proof that he was actually under the influence of alcohol or was impaired by alcohol, because the drunk driving statute itself, MCL 257.625, would count this offense as a prior conviction, this Court chooses to read the guidelines statute broadly to refer to the drunk driving statute as a whole rather than just to those offenses that require proof of operating a vehicle "under the influence of or impaired by" alcohol. *People v Bulger*, 291 Mich App 1 (2010). [NOTE: The defendant did not seek leave to appeal in the Supreme Court]

PRV 6 – Relationship To Criminal Justice System

It was proper to score PRV 6 at 5 points though the defendant's bond on a charged misdemeanor had been forfeited before he committed the sentencing offense. Though he was not "on bond" as PRV 6 states, the defendant could not be said to have "no relationship" to the criminal justice system. *People v Johnson*, 293 Mich App 79 (2011).

OFFENSE VARIABLES

OVs Generally

An offense designated within a particular crime class under the guidelines legislation, may not be counted or designated as a different crime class by the sentencing court for purposes of scoring the guidelines. *People v Bonilla-Machado*, 489 Mich 412 (2011)(it was error to consider assault of a prison employee, statutorily designated as a crime against public safety, as a crime against a person for purposes of scoring OV 13).

OV 1 – Aggravated Use of a Weapon

Where the weapon was concealed under the bedcovers at the time a search warrant was executed and drugs were found in the bedroom, and defendant was not home, it was error to score five points for an implied or displayed weapon under OV 1. *People v. Nelson*, 491 Mich. 869 (2012).

Delivery of heroin in a drug transaction will not ordinarily constitute the aggravated use of a weapon under OV 1 of the sentencing guidelines. Heroin is a harmful chemical substance and it can be used as a weapon. For example, one could forcibly inject heroin into an unwilling victim for the purpose of killing them by means of a heroin overdose. In such a case, we would have no difficulty in concluding that the heroin was used as a weapon as it was "used against an opponent, adversary, or victim." But that is not what happened here. There is no evidence that defendant forced the victim to ingest the heroin against his will. This was an ordinary, albeit illegal, consensual drug transaction. Defendant traded the heroin to the victim for something of value and thereafter the victim voluntarily ingested the heroin with tragic results, dying. But defendant did not attack the victim with the heroin. The heroin was not used as a weapon. Therefore, it is not appropriate to score OV 1 as if it were. Accordingly, the trial court must resentence defendant under properly scored sentencing guidelines, scoring OV 1 at zero points. *People v. Ball*, 297 Mich App 121 (6-19-12)(COA No. 303727).

The trial court committed plain legal error, entitling the defendant to resentencing on her conviction for delivery of methadone, in scoring OV 1 because the defendant did not use the methadone against her child as a weapon, as is required to score this variable. *People v Carr*, 489 Mich 855 (2011). [According to media reports, Carr was being monitored for drug use when she decided to use her daughter's urine to pass routine screenings and avoid being caught still

using illegal drugs. Because Carr was prescribed methadone as a treatment for heroin addiction, she gave her daughter methadone so the girl's urine would test positive for that drug and fool the people conducting the tests.]

OV 3 – Degree of Physical Injury

First responders can qualify as victims under OV 3. (OV 3 does not specifically define the term “victim”.) The trial court erred in declining to score OV 3 at 10 points where two firefighters were treated for injury sustained in responding to the arson of a dwelling house. The trial court had ruled that first responders were not “victims” of the criminal offense. *People v Fawaz*, ___ Mich App ___ (#307214, 12-20-12). [Likewise, the firefighters were “victims” for OV 9, under the specific definition of “victim” within that statute.]

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, 100 points may be scored for the death of a “victim” as the co-perpetrator was a victim of the defendant's criminal activity (even if shot by the homeowner). But the Court notes its conclusion that the co-perpetrator was a “victim” is limited to OV 3 and might not apply to other variables. *People v. Laidler*, 491 Mich. 339 (2012).

The trial court correctly scored OV 3 at 10 points where the victim suffered an infection as a result of the sexual assault. *People v McDonald*, 293 Mich App 292 (2011).

OV 4 – Psychological Injury

The trial court did not err in scoring 10 points for OV 4 where the victim testified at trial she was nervous and scared during the bank robbery and her written impact statement indicated sleeplessness for weeks and a continuing fear of being robbed by her customers. *People v. Earl*, 297 Mich App 104 (6-19-12)(Court of Appeals No.302945).

The victim of defendant's home invasion submitted a Victim Impact Statement declaring that he felt angry, hurt, violated, and frightened after the crime. We have held that evidence that a victim was left feeling “pretty angry,” and “trying to block out the memories,” of a crime was adequate to uphold an assessment of 10 points under OV 4. *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009). We have also held that evidence that a victim was “fearful during the encounter with the defendant” was sufficient to support such a score. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). The victim's statements about feeling angry, hurt, violated, and frightened support his score under our case law. Accordingly, we hold that the trial court properly scored OV 4 at 10 points. *People v Williams*, ___ Mich App ___ (Docket No. 306917, 10-16-12). [NOTE: An MSC application was not filed.]

The court of appeals 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 (2012). See also *People v. Hicks*, 259 Mich. App. 518 (2003) (cannot assume serious psychological injury from forceful purse snatching).

OV 7 – Aggravated Physical Abuse

CAUTION: The Michigan Supreme Court has granted leave to appeal on OV 7 in two cases. In *People v. Glen*, 491 Mich.934 (2012), the Court directed the parties to "address whether the trial court erroneously assessed 50 points for [OV 7] for committing assaultive acts beyond those necessary to commit the offense." In *People v. Hardy*, 491 Mich.934 (2012), the Court directed the parties to "address whether the trial court erroneously assessed 50 points for [OV 7] because the defendant racked a shotgun during the carjacking, and whether trial counsel was ineffective for waiving this issue."

Trial court erred in scoring 50 points where the defendant entered a gas station/party store, struck the clerk in 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 of the victims suffered serious physical injuries and neither of them 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*, 295 Mich. App. 529 (2012), leave granted 491 Mich. 934 (2012). See **Caution, above**.

OV 7 was properly scored at 50 points as there was ample evidence that the defendant engaged in conduct designed to substantially increase the victim's fear and anxiety, where the defendant ordered the victim to keep her eyes closed, indicated to her that he and other implied accomplices knew who she was and had been watching her, and made threats that clearly indicated that he could find her again in the future, thereby suggesting not only that she was suffering a horrific assault but that there might never be any escape, either. *People v. McDonald*, 293 Mich. App. 292 (2011).

Although the co-defendants engaged in a substantial beating of the victim, the conduct of the defendant who did not take part in or encourage others to participate in the beating was not sufficient to qualify as "sadism, torture, or excessive brutality" for purposes of scoring OV7 at 50 points. Moreover, unlike OV 1, OV 2, and OV 3, OV 7 does not state that "[i]n multiple offender cases, if 1 offender is assessed points for [the applicable behavior or result], all offenders shall be assessed the same number of points." For OV 7, only the defendant's actual participation should be scored. *People v. Hunt*, 290 Mich App 317 (2010).

OV 8 – Victim Asportation/Captivity

OV8 was improperly scored in a case of criminal sexual conduct because any movement of the complainant was merely incidental to the commission of the offenses and did not amount to asportation. *People v Thompson*, 488 Mich 888 (2010) (sex occurred in defendant's bedroom or daughter's bedroom).

OV 9 – Number of Victims

The trial court improperly scored 25 points for more than twenty victims of property loss where defendant pleaded guilty to vandalizing two school buildings. The community at large was not a direct victim of the crimes. *People v Carrigan*, 297 Mich App 513 (Docket No. 302090, 8/2/12).

First responders who are placed in danger of injury can be counted under OV 9. *People v Fawaz*, ___ Mich App ___ (#307214, 12-20-12). [Firefighters injured while trying to put out a fire in an arson case.]

OV 10 – Exploitation of a Victim's Vulnerability

Ten points may not be scored under OV 10 for exploitation of a "domestic relationship" where the parties previously dated but had neither a familial nor cohabitating relationship. The fact that the victim had left clothes at the defendant's apartment did not establish a cohabitating relationship. *People v Jamison*, 292 Mich App 440; 807 NW2d 427 (2011). See also *People v Brantley*, 296 Mich App 546 (Docket No. 298488, 5/17/12) (following *Jamison*). [Note: the *Jamison* court additionally concludes a present dating relationship, standing alone, would be insufficient unless there was co-habitation or a familial relationship.]

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 (2012).

No error in scoring 15 points for predatory conduct where defendant gave cellphone, rides and gifts to thirteen year old victim and some of the gifts and ride were given before the sexual incident(s). *People v Johnson*, ___ Mich App ___ (Docket No. 302173, 10-16-12).

The trial court erred in assessing points for OV10 in a case of embezzlement by an employee of a credit union because the defendant did not use abuse an authority status as that is defined in the statute. Defendant did use "fear or deference to an authority figure" to exploit the "victim" here. He simply was in a position to take the money and hide the transfers. The Court of Appeals also questioned whether a bank could be a "vulnerable" victim. *People v Brandt*, unpublished opinion of 01-28-10 (Court of Appeals #288466), lv den 489 Mich 875 (2011) after oral argument (Justice MJ Kelly questions whether an institution could ever be a vulnerable victim).

OV 11 – Criminal Sexual Penetration

They really mean it

The Michigan Supreme Court once again reverses the scoring of OV 11 where the trial court scored multiple sexual penetrations of the victim by the offender going beyond the sentencing offense (not “arising out of” the sentencing offense). *People v Moore*, 490 Mich 965 (December 21, 2011; #143725). See also *People v Hobbs*, 488 Mich 954 (2010); *People v Goodman*, 480 Mich 1052 (2008); *People v Amos*, 480 Mich 852 (2007); *People v VanCleve*, 480 Mich 887 (2007); *People v Kuroda*, 475 M 865 (2006); *People v Minter*, 475 Mich 865 (2006); *People v Thompson*, 474 Mich 861 (2005).

In *People v Johnson*, 474 Mich 96 (2006), the Supreme Court explained that “arising out of” means a causal connection between two events of a sort that is more than incidental. Something that “aris[es] out of,” or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. In *Johnson*, the victim testified that she had sexual intercourse with defendant on two different dates in November 2001. “There is no evidence that the penetrations resulted or sprang from each other or that there is more than an incidental connection between the two penetrations. That is, there is no evidence that the penetrations arose out of each other.”

What do they mean?

In practical terms, the multiple penetrations must occur during a single incident to be scored under OV 11.

[NOTE: If conduct cannot be scored in OV 11, it might still be scored in OV 13, which provides 50 points for a pattern of felonious criminal sexual activity involving three or more sexual penetration against a person under age 13.]

Fifty points properly scored for two additional penetrations arising out of the sentencing offense where defendant was convicted of three counts of first-degree CSC for acts against teenager over a period of three years and victim stated nearly every encounter involved penile-vaginal penetration and also cunnilingus and fellatio. *People v Johnson*, ___ Mich App ___ (Docket No. 302173, 10-16-12).

OV 12 – Number of Contemporaneous Felonious Criminal Acts

In a case of robbery which occurred inside of a grocery store, the trial court erred in assessing points under OV12 for either a larceny from a person (necessarily included lesser) or larceny in a building (cognate) because the defendant's act of wrongfully taking the victim's money was a single act and the robbery subsumes the larceny whether it was inside a building or not. The Legislature clearly intended for contemporaneous felonious acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense. *People v Light*, 290 Mich App 717 (2010). [Note: It was okay to score the act of carrying a concealed weapon.]

The trial court erred in assessing 25 points for OV12 reflecting 3 contemporaneous felonious acts within 24 hours involving crimes against a person on the basis of charges of disseminating sexually explicit matter to a minor, because those offenses are designated as crimes against public order. *People v Wiggins*, 289 Mich App 126 (2010).

All conduct that can be scored under OV 12 must be scored under that offense variable before proceeding to score OV 13. The trial court erred when it concluded it could score the conduct at issue under the variable yielding the highest total points. *People v Bemmer*, 286 Mich App 26 (2009).

OV 13 – Continuing Pattern of Criminal Behavior

Only those crimes committed during a five-year period that encompasses the sentencing offense may be considered in the scoring of OV13. *People v. Francisco*, 474 Mich. 82 (2006); *People v. Johnson*, 485 Mich. 932 (2009). The sentencing offense must be part of the pattern, i.e. one of the three or more crimes within the five-year period. *People v. Nelson*, 491 Mich. 869 (2012).

An offense designated within a particular crime class under the guidelines legislation, may not be counted or designated as a different crime class by the sentencing court for purposes of scoring the guidelines. *People v Bonilla-Machado*, 489 Mich 412 (2011)(it was error to consider assault of a prison employee, statutorily designated as a crime against public safety, as a crime against a person for purposes of scoring OV 13).

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 (2012). [NOTE: Abrogating *People v. Jackson*, 291 Mich. App. 644 (2011), which had held the opposite.]

No error in using dismissed 2008 bank robbery charge towards the scoring of OV13 where presentence report indicated defendant was identified by a parole agent for this offense and prosecutor presented a surveillance photo as further evidence. *People v. Earl*, 297 Mich. App. 104 (6-19-12)(#302945)

The trial court did not err in scoring OV13 for a continuing pattern of criminal behavior by including the defendant's juvenile adjudications because a juvenile adjudication clearly constitutes criminal activity because it amounts to a violation of a criminal statute. OV 13 does not require a criminal conviction. *People v Harverson*, 291 Mich App 171 (2010).

OV 14 – Leadership Role

The Court finds no clear error in scoring OV14 at 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 (2012).

OV 15 – Aggravated Controlled Substance Offenses

OV15 is a *McGraw* variable (*People v. McGraw*, 484 Mich. 120 (2009), i.e. the scoring is specific to conduct relating to the sentencing offense. Where defendant was convicted of possession with intent to deliver less than 50 grams of cocaine for less than a gram of cocaine found in his car, and the prosecutor dismissed a higher charge of possession with intent to deliver over 50 grams for 64 grams of cocaine found in a nearby motel room, it was error to score 50 points for the cocaine found in a motel room even if the two offenses occurred simultaneously. *People v. Gray*, 297 Mich App 22 (6-5-12)(#302168).

OV 19 – Threat to Security or Interference with the Administration of Justice

Because OV19 expressly includes events occurring after completion of the sentencing offense, the exception to the general rule set for in *People v McGraw*, 484 Mich 120 (2009) applies and OV19 may be scored for conduct occurring after completion of the sentencing offense. *People v Smith*, 488 Mich 193 (2010) [witness intimidation conduct].

OV 19 was properly scored at 15 points where the defendant told the victim that he knew who she was and that his boys had been watching her and required the victim to promise not to contact the police as a precondition to letting her go. *People v McDonald*, 293 Mich App 292 (2011).

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).

NEW CASE LAW ON DEPARTURES

Upward Departures Reversed

The Michigan Supreme Court recently reversed a departure sentence concluding the trial judge had a valid reason to depart when he revoked probation, but “failed to articulate any rationale to justify imposition of the longest possible minimum sentence” as required by *People v Smith*, 482 Mich 292 (2008). *People v Harrington*, 490 Mich 876 (2011).

The Court of Appeals held that a life sentence was disproportionately severe where the sentencing guidelines recommended a range of 9 to 46 months and defendant was convicted of entry without breaking with intent to commit larceny, a Class E offense, as a fourth habitual offender. The Court of Appeals agreed that some departure would be warranted based on the defendant’s criminal history and recidivist tendencies where he had 12 prior felony convictions and rapidly committed new offenses upon release from prison for the prior offenses. But a life sentence under the guidelines is generally reserved for murder convictions and for Class A offenses with the highest OV and PRV scores. Here, the life sentence was improperly imposed for what amounted to trespassing. *People v Brooks*, 293 Mich App 525 (2011). The Michigan Supreme Court vacated this portion of the COA opinion as dicta, where the defendant had been granted a new trial, but it also noted that the extent of such a departure may be challenged. 490 Mich 993 (2012).

Reversed upward departure where the trial court relied on “the amount of property stolen and not returned is \$93,415.00,” but the defendant received ten points under OV 16 for stealing property valued over \$20,000, and the court did not explain how or why this was a substantial and compelling reason that was not accounted for within the sentencing guidelines range. The Court also reversed where both the sentencing court and the judge who heard the motion for resentencing were unaware that the sentence was a departure from the guidelines range of 0 to 11 months, not 0 to 13 months. *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2011 (Docket No. 295602).

Reversed upward departure in a felony non-support case where the trial judge relied on the fact that a civil judgment was involved (in response to a discussion about prior non-payment and available employment), but the Court of Appeals concluded that this factor, while objective and verifiable, “does not irresistibly grab our attention.” *People v Camup*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket No. 299247).

Upward Departures Affirmed

The psychological injury suffered by the victim's family members and the likelihood of the defendant reoffending were properly considered by the trial court as substantial and compelling reasons that justify a departure from the statutory sentencing guidelines. *People v Corrin*, 489 Mich 855 (2011).

Downward Departures Reversed

The trial court improperly departed where it imposed a jail sentence of 363 days (with probation) to avoid deportation consequences for a lawful resident alien of Turkish heritage who faced ethnic persecution in his home country, but the trial court was mistaken as to federal immigration law. *People v Akhemdov*, unpublished per curiam of the Court of Appeals, issued 7/26/12, (Docket No. 303129).

The Court of Appeals found that several of the trial court's reasons for imposing a jail sentence and probation, rather than a prison term as called for by the guidelines, were not objective and verifiable, including: 1) speculation that the defendant might become eligible for the SAI boot camp program following its restructuring; 2) the belief that the defendant would be released earlier if sentenced to a 1-year minimum prison term; 3) the opinion that the crime was out of character for the defendant; and 4) the belief that the defendant's drug problem could be better monitored locally than within the prison system. The Court of Appeals also held that the trial court's reasoning that the offense was a result of the defendant's prescription drug problem was not substantial and compelling as "it is not at all uncommon for a substance abuse problem to lead to the commission of a crime." *People v Higelmire*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 2011 (Docket No. 300081).

Downward Departures Affirmed

In an appropriate case it is within the trial court's discretion and power to depart from a sentencing guidelines range and impose probation with conditions in order to rehabilitate a defendant. The trial court cited a number of bases for its departure, the primary one being to make sure that the community, including the victim was safe and its concern that putting defendant in prison for a few years would have no effect on his long-term rehabilitation. Although the trial court listed several factors that superficially appear to have been independent reasons for its departure, a closer analysis shows that they were simply intended to support the real reason for the departure. The trial court was "concerned about how to get services to [defendant]" and that his guidelines sentence would more-or-less ensure that he would not receive the services necessary to keep the community safe. The trial court is in the vastly superior position to observe and evaluate not only the defendant, but the victim, the context, the community, and anyone else who might have an effect on or be affected by its sentencing decision. The record amply supports the trial court's conclusion that the defendant was a fairly context-specific danger, that he would not change if he was sentenced to prison, and that he was actually working on improving himself. The trial court was clearly impressed that the defendant would continue to pose a danger unless rehabilitated, and the most effective way to do that was the sentence it imposed. The trial court did not abuse its discretion. *People v Doolittle*, unpublished opinion of the 9-28-10 (Court of Appeals #292423).

PRACTICE NOTE: Consider Military Combat Experience As A Basis For Downward Departure

The United States Supreme Court, in a case where it found counsel ineffective for failure to investigate and present the defendant's military service as a mitigating circumstance during the death penalty stage, said: Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front line as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter." *Porter v McCollum*, ___ US ___; 130 SCt 447, 455; 175 LEd2d 398 (2009).

SENTENCING CREDIT

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), citing *People v. Resler*, 210 Mich. App. 24 (1995). See also *People v. Milbank*, 471 Mich. 910 (2004). 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."

CSC 1ST AND 2ND AND 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 is a direct consequence of the plea. *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012). See also Amendment to MCR 6.302(B)(2)(2) (effective June 20, 2012).

All defendants convicted of first-degree CSC, and defendants 17 or older who are convicted of second-degree CSC involving a victim under the age of 13, are subject to mandatory lifetime electronic monitoring. People v Brantley, ___ Mich App ___ (Docket No. 298488, 5/17/12); *People v Johnson*, ___ Mich App ___ (Docket No. 302173, 10/16/12). But see *People v King*, 297 Mich App 465 (Docket No. 301793, 7/31/12) (disagreeing with *Brantley* that lifetime monitoring applies to all CSC first-degree convictions, but special panel request declined). See MCL 750.520b(2)(d); MCL 750.520c(2)(b); MCL 750.520n(1) and MCL 791.285 (all effective 8-28-06).

Monitoring is not required for a defendant convicted of second-degree CSC when the victim is 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).

Application of mandatory lifetime electronic monitoring provisions to offender whose crime occurred before 2006 violates the state and federal ex post facto clauses. *People v Woolworth*, unpublished opinion per curiam of the Court of Appeals, issued July 10, 2012 (Docket No. 297824).

PLEA BARGAINING AND THE SENTENCING GUIDELINES (Review)

In fashioning a plea bargain, the parties may agree to a specific sentence that is a departure from the guidelines range. The agreement functions as the substantial and compelling reason to depart. *People v Wiley*, 472 Mich 153 (2005).

A defendant who pleads in reliance on a valid preliminary evaluation of sentence length, for a specific sentence, and who is sentenced in accordance with that evaluation, has waived any objection to the scoring of the sentencing guidelines. *People v McKay*, 474 Mich 967 (2005). If, however, the preliminary evaluation of sentence length is simply for a sentence within the guidelines range, the defendant has not waived any objection to the scoring of those guidelines. *People v Price*, 477 Mich 1 (2006).

PRACTICE NOTE: *What happens if the court originally sentenced the defendant to probation, which was a downward departure from the guidelines range, in accordance with the parties' plea agreement, and then the defendant violates probation?* The sentencing court may revoke probation and sentence in accordance with the sentencing guidelines range OR the court may continue probation without having to provide substantial and compelling reasons to do so.

The original probation sentence was valid. *People v Wiley*, above. There is nothing in the sentencing guidelines legislation, MCL 769.34 et seq, that requires the court to revoke probation once a violation has occurred. *People v Hendrick*, 472 Mich 555, 562 (2005) (“[T]he Legislature did not alter our jurisprudence on probation in the statutory codification of sentencing guidelines.”) In *Hendrick*, *supra* at 561-562, our Supreme Court examined MCL 771.4 and the sentencing guidelines legislation and explained: “[I]f probation is revoked, the court ‘may’ sentence the defendant as if probation had never been granted. While the sentencing court may sentence the probationer in the same manner and to the same penalty, nothing in the statute requires it to do so. . . . Thus, the court may continue, extend, or revoke probation. In the event that the court revokes a defendant’s probation, it may sentence the defendant ‘in the same manner and to the same penalty as the court might have done if the probation order had never been made.’ [Emphasis added.]

INDETERMINATE SENTENCING

The two-thirds rule of *People v Tanner*, 387 Mich 683 (1972), was codified in the sentencing guidelines legislation. See MCL 769.34(2)(b). **But, it does not apply to convictions for offenses punishable by “life or any term of years.”** *People v Washington*, 489 Mich 871 (2011)(disavowing *People v Floyd*, 481 Mich 938 (2008)); *People v Harper and Burns*, 479 Mich 599, 617, n 31 (2007); *People v Drohan*, 475 Mich. 140, 162 n 14 (2006); *People v Powe*, 469 Mich 1032 (2004). [PRACTIC NOTE: Consider how this can be used in plea bargaining.]

SEX OFFENDER REGISTRATION – NEW DEVELOPMENTS

The circuit court erred in finding that a homeless person is unable to comply with the notice of residence or domicile obligation of SORA and thus in dismissing a charge of failure to comply with SORA. Homelessness is not a bar to compliance with SORA because homelessness does not preclude an offender from entering a police station and reporting to a law enforcement agency regarding the offender's residence 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. The Legislature intended SORA to be a comprehensive system that requires all sex offenders to register, whether homeless or otherwise. *People v Dowdy*, 489 Mich 373 (2011).

Under MCL 769.1(13) and MCL 28.724(5), a trial court must, before imposing sentence, satisfy multiple requirements in order to properly require a defendant to register as a sex offender. Because the trial court in this case failed to satisfy several of those requirements, its subsequent decision at a post-sentencing hearing, 20 months after a judgment of sentence was entered, to require registration was erroneous. *People v Lee*, 489 Mich 289 (2011)(the court had failed to: 1) require the defendant to register before sentencing; 2) have a registration form given to the defendant after sentencing and have the requirements explained to him; 3) forward the registration to the state police prior to imposing sentence; 4) include its determination on the judgment of sentence that the offense qualified for registration.) Had the People appealed the lack of registration within the time limits for doing so, a resentencing might have been proper, but the time limits for appealing were long past.

The defendant is entitled to withdraw his guilty plea to child enticement because his attorney failed to inform him that he would be required to register as a sex offender. Based on the reasoning of the U.S. Supreme Court in *Padilla v Kentucky*, 130 SCt 1473 (2010), similar to the risk of deportation, sex offender registration is, because of its close connection to the criminal process, difficult to classify as either a direct or a collateral consequence and this distinction is “ill suited to evaluate a *Strickland* claim.”” Like deportation, sex offender registration is not a criminal sanction, but it is a particularly severe penalty. Therefore, defense counsel must advise a defendant that registration as a sex offender is a consequence of a guilty plea. Failure to so

advise defendant rendered his plea involuntary and prejudiced him as he would not have pled guilty had he known he would be required to register as a sex offender. *People v Fonville*, 291 Mich App 363 (2011).

The Court of Appeals found “constitutionally deficient” performance where defense counsel’s failed to inform the defendant that he faced a mandatory 25-year minimum sentence for CSC-first degree involving a defendant 17 or older and a victim under the age of 13, and instead told the defendant he faced up to 20 years and likely would receive a minimum term of five to eight years. The Court concluded correct information as to the mandatory minimum sentence was “essential to enable the defendant to make an informed decision whether to accept the prosecution’s plea offer or proceed to trial.” *People v Douglas*, 296 Mich App 186, 196; 817 NW2d 640 (2012).

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).

Requiring the defendant to register as a sex offender on a public registry for 10 years constitutes cruel and unusual punishment in a case where the defendant at age 18 had consensual sex with his then 14-year-old girlfriend whom he subsequently married, and where he successfully completed HYTA probation and was discharged. *People v Dipiazza*, 286 Mich App 137 (2009).

The defendant adjudicated as a juvenile in 1999 at age 13 for one count of fourth-degree criminal sexual conduct and discharged in 2000, is not entitled to even discretionary removal from the Sex Offender Registry because he failed to file a petition for removal before October 1, 2007 or within three years of discharge from court jurisdiction and because the right to petition for removal only applies to juveniles charged with first-, second-, or third-degree criminal sexual conduct and not juveniles charged with fourth-degree criminal sexual conduct. *In re MS*, 291 Mich App 439 (2011). [Note: juvenile adjudications for 4th degree CSC are not on the *public* registration list.]

PAROLE AMENDMENTS

Effective March 31, 2011, inmates with a final deportation order may be paroled after serving one-half of their 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.

PRV 1**Prior High Severity Felony Convictions**

(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
75	3 or more prior high severity convictions.	<p>A "prior high severity felony conviction" is a conviction for any of the following crimes if the conviction was entered before the commission date of the sentencing offense:</p> <ul style="list-style-type: none"> a crime listed in class M2, A, B, C, or D (or a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D), or (effective January 9, 2007)* a felony that is not listed in <i>any</i> crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in <i>any</i> class) that is punishable by a maximum term of imprisonment of 10 years or more. MCL 777.51(2). <p>*2006 PA 655.</p>
50	2 prior high severity convictions.	
25	1 prior high severity conviction.	
0	No prior high severity convictions.	

PRV 2**Prior Low Severity Felony Convictions**

(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
30	4 or more prior low severity convictions.	<p>A "prior low severity felony conviction" is a conviction for any of the following crimes if the conviction was entered before the commission date of the sentencing offense:</p> <ul style="list-style-type: none"> a crime listed in class E, F, G, or H (or a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H), or (effective January 9, 2007)* a felony that is not listed in <i>any</i> crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in <i>any</i> class) that is punishable by a maximum term of imprisonment of less than 10 years. MCL 777.52(2). <p>*2006 PA 655.</p>
20	3 prior low severity convictions.	
10	2 prior low severity convictions.	
5	1 prior low severity conviction.	
0	No prior low severity convictions.	

PRV 3**Prior High Severity Juvenile Adjudications**

(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
50	3 or more prior high severity juvenile adjudications.	<p>A "prior high severity juvenile adjudication" is an adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the commission date of the sentencing offense:</p> <ul style="list-style-type: none"> • a crime listed in class M2, A, B, C, or D (or a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D), or • (effective January 9, 2007)* a felony that is not listed in <i>any</i> crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in <i>any</i> class) that is punishable by a maximum term of imprisonment of 10 years or more. MCL 777.53(2). <p>*2006 PA 655.</p>
25	2 prior high severity juvenile adjudications.	
10	1 prior high severity juvenile adjudication.	
0	No prior high severity juvenile adjudications.	

PRV 4**Prior Low Severity Juvenile Adjudications**

(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
20	6 or more prior low severity juvenile adjudications.	<p>A "prior low severity juvenile adjudication" is an adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the commission date of the sentencing offense:</p> <ul style="list-style-type: none"> • a crime listed in class E, F, G, or H (or a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H), or • (effective January 9, 2007)* a felony that is not listed in <i>any</i> crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in <i>any</i> class) that is punishable by a maximum term of imprisonment of less than 10 years. MCL 777.54(2). <p>*2006 PA 655.</p>
15	5 prior low severity juvenile adjudications.	
10	3 or 4 prior low severity juvenile adjudications.	
5	2 prior low severity juvenile adjudications.	
2	1 prior low severity juvenile adjudication.	
0	No prior low severity juvenile adjudications.	

PRV 5

Prior Misdemeanor Convictions and Prior Misdemeanor Juvenile Adjudications

(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
20	7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	<p>A "prior misdemeanor conviction" is a conviction:</p> <ul style="list-style-type: none"> • for a misdemeanor offense under Michigan law or the law of a political subdivision of Michigan, or under the law of another state or a political subdivision of another state, or under the law of the United States, • if the conviction was entered before the commission date of the sentencing offense. MCL 777.55(3)(a). <p>A "prior misdemeanor juvenile adjudication" is a juvenile adjudication:</p> <ul style="list-style-type: none"> • for conduct that, if committed by an adult, would be a misdemeanor under Michigan law or the law of a political subdivision of Michigan, or under the law of another state or a political subdivision of another state, or under the law of the United States, • if the order of disposition for the juvenile adjudication was entered before the commission date of the sentencing offense. MCL 777.55(3)(b).
15	5 or 6 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	
10	3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	
5	2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	
2	1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication.	
0	No prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	

Special Instructions for PRV 5:

- A prior conviction used to enhance the sentencing offense to a felony may not be counted under PRV 5. MCL 777.55(2)(b).
- Only prior convictions and adjudications for offenses expressly listed in PRV 5 may be counted as "prior misdemeanor convictions" or "prior misdemeanor juvenile adjudications" for purposes of scoring PRV 5:
 - only those prior misdemeanor convictions or prior misdemeanor juvenile adjudications that are offenses against a person or property, weapons offenses, or offenses involving controlled substances, and
 - all prior misdemeanor convictions and juvenile adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance. MCL 777.55(2)(a)–(b).

PRV 6

Offender's Relationship to the Criminal Justice System

Pts		Instructions
20	Offender is a prisoner of the department of corrections or serving a sentence in jail (includes an offender who is an escapee from jail or prison). MCL 777.56(3)(b).	PRV 6 assesses points based on an offender's relationship to the criminal justice system at the time the sentencing offense was committed. MCL 777.56.
15	Offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation.	The scope of PRV 6 includes consideration of an offender's relationship with a criminal justice system outside the state of Michigan. The point values indicated by applicable statements in PRV 6 should be assessed against an offender who is involved with the criminal justice system of another state or the federal criminal justice system. "Delayed sentence status" includes (but is not limited to) an offender assigned or deferred under MCL 333.7411 (deferral for certain controlled substance offenses), MCL 750.350a (deferral under limited circumstances for parental kidnapping), MCL 762.11 to 762.15 (assignment to youthful trainee status), MCL 769.4a (deferral under limited circumstances for domestic assault), MCL 600.1076 (deferral involving drug treatment courts), and MCL 750.430 (deferral for impaired healthcare professionals).
10	Offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony.	
5	Offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor.	
0	Offender has no relationship to the criminal justice system.	

PRV 7

Subsequent or Concurrent Felony Convictions

Pts	The offender has:	Instructions
20	2 or more subsequent or concurrent felony convictions.	<ul style="list-style-type: none"> A conviction for felony-firearm may not be counted under PRV 7. MCL 777.57(2)(b). A concurrent felony conviction that will result in a mandatory consecutive sentence may not be counted under PRV 7. MCL 777.57(2)(c). (Effective March 1, 2003)* a concurrent felony conviction that will result in a consecutive sentence under MCL 333.7401(3)* may not be counted under PRV 7. MCL 777.57(2)(c). <p>* 2002 PA 666.</p>
10	1 subsequent or concurrent felony conviction.	
0	No subsequent or concurrent felony convictions.	

OV 1

Aggravated Use of a Weapon

Pts		Instructions
25	A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon. MCL 777.31(1)(a).	<ul style="list-style-type: none"> • Each person in danger of injury or loss of life is counted as a victim for purposes of scoring OV 1. MCL 777.31(2)(a). • In cases involving multiple offenders, if one offender is assigned points for the use or the presence of a weapon, all offenders must be assigned the same number of points. MCL 777.31(2)(b). • Do not score five points if the sentencing offense is a conviction of MCL 750.82 (felonious assault) or MCL 750.529 (armed robbery). MCL 777.31(2)(e). • Score five points if an offender used an object to suggest that he or she had a weapon. MCL 777.31(2)(c). • Score five points if an offender used a chemical irritant, a chemical irritant or smoke device, or an imitation harmful substance or device. MCL 777.31(2)(d). • "Harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," "harmful radioactive device," and "imitation harmful substance or device" are defined in MCL 750.200h. MCL 777.31(3)(a). • "Incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.31(3)(b).
20	The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.31(1)(b).	
15	A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon. MCL 777.31(1)(c).	
10	The victim was touched by any other type of weapon. MCL 777.31(1)(d).	
5	A weapon was displayed or implied. MCL 777.31(1)(e).	
0	No aggravated use of a weapon occurred. MCL 777.31(1)(f).	

OV 2

Lethal Potential of Weapon Possessed or Used

Pts		Instructions
15	The offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device. MCL 777.32(1)(a).	<ul style="list-style-type: none"> • In cases involving multiple offenders, if one offender is assessed points for possessing a weapon, all offenders must be assessed the same number of points. MCL 777.32(2). • “Harmful biological substance,” “harmful biological device,” “harmful chemical substance,” “harmful chemical device,” “harmful radioactive material,” and “harmful radioactive device” are defined in MCL 750.200h. MCL 777.32(3)(a). • A “fully automatic weapon” is a firearm that ejects an empty cartridge and loads a live cartridge from the magazine for the next shot without requiring renewed pressure on the trigger for each successive shot. MCL 777.32(3)(b). • A “pistol,” “rifle,” or “shotgun” includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm made in or after 1898 that fires fixed ammunition. A “pistol,” “rifle,” or “shotgun” does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle. MCL 777.32(3)(c). • An “incendiary device” includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.32(3)(d).
15	The offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon. MCL 777.32(1)(b).	
10	The offender possessed or used a short-barreled rifle or a short-barreled shotgun. MCL 777.32(1)(c).	
5	The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon. MCL 777.32(1)(d).	
1	The offender possessed or used any other potentially lethal weapon. MCL 777.32(1)(e).	
0	The offender possessed or used no weapon. MCL 777.32(1)(f).	

OV 3

Degree of Physical Injury to a Victim

Pts		Instructions
100	A victim was killed. MCL 777.33(1)(a).	<ul style="list-style-type: none"> • In cases involving multiple offenders, if one offender is assessed points for death or physical injury, all offenders must be assessed the same number of points. MCL 777.33(3)(a). • Score 100 points if death results from the commission of the offense and homicide is not the sentencing offense. MCL 777.33(2)(b). Any crime in which the death of a person is an element of the crime is a "homicide." MCL 777.1(c). • Score 50 points under this variable if death results from an offense or attempted offense that involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and any of the following apply: <ul style="list-style-type: none"> – the offender was under the influence of or visibly impaired by the use of alcohol, a controlled substance, or a combination of alcohol and a controlled substance, MCL 777.33(2)(c)(i); – the offender had an alcohol content of 0.08 grams* or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, MCL 777.33(2)(c)(ii); or – the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212 or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(iv), MCL 777.33(2)(c)(iii). • Do not score five points if "bodily injury" is an element of the sentencing offense. MCL 777.33(2)(d). • "Requiring medical treatment" refers to an injury's need for treatment not whether a victim was successful in obtaining treatment. MCL 777.33(3). <p><i>*Effective October 1, 2013, the alcohol content level increases to 0.10 grams or more.</i></p>
50	A victim was killed. MCL 777.33(1)(b). (35 points for offenses committed before September 30, 2003. 2003 PA 134.)	
25	Life threatening or permanent incapacitating injury occurred to a victim. MCL 777.33(1)(c).	
10	Bodily injury requiring medical treatment occurred to a victim. MCL 777.33(1)(d).	
5	Bodily injury not requiring medical treatment occurred to a victim. MCL 777.33(1)(e).	
0	No physical injury occurred to a victim. MCL 777.33(1)(f).	

OV 4

Degree of Psychological Injury to a Victim

Pts		Instructions
10	Serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(a).	<p>Ten points may be scored if the victim's serious psychological injury may require professional treatment. Whether the victim has sought treatment for the injury is not conclusive. MCL 777.34(2).</p>
0	No serious psychological injury requiring professional treatment occurred to a victim. MCL 777.34(1)(b).	

OV 5

Psychological Injury Sustained by a Member of a Victim's Family

Score for crime in "Person" crime group **only** if the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.

Pts		Instructions
15	Serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(a).	<ul style="list-style-type: none"> Assess 15 points if the family member's serious psychological injury may require professional treatment. The fact that treatment has not been sought is not determinative. MCL 777.35(2).
0	No serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(b).	<ul style="list-style-type: none"> Any crime in which the death of a person is an element of the crime is a "homicide." MCL 777.1(c).

OV 6

Intent to Kill or Injure Another Individual

Score for crime in "Person" crime group **only** if the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.

Pts		Instructions
50	The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer. MCL 777.36(1)(a).	<ul style="list-style-type: none"> Unless the sentencing court has information that was not presented to the jury, an offender's OV 6 score must be consistent with the jury's verdict. MCL 777.36(2)(a). Ten points must be scored if a killing is intentional within the definition of second-degree murder or voluntary manslaughter but the death took place in a combative situation or in response to the decedent's victimization of the offender. MCL 777.36(2)(b). Any crime in which a person's death in an element of the crime is a "homicide." MCL 777.1(c).
25	The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result. MCL 777.36(1)(b).	
10	The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life. MCL 777.36(1)(c).	
0	The offender had no intent to kill or injure. MCL 777.36(1)(d).	

OV 7 Aggravated Physical Abuse

Pts		Instructions
50	A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(a).	<ul style="list-style-type: none"> Each person placed in danger of injury or loss of life is a victim for purposes of scoring OV 7. MCL 777.37(2). "Sadism" is "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3).
0	No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(b).	<ul style="list-style-type: none"> Effective April 22, 2002, 2002 PA 137 deleted "terrorism"* from OV 7's list of behaviors meriting points. Although "terrorism" was eliminated from consideration under OV 7, the conduct previously defined as "terrorism" remains in OV 7's statutory language as "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). *"Terrorism" is now addressed by OV 20. MCL 777.49a.

OV 8 Victim Asportation or Captivity

Pts		Instructions
15	A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a).	<ul style="list-style-type: none"> Each person in danger of injury or loss of life is a victim for purposes of scoring OV 8. MCL 777.38(2)(a).
0	No victim was asported or held captive. MCL 777.38(1)(b).	<ul style="list-style-type: none"> Zero points must be scored if the sentencing offense is kidnapping. MCL 777.38(2)(b).

OV 9 Number of Victims		
Pts		Instructions
100	Multiple deaths occurred. MCL 777.39(1)(a).	<ul style="list-style-type: none"> A “victim” for purposes of scoring OV 9 is each person placed in danger of injury or loss of life or (effective March 30, 2007)* loss of property. MCL 777.39(2)(a). 100 points are scored only in homicide cases. MCL 777.39(2)(b). Any crime in which a person’s death is an element of the crime is a “homicide.” MCL 777.1(c). <p>*2006 PA 548.</p>
25	10 or more victims were placed in danger of physical injury or death. (Effective March 30, 2007.) 20 or more victims were placed in danger of property loss. MCL 777.39(1)(b).	
10	2 to 9 victims were placed in danger of physical injury or death. (Effective March 30, 2007.) 4 to 19 victims were placed in danger of property loss. MCL 777.39(1)(c).	
0	Fewer than 2 victims were placed in danger of physical injury or death. (Effective March 30, 2007.) Fewer than 4 victims were placed in danger of property loss. MCL 777.39(1)(d).	

OV 10 Exploitation of a Victim's Vulnerability		
Pts		Instructions
15	Predatory conduct was involved. MCL 777.40(1)(a).	<ul style="list-style-type: none"> Do not automatically score points for victim vulnerability just because one or more of the factors addressed by OV 10 are present in the circumstances surrounding the sentencing offense. MCL 777.40(2). “Predatory conduct” is an offender’s preoffense conduct directed at a victim for the primary purpose of victimization. MCL 777.40(3)(a). To “exploit” a victim is to manipulate a victim for the offender’s selfish or unethical purposes. MCL 777.40(3)(b). A victim’s “vulnerability” is the victim’s readily apparent susceptibility to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c). “Abuse of authority status” means the offender used a victim’s fear of or deference to an authority figure to exploit the victim. Examples of an authority figure include, but are not limited to, a teacher, parent, or physician. MCL 777.40(3)(d).
10	The offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status. MCL 777.40(1)(b).	
5	The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. MCL 777.40(1)(c).	
0	The offender did not exploit a victim’s vulnerability. MCL 777.40(1)(d).	

OV 11

Criminal Sexual Penetration

Pts		Instructions
50	Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a).	<ul style="list-style-type: none"> All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11. MCL 777.41(2)(a). Multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OV's 12 or 13.* MCL 777.41(2)(b). However, if any conduct is scored under this variable, that conduct must not be scored under OV 12 and may only be scored under OV 13 if the conduct is related to the offender's membership in an organized criminal group. MCL 777.42(2)(c); MCL 777.43(2)(c). The one penetration on which a first- or third-degree criminal sexual conduct offense is based must not be counted for purposes of scoring OV 11. MCL 777.41(2)(c). <p><i>*OV 12 addresses criminal acts that occur within 24 hours of the sentencing offense and will not result in a separate conviction. OV 13 accounts for an offender's pattern of criminal conduct over a period of five years regardless of outcome.</i></p>
25	One criminal sexual penetration occurred. MCL 777.41(1)(b).	
0	No criminal sexual penetrations occurred. MCL 777.41(1)(c).	

OV 12

Number of Contemporaneous Felonious Criminal Acts

Pts		Instructions
25	Three or more contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(a).	<ul style="list-style-type: none"> A felonious criminal act is contemporaneous if both of the following circumstances exist: <ul style="list-style-type: none"> the criminal act occurred within 24 hours of the sentencing offense, MCL 777.42(2)(a)(i), and the criminal act has not and will not result in a separate conviction, MCL 777.42(2)(a)(ii). Conduct scored in OV 11 must not be scored under this variable. MCL 777.42(2)(c). Violations of MCL 750.227b (possession of a firearm during the commission of a felony) should not be counted when scoring this variable. MCL 777.42(2)(b).
10	Two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b).	
10	Three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(c).	
5	One contemporaneous felonious criminal act involving a crime against a person was committed. MCL 777.42(1)(d).	
5	Two contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(e).	
1	One contemporaneous felonious criminal act involving any other crime was committed. MCL 777.42(1)(f).	
0	No contemporaneous felonious criminal acts were committed. MCL 777.42(1)(g).	

OV 13**Continuing Pattern of Criminal Behavior**

Pts		Instructions
50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a).	<ul style="list-style-type: none"> • To score this variable, all crimes within a period of five years, including the sentencing offense, must be counted without regard to whether the offense resulted in a conviction. MCL 777.43(2)(a).
25	(Effective January 16, 2009.) * The offense was part of 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. MCL 777.43(1)(b).	<ul style="list-style-type: none"> • The existence of an organized criminal group may be inferred from the facts surrounding the sentencing offense, and the group's existence is more important than the presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication demonstrated by the criminal group. MCL 777.43(2)(b).
25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c) (formerly MCL 777.43(1)(b)).	<ul style="list-style-type: none"> • Do not consider conduct scored in OV's 11 or 12 unless the offense was related to membership in an organized criminal group. MCL 777.43(2)(c).
10	(Effective until February 28, 2003.) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property. MCL 777.43(1)(c).	<ul style="list-style-type: none"> • Do not consider conduct scored in OV's 11 or 12 unless the offense was related to membership in an organized criminal group or (effective January 16, 2009) that are gang-related.* MCL 777.43(2)(c).
10	<p>(Effective March 1, 2003, through January 15, 2009.) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(i) to (iii) or 333.7403(2)(a)(i) to (iii). MCL 777.43(1)(c).</p> <p>(Effective January 16, 2009.)* The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(i) to (iii) or 333.7403(2)(a)(i) to (iii) of the Public Health Code, 1978 PA 368, MCL 333.7401 and 333.7403. MCL 777.43(1)(d) (formerly MCL 777.42(1)(c)).</p>	<ul style="list-style-type: none"> • Score 50 points only if the sentencing offense is first-degree criminal sexual conduct. MCL 777.43(2)(d). • (Effective March 1, 2003.) Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring this variable. MCL 777.43(2)(e). • Only one crime involving the same controlled substance may be counted under this variable. For example, conspiracy and a substantive offense involving the same amount of controlled substances cannot both be counted under OV 13. Similarly, possession and delivery of the same amount of controlled substances may not be counted as two crimes under OV 13. MCL 777.43(2)(f).
10	(Effective until January 15, 2009.) The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. MCL 777.43(1)(d).	<p style="text-align: center;">continued on next page</p>

*2008 PA 562.

OV 13**Continuing Pattern of Criminal Behavior**

Pts		Instructions
10	<p>(Effective March 1, 2003, through January 15, 2009.) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of MCL 333.7401(2)(a)(i) to (iii) or 333.7403(2)(a)(i) to (iii). MCL 777.43(1)(e).</p> <p>(Effective January 16, 2009.)* The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of MCL 333.7401(2)(a)(i) to (iii) or 333.7403(2)(a)(i) to (iii) of the Public Health Code, 1978 PA 368, MCL 333.7401 and 333.7403. MCL 777.43(1)(e).</p>	
5	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. MCL 777.43(1)(f).	
0	No pattern of felonious criminal activity existed. MCL 777.43(1)(g).	

OV 14**Offender's Role**

Pts		Instructions
10	The offender was a leader in a multiple offender situation. MCL 777.44(1)(a).	<ul style="list-style-type: none"> Consider the entire criminal transaction in which the sentencing offense occurred when determining the offender's role. MCL 777.44(2)(a).
0	The offender was not a leader in a multiple offender situation. MCL 777.44(1)(b).	<ul style="list-style-type: none"> In cases involving three or more offenders, more than one offender may be considered a leader. MCL 777.44(2)(b).

OV 16**Degree of Property Damage**

Score for crime in "Person" crime group **only** if the sentencing offense is a violation or attempted violation of MCL 750.110a (home invasion).

Pts		Instructions
10	Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged. MCL 777.46(1)(a).	<ul style="list-style-type: none"> In cases involving multiple offenders or multiple victims, the appropriate point total may be determined by aggregating the value of property involved in the offense, including property involved in uncharged offenses or property involved in charges dismissed under a plea agreement. MCL 777.46(2)(a). Use the value of the property to score this variable in cases where the property was unlawfully obtained, lost to the lawful owner, or destroyed. If the property was damaged, use the amount of money necessary to restore the property to its pre-offense condition. MCL 777.46(2)(b). Money or property involved in admitted but uncharged offenses or in charges dismissed under a plea agreement may be considered in scoring this variable. MCL 777.46(2)(c).
10	The property had a value of more than \$20,000.00 or had significant historical, social, or sentimental value. MCL 777.46(1)(b).	
5	The property had a value of \$1,000.00 or more but not more than \$20,000.00. MCL 777.46(1)(c).	
1	The property had a value of \$200.00 or more but not more than \$1,000.00. MCL 777.46(1)(d).	
0	No property was obtained, damaged, lost, or destroyed or the property had a value of less than \$200.00. MCL 777.46(1)(e).	

OV 17**Degree of Negligence Exhibited**

Score for crime in "Person" crime group **only** if the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

Pts		Instructions
10	The offender showed a wanton or reckless disregard for the life or property of another person. MCL 777.47(1)(a).	<ul style="list-style-type: none"> If points are assessed against the offender for OV 6, ten points may not be scored under this variable. MCL 777.47(2). Definitions for "aircraft," "ORV," "snowmobile," "vehicle," and "vessel" are referenced in MCL 777.1.
5	The offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown. MCL 777.47(1)(b).	
0	The offender was not negligent. MCL 777.47(1)(c).	

OV 18**Degree to Which Alcohol or Drugs Affected the Offender**

Score for crime in "Person" crime group **only** if the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

Effective September 30, 2003, 2003 PA 134 amended the statute governing point allocations for OV 18.

Language appearing in the shaded areas of the chart below represents the variable as it applies to offenses that occurred before September 30, 2003. Unshaded areas contain the instructions for scoring OV 18 for offenses occurring on or after September 30, 2003, the amendment's effective date.

Pts		Instructions
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(a).	<ul style="list-style-type: none"> For purposes of scoring OV 18, "any bodily alcohol content" is either of the following: <ul style="list-style-type: none"> an alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine,* MCL 777.48(2)(a), or any presence of alcohol within a person's body from the consumption of alcohol except for alcohol consumption as part of a generally recognized religious service or ceremony, MCL 777.48(2)(b). Definitions for "aircraft," "ORV," "snowmobile," "vehicle," and "vessel" are referenced in MCL 777.1. <p>continued on next page</p>
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.	
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(b).	
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.	
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender was under the influence of alcoholic or intoxicating liquor, a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance; or while the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(iv); or while the offender had an alcohol content of 0.08 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the offender had an alcohol content of 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(c).	
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.	
5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while he or she was visibly impaired by the use of alcoholic or intoxicating liquor or a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content. MCL 777.48(1)(d).	

OV 18**Degree to Which Alcohol or Drugs Affected the Offender**

Score for crime in "Person" crime group **only** if the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

Effective September 30, 2003, 2003 PA 134 amended the statute governing point allocations for OV 18. Language appearing in the shaded areas of the chart below represents the variable as it applies to offenses that occurred before September 30, 2003. Unshaded areas contain the instructions for scoring OV 18 for offenses occurring on or after September 30, 2003, the amendment's effective date.

Pts		Instructions
5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.07 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was visibly impaired by the use of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content.	*Beginning October 1, 2013, an alcohol content of 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
0	The offender's ability to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive was not affected by an alcoholic or intoxicating liquor or a controlled substance or a combination of alcoholic or intoxicating liquor and a controlled substance. MCL 777.48(1)(e).	
0	The offender's ability to operate a vehicle was not affected by an intoxicating liquor or a controlled substance or a combination of intoxicating liquor and a controlled substance.	

OV 19**Threat to Security or Interference With the Administration of Justice**

Pts		Instructions
25	The offender by his or her conduct threatened the security of a penal institution or court. MCL 777.49(a).	
15	The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services. MCL 777.49(b).	
10	The offender otherwise interfered with or attempted to interfere with the administration of justice. MCL 777.49(c).	
0	The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or the threat of force. MCL 777.49(d).	

OV 20 Terrorism		
Pts		Instructions
100	The offender committed an act of terrorism by using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(a).	<ul style="list-style-type: none"> For purposes of scoring this variable, the terms “act of terrorism” and “terrorist” are defined in MCL 750.543b. MCL 777.49a(2)(a). “Harmful biological substance,” “harmful biological device,” “harmful chemical substance,” “harmful chemical device,” “harmful radioactive material,” and “harmful radioactive device” are defined in MCL 750.200h. MCL 777.49a(2)(b). “Incendiary device” includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.49a(2)(c). For purposes of OV 20, “terrorist organization” is defined in MCL 750.543c. MCL 777.49a(2)(d).
50	The offender committed an act of terrorism without using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(b).	
25	The offender supported an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(c).	
0	The offender did not commit an act of terrorism or support an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(d).	

OV 15**Aggravated Controlled Substance Offenses**

Effective March 1, 2003, 2002 PA 666 amended the statute governing point allocations for OV 15. Language appearing in the shaded areas of the chart below represents the variable as it applies to offenses that occurred before March 1, 2003. Unshaded areas contain the instructions for scoring OV 15 for offenses occurring on or after March 1, 2003, the amendment's effective date.

Pts		Instructions
100	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv). MCL 777.45(1)(a).	<ul style="list-style-type: none"> • "Deliver" is the actual or constructive transfer of a controlled substance from one person to another person without regard to remuneration. MCL 777.45(2)(a). • A "minor" is an individual 17 years of age or less. MCL 777.45(2)(b). • "Trafficking" is the sale or delivery of actual or counterfeit controlled substances on a continuing basis to another person or persons for further distribution. MCL 777.45(2)(c).
75	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 grams or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv). MCL 777.45(1)(b).	
50	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv). MCL 777.45(1)(c).	
25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender. MCL 777.45(1)(d).	
25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender.	
20	The offense involved the sale, delivery, or possession with intent to sell or deliver 225 grams or more of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2.	continued on next page
15	The offense involved the sale, delivery, or possession with intent to sell or deliver 50 or more grams but less than 225 grams of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2.	
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants. MCL 777.45(1)(e).	
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants.	

OV 15

Aggravated Controlled Substance Offenses

Effective March 1, 2003, 2002 PA 666 amended the statute governing point allocations for OV 15. Language appearing in the shaded areas of the chart below represents the variable as it applies to offenses that occurred before March 1, 2003. Unshaded areas contain the instructions for scoring OV 15 for offenses occurring on or after March 1, 2003, the amendment's effective date.

Pts		Instructions
10	The offense is a violation of MCL 333.7401(2)(a)(i) to (iii) pertaining to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv) and was committed in a minor's abode, settled home, or domicile, regardless of whether the minor was present. MCL 777.45(1)(f).	
5	The offense involved the delivery or possession with the intent to deliver marijuana or any other controlled substance or a counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking. MCL 777.45(1)(g).	
5	The offense involved the delivery or possession with the intent to deliver marijuana or any other controlled substance or counterfeit controlled substance or possession of controlled substances or counterfeit controlled substances having a value or under such circumstances as to indicate trafficking.	
0	The offense was not an offense described in the categories above. MCL 777.45(1)(h).	
0	The offense was not an offense described in the categories above.	

OV 19

Threat to Security or Interference With the Administration of Justice

Pts		Instructions
25	The offender by his or her conduct threatened the security of a penal institution or court. MCL 777.49(a).	
15	The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services. MCL 777.49(b).	
10	The offender otherwise interfered with or attempted to interfere with the administration of justice. MCL 777.49(c).	
0	The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or the threat of force. MCL 777.49(d).	

