Felony Sentencing Seminar

Friday, March 1, 2013

Saginaw County Courthouse
Jury Assembly Room - Fourth Floor
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Presented by the Saginaw County Bar Association and the
Criminal Defense Resource Center of the
State Appellate Defender Office with
support through a generous grant from the
Michigan Commission on Law Enforcement Standards

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
February 2013
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(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?

	Scenario 1	Scenario 2	Scenario 3
Sent offense:	Unarmed Robbery	CSC-1st deg	Conspiracy to Kidnap
Priors:	Carjacking	Unarmed Robbery	Arson of Insured Prop
	Felonious Assault	Home Inv. – 3rd deg	Felony Firearm (1st)
	Armed Robbery	OUIL – 3rd offense	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 (2012).

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.

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.]

NEW CASE LAW ON SCORING THE SENTENCING GUIDELINES

PRIOR RECORD VARIABLES

10-Year Gap Rule –

Reminder: Determine the length of time between the *commission* date of the sentencing offense and the *discharge* date of the offender's conviction or juvenile adjudication immediately preceding it. If the time span is 10 years or more, that conviction or juvenile adjudication–and any convictions or adjudications that occurred earlier–must not be counted when scoring the offender's PRVs. If the last preceding conviction can be counted, then repeat this process, i.e. determine whether there is a 10-year gap between the *commission* date of the last preceding conviction and the *discharge* date of the next earlier conviction or adjudication. If the time span equals or exceeds 10 years, that conviction or adjudication and any preceding it may not be counted. Repeat this process back through the rest of the offender's criminal history.

***If a discharge date is not available, determine the date by adding the amount of time the defendant was placed on probation or the length of the minimum term of incarceration to the date the defendant was convicted (not the date the defendant was sentenced) and use that date as the discharge date.

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

PRV 1 – Prior High Severity Convictions

In determining whether an out of state conviction constitutes a high or low severity felony conviction, the court must consider whether the conviction "corresponds" to a Michigan felony offense. The term "corresponds" refers to something that is "similar or analogous." Ohio's second-degree burglary statute corresponds to Michigan's second-degree *and* third degree home invasion statutes as the Ohio crime requires a trespass of a dwelling by force, stealth or deception, with intent to commit a criminal offense. While the Ohio statute does not specify whether the intended offense must be a felony or misdemeanor, and the Ohio statute punishes the crime with a maximum penalty of 8 years, the Court of Appeals concluded Ohio second-degree burglary most closely corresponds to Michigan's second-degree home invasion statute, thus making it a high-severity felony conviction. *People v Crews*, ___ Mich App ___ (Docket No. 305830, 2/5/13).

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 (2011).

PRV 5 - Prior Misdemeanors

Defendant's disorderly conduct convictions were not scorable offenses, but there was no error in scoring an Ohio conviction for "attempt to commit an offense" where the original charge involved a controlled substance and the Ohio statute treats attempted drug offenses in the same manner as the completed offense. The Court declined to rule on whether possession or illegal use of drug paraphernalia is a scorable offense. *People v Crews*, ___ Mich App ___ (Docket No. 305830, 2/5/13).

Where the order of disposition for a juvenile illegal entry offense was not entered before the sentencing offense was committed, it was error to score this adjudication under PRV 5. *People v Gibbs*, ___ Mich App ___ (Docket No. 306124, 306127; 2/14/13).

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

No error in scoring five points where at the time of the commission of the sentencing offense defendant had pled guilty to a juvenile charge and was awaiting adjudication and sentencing, even if he was not on bond at the time. *People v Gibbs*, ___ Mich App ___; ___ NW2d ___ (Docket No. 306124, 306127; 2/14/13).

No error in scoring ten points for juvenile probationary status as juvenile adjudication of a criminal matter with a resulting probationary sentence demonstrates a relationship to the criminal justice system. *People v Anderson,* 298 Mich App 178 (2012).

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

The trial court committed plain legal error, entitling the defendant to resentencing on her conviction for delivery of methodone, 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.]

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 (2012).

The Michigan Supreme Court reverses an assessment of points in the new *Crabtree* case, relying on *People v Ball, supra.* While the order in *Crabtree* does not mention the underlying facts, the unpublished decision of the Court of Appeals upheld an assessment of 20 points under OV 1 and 15 points under OV 2 where OMNI officers were exposed to harmful chemical substances in cleaning-up a meth lab. The order in *Crabtree*, which reverses that decision, appears to stand for the proposition that mere exposure to harmful chemical substances is not the same as *using* the

substance as a weapon. *People v Crabtree*, 493 Mich 878 (2012), reversing unpublished decision of the Court of Appeals, issued March 20, 2012 (Docket No. 302583).

OV 2 – Lethal Potential of Weapon Possessed or Used

See *Crabtree, supra.*

OV 3 – Degree of Physical Injury

The trial court properly scored ten points where one victim lost part of his ear, resulting in four stitches, and another victim suffered whiplash and completed seven weeks of physical therapy. *People v Gibbs*, ___ Mich App ___; ___ NW2d ___ (Docket No. 306124, 306127; 2/14/13).

The trial judge erred in scoring 0 points under OV 3 where the newborn child died and the sentencing offense was second-degree murder. In this situation, and in accordance with the case of *People v Houston*, 473 Mich 399 (2005), 25 points is the proper assessment where defendant caused the death of her baby. Defendant's conduct need not be the sole cause of death to score points under OV 3. *People v Portellos*, __ Mich App __ (Docket No. 301190; 11/13/12).

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 (2012).

The victim's statements about feeling angry, hurt, violated, and frightened support the scoring of OV 4 at 10 points for this home invasion offense. *People v Williams*, 298 Mich App 121 (2012). [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 5 – Pysch Injury Sustained by Member of Victim's Family (Reminder: Homicide offenses only)

The trial court did not err in scoring zero points under OV 5 where the grandmother of the deceased newborn child submitted a sentencing letter that spoke about her disbelief, grief, anger and heartbreak over the loss of the baby, but there was no evidence either she or her husband necessarily required professional treatment. *People v Portellos*, ___ Mich App ___ (Docket No. 301190; 11/13/12).

OV 7 – Aggravated Physical Abuse

CAUTION: The Michigan Supeme 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 sexual assault 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 (2012).

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

A defendant convicted of possession of child pornography may be scored 10 points for exploitation of the victim's youth despite lack of contact with the child because the defendant nevertheless engages in systematic exploitation of a vulnerable victim. *People v Needham*, ___ Mich App ___ (Docket No. 309491; 1/15/13).

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*, 298 Mich App 128 (2012).

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 Bemer*, 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).

Nothing precludes scoring OV 13 for multiple convictions arising out of the same incident. *People v Gibbs*, ___ Mich App ___ (Docket No. 306124, 306127; 2/14/13).

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 (2012)

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 trial court properly scored 10 points for a leadership role despite defendant's contention he was the only one charged with a crime as the Court of Appeals defines "multiple offender situation" as a situation consisting of more than one person violating the law while part of a group, and in this case there was another individual with the defendant who was also violating the law. *People v Jones*, ___ Mich App ___ (Docket No. 307184, 1/24/13).

The trial court did not err in scoring 10 points where defendant Henderson perpetrated the offense with a gun, did most of the talking, gave orders to co-defendant Gibbs, and checked to make sure Gibbs took everything of value. *People v Gibbs*, ___ Mich App ___(Docket No. 306124, 306127; 2/14/13).

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 (2012).

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

MSC grants leave to determine whether this variable was properly scored at 10 points where the defendant left the scene of the crime before police arrived and did not turn himself for 15 days although he knew he was wanted in connection with the victim's death. *People v Johnny Lee Williams*, 493 Mich 876 (2012).

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].

The trial judge did no err in scoring zero points under OV 19 for two reasons. First, the statute is not written to allow an assessment of ten points for interference or attempted interference with emergency medical services. Second, the trial court did not abuse its discretion in not scoring points for a false statement to the police where defendant was in post-op recovery suffering the effects of anesthesia when she gave the statement *People v Portellos*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301190, 11/13/12).

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

OV 19 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).

NEW CASE LAW ON DEPARTURES

The trial court properly relied on defendant's strong family and community support, her age (30), lack of prior record, steady and exemplary work history, cooperation with the police and the fact that she was learned disabled and did not make good decisions under pressure. *People v Portellos*, ___ Mich App ___(Docket No. 301190, 11/13/12).

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*, 297 Mich App 745 (2012).

Error to depart based on belief defendant terrorized his parents through arson of dwelling where trial court could have scored 50 points under OV 7 and did not do so and did not explain why a score under this variable would have been inadequate. Moreover, the trial court erred in departing based on the subjective conclusion defendant could have done more to assist his parents after the fire started. But departure was upheld where the trial court properly relied on the planning defendant engaged in, the extreme nature of the victims' injuries, the unusual level of psychological trauma caused by the familial nature of the relationship between victims and the defendant, and the defendant's pattern of escalating violence and his inability to benefit from counseling. *People v Anderson,* 298 Mich App 178 (2012).

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).

> **PRACTICE NOTE**: Consider Military Combat Experience As A Basis For Downward Departure
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> 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."

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

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

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

Where the defendant is placed in an at-home electronic monitoring program through the sheriff's department and under the control of the sheriff's department, this nevertheless does not satisfy the requirement of 30 days in jail for an OWI second offense (OWI with minor in the car, second offense). *People v Pennebaker*, 298 Mich App 1 (2012).

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.]

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.

JUVENILES (< 18 AT TIME OF OFFENSE) CONVICTED OF 1ST DEGREE MURDER

In *People v Carp*, ___ Mich App ___ (11/15/12, 307758), the Court of Appeals concluded the decision in *Miller v Alabama*, ___ US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), does not apply retroactively to cases on collateral review. The Court also concluded MCL 791.234(6)(a), the parole statute that precludes parole for first-degree murder, is unconstitutional as applied to juvenile offenders. The Court further concluded trial judges must exercise discretion at sentencing to determine whether a life sentence for a juvenile convicted of first-degree murder will allow for parole or not. In exercising that discretion, the trial court should consider characteristics of youth and the circumstances of the offense as delineated in *Miller* in order to arrive at an individualized and proportionate sentence. And if the sentence chosen is life with the possibility of parole, the Michigan parole board must provide meaningful determination and review when parole eligibility arises.

However, on January 30, 2013, in *Hill v Snyder*, the US District Court, for the Eastern District of Michigan, by Judge John O'Meara concluded *Miller* is retroactive. His order said "compliance with *Miller* and *Graham* requires providing a fair and meaningful possibility of parole to each and every Michigan prisoner who was sentenced to life for a crime committed as a juvenile." Judge O'Meara has ordered the parties in that case to provide further briefing to him by March 29, 2013 concerning how parole determinations should be made for juvenile lifers.