MCBA Criminal Law Committee
Criminal Defense Resource Center of the State Appellate Defender Office

MICHIGAN FELONY SENTENCING SEMINAR

Macomb County, June 24, 2011

Materials

SORA Handouts:

Criminal Defense Newsletter, May and June 2011
Cheryl A. Carpenter, Redford

Changes to Michigan's Sex Offender Registry
Thomas Robertson, Executive Director
Prosecuting Attorneys Coordinating Council

Michigan State Police Handout
Sgt. Christopher Hawkins

Sentence Law Handout:

Sentence Law Updates, June 2011
Anne Yantus, State Appellate Defender Office

Probation Department Handouts:

Felony Drug Court Entry Procedure
Probation Enhancement Program
Larry MacDonald, Supervisor, Macomb County Probation Department

The seminar is supported through a generous grant from the Michigan Commission on Law Enforcement Standards

MICHIGAN FELONY SENTENCING SEMINAR

Macomb County, June 24, 2011

12:00–12:15 Introductions, Judicial Top Ten List
Hon. Mark S. Switalski, Chief Judge

12:15-1:00 SORA Updates
Sgt. Christopher Hawkins, Michigan State Police
Cheryl A. Carpenter, Redford

1:00-1:15 SORA Q & A Period and Hypothetical Problems

1:15-1:30 BREAK

1:30-2:15 Sentence Law Updates (including Guidelines)
Anne Yantus, State Appellate Defender Office

2:15-2:30 Sentence Law Q & A and Hypothetical Problems

2:30-2:45 Drug Court and Probation Enhancement Program
Larry MacDonald, Macomb County Probation

2:45-3:00 Community Corrections Programs
Patricia Mazzola, Community Corrections
Stacie Kucharek, Community Corrections

Criminal Defense Newsletter

May, 2011
Volume 34, Number 8

One Step Forward, Two Steps Back for Reform: The 2011 Michigan Sex Offender Registry Amendments

Part One

Introduction

In 1995, Michigan enacted the Sex Offender Registration Act (SORA). MCL 28.722 *et al.* The legislative intent behind SORA was to "prevent and protect against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. SORA was enacted as an "effective means to monitor those persons who pose such a potential danger." *Id.* Although the legislative intent was to protect the public from future sexual offenses, there is little evidence that the sex offender registry (SOR) reduces crime.[1]

Michigan currently has 46,635 people on the sex offender registry.[2] Our state has the second largest per capita number of registrants in the country. *Id.* Michigan has more registered sex offenders than Illinois, Indiana and Pennsylvania combined. *Id.* The over-inclusive nature of SORA is one of the reasons that Michigan has such a large sex offender registry. The registry is offense-based rather than risk-based. Michigan's SOR includes individuals who are at low risk to re-offend and whose offenses were not predatory or pedophilic in nature. Including these individuals on the registry does little to protect the public from future criminal sexual acts.

Features

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There may be some relief in July 1, 2011, when drastic changes to SORA occur.[3] Juvenile offenders will see the most benefit, which includes removing all juveniles from the registry who were 13 or younger at the time of the offense. However, the changes do not go far enough to remove low risk individuals. Many low-risk young adults will remain on the registry and their registration will increase from 25 years to life. Also, there is no removal provision for low-risk adult offenders who had minor sexual offenses or those adults who prove that they have been rehabilitated. The lack of a general petitioning process for removal is a big flaw in the new law. Further, those listed on the registry will face far greater hardships and obstacles in their lives under the new law.

Criminal defense attorneys must make it a priority to learn the new SORA laws in order to educate not only their clients but also judges and prosecutors. It is ineffective assistance of counsel not to inform a client that a plea or guilty verdict will trigger SOR. *People v. Fonville.* ___ Mich App ___, 2011 WL 222127 (# 294554, 1-25-11). It is also very important for defense counsel to fully inform their clients of the extreme hardships they will face as registered sex offenders. Being a listed offender entails much more than verifying an address and having a photograph on the registry. SOR impacts every area of a registrant's life - personal relationships, employment, housing, travel, and mental health. Parents who are registered sex offenders cannot participate in their child's school activities because the student safety zone does not allow them to "loiter" within a 1000 feet of an elementary, middle or high school. School districts and law enforcement liberally construe loiter to include parent/teacher conferences, sporting activities and the like. SOR is not a collateral consequence of a sexual conviction. It is a direct, punitive consequence that has major implications on a person's life.

A summary of the amendments to SORA that take effect on July 1, 2011 follows.

SORA Requirements Are For Those "Convicted" Of A "Listed Offense" MCL 28.722(B)

These are the definitions of which individuals must register as a sex offender:

1. Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal cases, including (an adult) conviction subsequently set aside for a listed offense. (See tiers below for all listed offenses).

2. Either of the following:
   a. Being assigned to youthful trainee status (HYTA) before 10/1/2004. This does not apply if a petition is granted at any time allowing an individual to discontinue registration, including reduced registration periods that extend to or past July 1, 2011.
   b. Being assigned to youthful trainee status (HYTA) before 10/1/2004 if the individual is convicted of any other felony on or after July 1, 2011.

3. Having a juvenile adjudication if BOTH of the following apply (this applies to both in-state and out-of-state adjudications):
   a. The individual was 14 or older at the time of the offense.
   b. The offense would classify the individual as a Tier III offender.

Tier Based Registry - Life, 25 or 15 Years

Under old law, individuals were placed on the registry for either life or 25 years, based on the conviction offense. Under new law, SORA remains offense-based, however, offenders will be placed in tiers based on their conviction offense. All "listed offenses" for SORA purposes are in the tiers below.

Tier I Important Information

- Register for 15 years with petitioning opportunities for removal after 10 years. MCL 28.725(10).
- Non-public list that is only available to law enforcement. MCL 28.728(4)(c)
- Must verify domicile or residence one time a year, between January 1st to 15th. MCL 28.725a(a)
- Includes attempts or conspiracy for any of the Tier I listed offenses.

Tier I Offenses

750.145c(4)	A person who knowingly possesses any child sexually abusive material. (currently 25-year registration)
750.335a(2)(B)	Indecent exposure with fondling of self, if the victim is a minor. (currently 25-year registration)

750.349b	Unlawful imprisonment/restraint if the victim is a minor.
750.520e	4th Degree CSC if the victim is 18 or older. (currently 25-year registration)
750.520g(2)	Assault w/ Attempt to commit (touch) if the victim is 18 or older. (currently 25-year registration)
750.539j	Surveillance of or distribution, dissemination, or transmission of recording, photograph, or visual image of individual having reasonable expectation of privacy, if the victim is a minor. (new registerable offense)
750.10A	Anyone who was at the time of the offense is a sexually delinquent person.

Tier II Important Information

- Register for 25 years. MCL 28.725(11).
- Public list available on the internet.
- Must verify domicile or residence two times a year, between January 1st to 15th and July 1st to 15th. MCL 28.725a(b).
- Includes tier I offender subsequently convicted of another tier I offense.
- Includes attempts or conspiracies of any of the Tier II listed offenses.

Tier II Offenses

750.145a	A person who accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child or individual to commit an immoral act.
750.145b	A person who accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child or individual to commit an immoral act . . . with a prior conviction.
750.145c(2)	A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material. (currently lifetime registration)
750.145c(3)	A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material. (currently lifetime registration)
750.145d(1)(A)	Use of the internet to solicit or commit an immoral act except for a violation arising out of a violation of 750.157c. (coercing a minor to commit a felony)
750.158	Sodomy against a minor; unless either of the following applies: (A) victim consented, was 13 up to the age of 16 and no more than 4 years age difference OR (B) victim consented, was 17 or older and was not under custodial authority of the individual.
750.338, 750.338a or 750.338b	Gross indecency, victim 13 up to the age of 18, unless either of the following applies: (A) victim consented, victim 13 up to the age of 16, not more than 4 years age difference, OR (B) victim consent, victim 16 or 17 and victim was not under custodial authority of the individual.
750.448	Solicit to commit prostitution if the victim is a minor.
750.455	Pandering - enticing female to become a prostitute.
750.520c	2nd Degree CSC if the victim is 18 or older.
750.520c	2nd Degree CSC if victim is 13 up to the age of 18.
750.520e	4th Degree CSC if victim is 13 up to the age of 18.
750.520g(2)	Assault w/Attempt to Commit (touch) if victim is 13 up to the age of 18.

Tier III important information

- Register for lifetime. MCL 28.725(12).
- Public list available on the internet.
- Must verify domicile or residence four times a year, between January 1st to 15th, April 1st to 15th, July 1st to 15th and October 1st to 15th. MCL 28.725a(c)
- includes attempts or conspiracies for any of the Tier III listed offenses.

Tier III Offenses

750.338	Gross indecency between males, victim under 13. (currently 25-year registration)
750.338a	Gross indecency between females, victim under 13. (currently 25-year registration)
750.338b	Gross indecency between male and female, victim under 13. (currently 25-year registration)
750.349	Kidnapping committed against a minor.
750.350	Kidnapping victim under 14.
750.520b	1st Degree CSC, does not apply when a court determines victim consented, victim 13 up to the age of 16, less than 4 yr. age difference.
750.520c	2nd Degree CSC, victim under the age of 13.
750.520d	3rd Degree CSC, does not apply when a court determines victim consented, victim 13 up to the age of 16, less than 4 yr. age difference. (currently 25-year registration)
750.520e	4th Degree CSC committed by individual 17 or older against victim less than 13.
750.520g(1)	Assault w/Attempt to commit penetration, does not apply when a court determines victim consented, victim 13 up to the age of 16, less than 4 yr. age difference. (currently 25-year registration)
750.520g(2)	Assault w/Attempt to Commit touch, victim under the age of 13. (currently 25-year registration)

Catch-All Provision

A problem for criminal defense attorneys who attempted to plea bargain a sex crimes case was the catch-all provision of SORA. This provision required individuals to register for "any other violation of a law . . . that by its nature constitutes a sexual offense against an individual who is less than 18 years of age," (old law, MCL 28.722(e)(xi)). When a defense attorney and prosecutor negotiated a plea bargain from a sexual offense to a non-sexual offense, such as dismissal of a criminal sexual conduct third degree victim 13-15 in exchange for a guilty plea of an assault and battery charge, the catch-all provision would trigger registration for 25 years if the victim was under the age of 18.

The new SORA amendment now places the catch-all provision offenders in Tier I, comprised of "any other violation of a law of this state or a local ordinance of a municipality, other than Tier II or Tier III offense, that by its nature constitutes a sexual offense against an individual who is a minor." MCL 28.722(s)(vi). Minor is defined as a person less than 18 years of age at the time the offense was committed. MCL 28.722(l).

For a catch-all offender, the SORA requirements will not be as onerous as they were with the old law. The offender will be placed in Tier I which requires 15-year registration on a non-public list unless the catch-all offense is a Tier II or III offense. The catch-all provision offenses will rarely be Tier II or III offenses since the catch-all provision usually captured offenders who pled guilty to a nonsexual offense which is not a listed offense for SORA purposes.

Juveniles Under Age Of 14 Will Be Removed From Registry

Juveniles under the age of 14 are excluded from the definition of "convicted" for SORA purposes, and they are not required to register. MCL 28.722(b)(iii). In order to qualify for removal, the juvenile's case cannot have been a designated case (juvenile waived to adult circuit court).

This is an important change in SORA because these offenders were at the lowest risk for re-offending and have the highest percentage of success in sexual

abuse treatment programs. Further, the majority of juveniles under age of 14 who were adjudicated of a listed offense were simply engaged in juvenile sexual exploration, not predatory conduct.

It is unclear whether the MSP will automatically remove these juvenile offenders or if a court order is needed. The statute speaks of a petitioning process and court orders for these juveniles: the court "shall" grant the petition for immediate removal if individual was both (i) adjudicated as a juvenile and (ii) petitioner was less than the age of 14 at time of offense. MCL 28.728c(15)(a). Many of the individuals who had adjudications for a listed offense when they were under age of 14 will not realize that they can petition for removal. This writer has seen it happen numerous times under the old petitioning laws for alternate registration. Letters from the MSP informing offenders of this opportunity will remain unopened, thrown away or never received by these registrants. It seems unfair to leave these individuals on the registry because they did not know they could petition for automatic removal. The duty to remove should be placed on MSP, not on the registrant. Also, many of these individuals will lack the financial resources to hire an attorney to assist them in this petitioning process and/or lack the ability and knowledge to file the petition and appear in court in pro per. The legislative intent is automatic removal, so it should be automatic.

Juveniles Aged 14-16 Will Be Removed From Registry if Tier I or II

Juveniles in the 14 to 16-year-old age group do not have to register as sex offenders if their offense does not fall into a Tier III category. MCL 28.722(b)(iii). This will be problematic because Criminal Sexual Conduct Second Degree with victim under 13 is a Tier III offense. There will be many cases where juveniles aged 14-16 engaged in sexual contact with a 10 to 12-year-old. There will only be a 2 to 4 year age difference between the parties, however, adjudication for this offense will lead to lifetime non-public registration. Defense counsel should be aware of this and seek a plea bargain for alternative charges.

Juveniles Aged 14-16 with Tier III Offenses Will Be On Non-Public Registry for Lifetime

An important step forward for juvenile offenders is that they go on to a non-public registry. Old law mandated that juvenile adjudications for 1st and 2nd degree CSC remain on a non-public registry until the defendant turned 18 years old. At that point, he or she were placed on the public registry. New law requires that all juvenile offenders remain on a non-public registry for their lifetime as long as their case was not designated to be tried in the same manner as an adult. MCL 28.728(4)(a).

A step backward for juvenile offenders is the requirement of lifetime registration for adjudication of Tier III offenses. Lifetime registration for an individual who committed an offense when he or she were 14 to 16 years of age is unduly harsh, especially when juvenile offenders do not have the maturity of adult offenders and those adult offenders may spend less time on SOR. There is a limited opportunity for these juveniles to petition for removal after 25 years. See below for details on petitioning process. This is not enough of a safeguard for our juvenile offenders.

This section will only apply to juveniles aged 14 or older with Tier III offenses since juveniles under age of 14 or juveniles aged 14-16 with Tier I or II offenses will be removed from the registry.

Adult Expungements Remain Convictions for SORA

A disappointment in the new law is that convictions that are set aside, known also as expunged, remain convictions for SORA purposes. MCL 28.722(b)(1). Thus, those individuals who had adult convictions set aside will remain on SOR. One minor concession is that the public registry will list that the conviction has been expunged if the offender forwards the set-aside paperwork to MSP. MCL 28.728(10).

Juvenile Expungements are Not Convictions for SORA

This is not a change in the law, however, many registrants and defense attorneys do not realize that an individual who had his or her juvenile adjudication set aside does not have to register as a sex offender. A juvenile set aside is not a conviction for SORA. It is a matter of exclusion because the law states, "convicted . . . include[s] a conviction subsequently set aside under 1965 PA 213, MCL 780.621 to 780.624." MCL 28.722(b)(i). There is no reference to juvenile set aside law, thus, juveniles who get their adjudications set aside do not have to register. This is only relevant to juveniles aged 14-16 with Tier III offenses since all

other juveniles will be removed from SOR under the new law.

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Special thanks to Barb Lambourne and Sharon Denniston, Steering Committee members of the Coalition for a Useful Registry, in helping compile the information contained in this article.

Endnotes

1. Letourneau, E., "Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?" (2010), Criminal Justice and Behavior , vol. 37 no. 5, 553-569, Shaffer, D.K. (2010), "Sex offender registration and notification laws as a means of legal control," in James J. Chriss (ed.) Social Control: Informal, Legal and Medical (Sociology of Crime Law and Deviance, Volume 15), Emerald Group Publishing Limited, pp.43-63

2. National Center for Missing and Exploited Children, 2010.

3. Michigan is drastically changing SOR in order to comply with the federal Adam Walsh Act which is the federal sex offender law. If Michigan did not substantially comply with Adam Walsh Act, the state would have lost up to 10% in Federal Byrne Grant funds. However, the costs of implementing SORA amendments are unknown at this time. This writer believes that the implementation costs will far outweigh any lost federal grant money.

Representing Prisoners at Parole Revocation Hearings

presented by the
Prisons and Corrections Section of the State Bar of Michigan
SATURDAY, JUNE 4, 2011
9:30-1:00
STATE BAR OF MICHIGAN
306 Townsend Street Lansing, Michigan 48933-2012

A seminar for attorneys interested in representing prisoners facing parole revocation

BACKGROUND

Parole revocations are not the usual administrative proceeding, and differ considerably from criminal proceedings. Revocations require focus on parole conditions and the expectations of the Parole Board, and parolees are held to a high standard of accountability in their behavior, including their responsibility for areas within their control.

PURPOSE OF SEMINAR

To provide an overview of policies on parole revocation and discussion of problems that should be addressed from the perspective of the Michigan Parole Board, including outcomes and special remedies for access to mental health programs (the D-47 Process)

PRESENTATIONS WILL INCLUDE

Detailed information on the parole revocation process: arraignment, appointment of counsel, and hearing preparation.
Speaker, Rachel Johnson, Michigan Department of Corrections

Criminal Defense Newsletter

June, 2011
Volume 34, Number 9

One Step Forward, Two Steps Back for Reform: The 2011 Michigan Sex Offender Registry Amendments

Part Two

How to Keep Your Client off SOR

There are a handful of ways for defense counsel to shield their clients from SOR. They are listed below:

1. Holmes Youthful Trainee Act (HYTA)
   - young offenders between ages of 17-20 will remain off registry if they successfully complete their probation and are discharged pursuant to HYTA
   - HYTA is not a listed offense for SORA purpose
   - It is important to note that this only applies to defendants who received HYTA after 10/1/04. Those who received HYTA prior to 10/1/04 are considered to have a conviction for SORA purposes and are required to register. MCL 28.722(b)(ii)(A)
   - defendants can receive HYTA for following offenses:
     a) 750.520d(1)(a) - CSC 3 - victim 13-15
     b) 750.520e(1)(a) - CSC 4 - victim 13-15 and defendant not more than 5 yrs older
     c) 750.520g - Assault with intent one of the above
     d) any other listed offense unless it carries life imprisonment or is CSC 1, 2, or any other CSC 3 or 4 other than listed above

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2. Prove consent in Romeo and Juliet cases in a hearing before sentencing
   - this provision applies to cases pending or after 7/1/11
   - HYTA is not required so the sentencing judge has more options in sentencing
   - see below section for detailed description of procedure

3. Constitutional challenges for cruel or unusual punishment for HYTA defendants
   - see *People v Dipiazza*, 286 Mich App 137 (2009)

4. Consent calendar for juvenile offenders between the ages of 14-16 with tier III offense
   - consent calendar is only necessary for juveniles in this category because all others will not have conviction for SORA purposes

5. Set aside for juvenile adjudications
   - see previous section

6. Petitions for reduction in registration length for tier I or III offenders
   - see below section

New Petitioning Procedures for Removal or Reduction of Registration on SOR

Effective 7/1/11, there are four distinct opportunities for petitioning for removal or reduction of time on SOR:

1. Removal in consensual cases (Romeo and Juliet)
2. Reduction in length of registration for Tier I and III offenses
3. Removal of some juvenile adjudications
4. Removal for individuals convicted of offenses no longer considered listed offenses

A. Consensual case petitions (Romeo and Juliet)

This section applies to cases that have been sentenced prior to 7/1/11. This gives broader relief for removal from SOR than old law which required that the defendant be sentenced pursuant to HYTA. HYTA is no longer a required element for petitioning. In addition, old Romeo and Juliet petitions reduced registration from 25 to 10 years. New law allows for immediate removal. Consent is the essential element of this petition along with the ages of the parties. Any tier can petition for immediate removal under this section.

MCL 28.728c(14) states:

The court shall grant a petition by an individual if the court determines the listed offense was the result of a **consensual** sexual act and ANY of the following apply:

(A) ALL of the following:
(i) The victim was 13 or older but less than 16 years old at the time of the offense.
(ii) The petitioner is not more than 4 years older than the victim.

(B) ALL of the following:
(i) Petitioner was convicted of
   - Crime against nature or sodomy against victim under 18 (MCL 750.158) or
   - Gross Indecency victim 13-17 years old (MCL 750.338, 750.338a, or 338b)

(ii) Victim was 13 or older but less than 16 years old at the time of offense.
(iii) Petitioner is not more than 4 years older than the victim.

(C) ALL of the following:
(i) Petitioner was convicted of
   - Crime against nature or sodomy against victim under 18 (MCL 750.158) or
   - Gross Indecency victim 13-17 years old (MCL 750.338, 750.338a, or 338b)
   - CSC 2nd and "that other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections." (MCL 750.520c(1)(i

(ii) Victim was 16 years or older at the time of the offense.
(ii) Victim was not under the custodial authority of the petitioner at the time of the offense.

B. Petitions for Reduction in Registration Length for tier I or III only

Tier I offenders can petition after 10 years for removal from the registry if they can prove certain criteria as explained below. MCL 28.728c(1). Tier III

offenders who were juveniles at the time of their offense can petition after 25 years for removal if they can prove certain criteria as explained below. Adult defendants have no relief. MCL 28.728c(2). Tier II offenders have no relief for reduction of their 25 year registration period.

Court Uses These Factors for both Tier I and III reductions in registration length

The following is applicable for both tier I and III petitions for reductions in registration. There are additional criteria that must be proven for tier I and III reductions which are described below.

MCL 28.728c(11) states that the court shall consider ALL of the following in determining whether or not to allow the discontinuation of registration but shall NOT grant the petition if the court determines that the individual is a continuing threat to the public:

- The individual's age and level of maturity at the time of the offense.
- The victim's age and level of maturity at the time of the offense.
- The nature of the offense.
- The severity of the offense.
- The individual's prior juvenile or criminal history.
- The individual's likelihood to commit further listed offenses.
- Any impact statement submitted by the victim
- Any other information considered relevant by the court. This should include letters of support by family, friends and others in the community who know the petitioner.

Tier I Petition for Reduction of Registration from 15 to 10 years

MCL 28.728c(12) states the court may grant a petition under Tier I if ALL of the following apply:

(a) Ten or more years have elapsed from the date of conviction or from release from any period of confinement.
(b) The petitioner has not been convicted of any felony since the date of conviction or release from confinement.
(c) The petitioner has not been convicted of any listed offense since the date of conviction or release from confinement.
(d) The petitioner completed their sentence or assignment without revocation.
(e) The petitioner successfully completed an appropriate sex offender treatment program certified by the US Attorney General or another appropriate SO treatment program. The court may waive this requirement if successful completion was not a condition of petitioner's sentence.

Tier III Petition for Reduction of Registration from Lifetime to 25 years

MCL 28.728c(13) states the court may grant a petition under Tier III if ALL of the following apply:

(a) The petitioner was adjudicated as a juvenile and required to register.
(b) 25 or more years have elapsed since the date of adjudication or release from any period of confinement.
(c) The petitioner has not been convicted of any felony since the date of conviction or release from confinement.
(d) The petitioner has not been convicted of any listed offense since the date of conviction or release from confinement.
(e) The petitioner completed their sentence or assignment without revocation.
(f) The petitioner successfully completed an appropriate sex offender treatment program certified by the US Attorney General or another appropriate SO treatment program. The court may waive this requirement if successful completion was not a condition of petitioner's sentence.

C. Juvenile Adjudication Removals

Juveniles aged 13 or younger at the time of their offense will be removed from the registry if they were adjudicated as a juvenile. MCL 28.728c(15)(a). It cannot have been a designated case. See above section entitled Juveniles under age of 14 will be removed from registry for a discussion on whether this requires a petition and court order or if it will be an automatic removal by MSP.

Juveniles aged 14-16 who were adjudicated of tier I or II offenses as a juvenile (not designated as adult case) are not required to register since these offenses

are not considered convictions for SOR purposes. MCL 28.722(B)(ii)(b). Petitions for removals for these juveniles are filed pursuant to MCL 28.728c(15)(b)

D. Removals Due to Offenses Taken Out of SORA

If an individual was registered under this act before July 1, 2011 for an offense that required registration but for which registration is no longer required on or after July 1, 2011, they can petition for removal from SOR. MCL 28.728c(15)(b). These offenses required three convictions to trigger registration. They were commonly known as the "peeing in public" offender. Offenses that were previously required to register but required anymore are:

1. Disorderly Person/Indecent or Obscene Conduct;
   MCL MCL 750.167(1)(f)
2. Indecent Exposure;
   MCL MCL 750.335a(2)(a)

Romeo and Juliet after 7/1/11 - Hearing to Determine if Defendant Required to Register

Under old law, Romeo and Juliet offenders could only avoid SOR if they received HYTA (as adults) or were placed on the consent calendar (juveniles). The new law still exempts HYTA defendants and juveniles on consent calendar from SOR but it goes one step further. But individuals can avoid SOR even if they do not receive HYTA or consent calendar if the sentencing court finds the offense was consensual. Also required is a specific age group for victims and defendants. Consent is the essential element in these cases. Below are the steps a court must take when making the determination whether a person charged in a Romeo and Juliet case has to register. MCL 28.723a.

This section only applies to the following offenses:

750.158 Sodomy against a minor

Defendant must prove either of the following::
a) victim consented
b).13 up to the age of 16
c) no more than 4 years age difference between parties

OR
a) victim consented
b) victim was 17 or older and was not under custodial authority of the individual.

750.520b 1st Degree CSC

750.520d 3rd Degree CSC

750.520g(1) Assault w/Attempt to commit penetration,

Defendant must prove:
a) victim consented
b) victim 13 up to the age of 16
c) less than 4 yr. age difference.

Important Points For Romeo and Juliet Hearings:

1. Hearing held prior to sentencing (adult) or disposition (juvenile)

A hearing must take place prior to sentencing. However, the new law is unclear whether the hearing should take place before the plea. It is important for defense counsel to have this hearing prior to the plea so the defendant can make an intelligent and voluntary decision whether to plead guilty or go to trial. This may be an issue of conflict because prosecutors may argue that this is akin to a mini-trial and should not precede a trial. However, defense should argue that SOR is a direct consequence of a conviction and a client cannot make an informed decision on whether to plead guilty or go to trial if they do not know if the conviction will require SOR.

People v. Fonville, --- N.W.2d ----, 2011 WL 222127, Mich.App., January 25, 2011 (NO. 294554).

2. Defendant has burden of proof by preponderance of evidence

3. Rules of evidence, except Rape Shield Act, shall not apply to these hearing

4. Victim does not have to attend hearing and may submit letter the court can use to determine consent

It is important for defense counsel to hold preliminary examinations in the above four types of cases in order to cross exam the complaining witness about consent. This may be the only opportunity to do so.

5. These hearings only apply to the 4 offenses listed above (not CSC 2 or 4)

Cannot File Second Petition if Previous Petition Was Denied After A Hearing

A petition shall not be filed under this section if a previous petition was filed under this section and was denied by the court after a hearing. MCL 28.728c(4). This raises questions on whether a petition can be filed under the amended SORA of July 1, 2011 if a prior petition for alternate registration was filed and denied under petitioning procedures of the old law. The amendments to SORA substantially change the petitioning requirements. Consent was never an issue in prior petitions for alternate registration. In prior petitions, Defendants had to prove lack of force or coercion in addition to many other factors that have been removed for new petitions.

In addition, what is the definition of a hearing for this section? If a prior petition was filed and denied under old law and the court only allowed oral arguments, should another petition be allowed since there was not a hearing? Does hearing mean evidentiary hearing or oral arguments? It is this writer's argument that if a prior petition was denied under the old law, a petition under this new law should be allowed.

Immediate Removal for Registrants Who Had Petitions for Alternate Registration Granted Prior to 7/1/11

A plain reading of the new law supports the proposition that individuals who received HYTA and were granted petitions for alternate registration (25 to 10 years) are to be immediately removed from SOR because they no longer have a conviction for SOR purposes. Some of these individuals still have a couple of years left to register. Convicted for SOR purposes is now defined as:

> Being assigned to youthful trainee status (HYTA) before 10/1/2004. This does not apply if a petition is granted at any time allowing individual to discontinue registration, including reduced registration periods that extend to or past July 1, 2011. MCL 28.722(b)(ii)(A)

Registrant's Information Required on Public Registry

The new SORA amendments require much more personal information from a registrant. Much of the new information will go on the private law enforcement database but some information will go on the public registry. For example, a registrant's employer's address will be placed on the public registry. Although the employer's name is on private database, the employer's address will be public. This almost guarantees that registrants will be unemployable. Internet searches such as Google will make it easy for anybody to type in an address to find who it belongs to. Employers will be very hesitant to hire a registered offender because of social pressure and backlash. It is McDonald's corporate policy not to hire sex offenders. Below is the list of information that will be on a registrant's public listing:

- Legal name, aliases, nicknames, ethnic or tribal names, or other names by which the individual is or has been known.
- Date of birth
- Address where the individual resides or will reside. If they do not have a residential address they shall provide the location or area used or to be used in lieu of a residence or, if they are homeless the city, village or township where they spend or will spend the majority of their time.
- Address of individual's employer. Includes contractor and any individual who has agreed to hire or contract with the registrant for their services. Must include the address or location of employment if different from the address of the employer. If individual lacks a fixed employment location... the general areas where the individual works and the normal travel routes taken in the course of their employment.
- Address of any school being attended or any school the individual has been accepted to and plans to attend. This includes public or private post-secondary school or school of higher education, including a trade school. This does not apply to an individual whose enrollment and participation at an institution

of higher education is solely through mail or the internet.
- Address of any school of higher education where an individual works or volunteers.
- License plate number or registration number, and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual
- Brief summary of convictions for listed offenses regardless of when they occurred
- Complete physical description.
- Photograph.
- Text of the law that defines the offense for which individual is registered.
- Registration status (compliant, non-compliant or absconder).
- Tier classification (I, II or III)

Registrant's Information Required for Private Law Enforcement Database

- Social security number and any social security number previously used by registrant
- Alleged dates of birth.
- Name and address of any place of temporary lodging used or to be used, during any period the individual is away or is expected to be away from their residence, for more than 7 days. Must include the dates the lodging is used or will be used.
- Name of individual's employer
- Name of any school being attended or any school the individual has been accepted to and plans to attend.
- Name of any school of higher education where an individual works or volunteers.
- All telephone numbers registered to the individual or routinely used by the individual.
- All electronic mail addresses and instant message addresses assigned to or routinely used by the individual and ALL login names or other identifiers used by the individual when using any electronic mail address or instant messaging system.
- The location, including where it is habitually stored or kept, of any motor vehicle, aircraft or vessel owned or regularly operated by individual.
- Individual's driver's license number or state ID number.
- Digital copy of registrant's passport and other immigration documents.
- Occupational and professional licensing information for individual including any license that authorizes the registrant to engage in any occupation, profession, trade or business.
- Brief summary of convictions for listed offenses regardless of when they occurred, including where the offense occurred and the original charge if the conviction was for a lesser offense.
- Registrant's fingerprints and palm prints. If not already on file with the MSP individual must have their fingerprints and/or palm prints taken not later than September 12, 2011.
- Electronic copy of registrant's MI driver's license or ID card, including photograph.
- Any outstanding arrest warrant information.
- Whether a DNA sample has been collected and the location where sample is stored.
- Complete criminal history record including dates of all arrests and convictions.
- Michigan Department of Corrections number and status of parole, probation or supervised release.
- Registrant's FBI investigation number.

Recapture Provision

This is a murky area of the new law. This provision puts individuals back on the registry who were removed early if they are convicted of ANY felony after 7/1/11. The subsequent felony does not have to be a listed sexual offense. Felony is defined as a conviction that carries imprisonment of 1 year or more. MCL 28.722(f). It is this writer's belief that this section only applies to HYTA defendants with convictions prior to 10/1/04 who had petitions granted for reduction in registration from 25 to 10 years. However, the language of the new statute is not clear as who this recapture provision applies. It is important for defense counsel to argue that this section does not apply to juveniles whose petitions for immediate removal were granted since juvenile adjudications are not mentioned in any of the sections addressing the recapture provision. Sections of the new law that reference the recapture provision are:

Convicted means . . . being assigned HYTA . . . before 10/1/04 if the individual is convicted of any other felony on or after 7/1/11.
MCL 28.722(b)(ii)(B)

Subject to subsection (2), the following individuals who are domiciled . . . in this state . . . are required to be registered under this act . . . [a]n individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after 7/1/11. MCL 28.723(1)(e)

Subject to section 3, an individual convicted of a listed offense in this state after 10/1/95 and an individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after 7/1/11, shall register before sentencing, entry of order of the family division or assignment to HYTA for that listed offense or that other felony. MCL 28.724(5)

For an individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after 7/1/11, any period of time that he or she was not incarcerated for that listed offense or that other felony and was not civilly committed counts toward satisfying the registration period for that listed offense as described in this section. MCL 28.725(14).

Changes that Must Be Made in Person, With Law Enforcement Within 3 Business Days:

MCL 28.725(1)

1. Individual changes or vacates a residence.
2. Individual changes place of employment, or employment is discontinued.
3. Individual changes student status including enrollment and when enrollment is discontinued.
4. Any changes in name.
5. Individual intends to temporarily reside at any place other than their residence for more than 7 days.
6. Individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings.
7. Individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued.

Notify Law Enforcement Within 3 days of a Move of Residence to Out of State

If a registrant moves out of Michigan to a new state, they must report in person and notify law enforcement within 3 days before they change their residence to another state and, if known, indicate the new address. MCL 28.725(6)

Penalties for Non-compliance:

- ANY failure to change required information, within 3 business days, is a felony conviction.
- No prior convictions for a violation: imprisonment for not more than 4 years or a fine of not more than $2000, or both.
- 1 prior conviction for a violation: imprisonment for not more than 7 years or a fine of not more than $5000, or both.
- 2 or more prior convictions for a violation: imprisonment for not more than 10 years or a fine of not more than $10,000, or both.
- ANY failure to verify information periodically (annually, bi-annually or quarterly) is guilty of a 2 year misdemeanor (which is treated like a felony) or a fine of not more than $2000, or both.
- An individual who willfully fails to sign a registration and notice is guilty is a misdemeanor punishable by imprisonment for not more than 93 day or a fine of not more than $1000 , or both.
- An individual who willfully refuses or fails to pay the one time registration fee within 90 days of the day the individual first reports is guilty of a misdemeanor punishable by imprisonment for not more than 90 days.

Must Report Travels Out of Country Greater Than Seven Days

A new requirement for sex offenders is that they must report travels to any foreign country if out of the United States for more than 7 days. MCL 28.725(7). The individual must notify law enforcement not later than 21 days before travel.

Homeless

A new provision has been added to SORA to allow homeless to register "the location or area used or to be used by the individual in lieu of a residence or, if the individual is homeless, the village, city, or township where the person spends or will spend the majority of his or her time." MCL 28.727(d). This will alleviate some of the problems homeless has had in the past in fulfilling their registration requirements.

MSP Shall Remove Registrants Within 7 days After Determination That They No Longer Need to Register

A new provision in SORA mandates that Michigan State Police remove a registrant from both the public internet website and law enforcement database within 7 days of determining that the registrant no longer is required to register. MCL 28.728(9). The time frame for removal had not been specified in the old law but it was this writer's experience that MSP always complied quickly with court orders for removals.

Constitutional Challenges to Information on Public Registry are Specifically Preserved

It may be a foreshadowing of the numerous constitutional challenges that will be made to the vast changes in sora, but the new law specifically states that "[i]f a court determines that the public availability . . . Of any information concerning individuals registered under this act violates the constitution of the united states or this state, the department shall revise the public internet website . . . So that it does not contain that information." MCL 28.728(8)

Conclusion

The above analysis of the 2011 SORA amendments is advisory only. Defense counsel should study the laws thoroughly before handling any SORA related issues. Many of the amendments are vague and subject to judicial interpretation. This writer did her best to interpret the amendments, however, many questions remain unanswered. There will be many constitutional challenges and appellate reviews.

Prosecutors and judges are asked to remember the legislative intent behind SORA: to protect the public from dangerous individuals and prevent commission of future crimes. MCL 28.721a. Many of the 2011 amendments were enacted to give relief to juvenile and young adult offenders who are not dangerous and at low risk to re-offend. Judges have the power to remove individuals from the registry. Judges are encouraged to use this power freely so Michigan's sex offender registry contains only the dangerous pedophiles and sexual predators that are likely to re-offend. The over-inclusive nature of our registry makes gives Michigan the second highest per capita rate of registered sex offenders in the country. The real travesty is that the registry is destroying young people's lives forever. The registry is a scarlet letter that cannot be hidden from society. Should our young wear this letter for the rest of their lives? Should their lives be ruined because of a sexual exploration and experimentation? This is not the intent of SORA, however, this is reality. Judges and prosecutors have the power to stop this injustice.

The next step in making our registry useful is to give discretion to judges to remove or reduce registration time for any offender they believe is low risk to society. Judges and prosecutors know the facts surrounding a case. Legislators in Lansing do not. As Abraham Lincoln wisely said, "The best way to get a bad law repealed is to enforce it strictly." Michigan's registry should be risk based, not offense based. The amendments coming in July are a step in the right direction but do not go far enough. Furthermore, the punishments on registrants are becoming so extreme that registrants cannot find any employment or housing. They cannot be involved in their children's educational activities. They are subject to harassment and isolation. They live a sentence that far exceeds the punishment given to them in court.

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Special thanks to Barb Lambourne and Sharon Denniston, Steering Committee members of the Coalition for a Useful Registry, in helping compile the information contained in this article.

Quick Reference Guide on PA 17 & PA 18 of 2011 – Michigan Sex Offender Registry

	Description	Tier 1 Adult only	Tier 2 Adult only	Tier 3 Adult	Tier 3 Adjudicated Juvenile (only if 14 or older at offense)	MI PA 295 of 1994 Requirement (Old Law)
Duration		15 yrs	25 yrs	Life	Life	25 or Life
Frequency		Annual	Bi-Annual	Quarterly	Quarterly	Annual/Quarterly
Public/Non-Public		1 Offense Non-Public; > 1 is Public	Public	Public	Non-Public	Public (Juveniles non-public til 18; some after 18)
Consensual Exception - C1	C1 - Consensual; victim 13 – 15; < 4 yrs. difference in age		New offenses with C1 below excluded	New offenses with C1 below excluded	New offenses with C1 below excluded	No
Consensual Exception - C2	C2 - Consensual; victim 16 – 17 and not under custodial authority		New offenses with C2 below excluded			No
Petitioning – Good Behavior	Allowed for "good behavior" if certain requirements are met and no prior petition has been denied	At 10 yrs	None	None	At 25 yrs.	No
Petitioning - Consensual	Existing registrants can petition court for C1 or C2 consensual determination		Existing registrant can petition for C1 or C2 determination	Existing registrant can petition for C1 determination	Existing registrant can petition for C1 determination	Limited petitioning for HYTA and Some juveniles
No Longer Required to Register (Because of Age or Offense)						
Adjudicated juveniles < 14 years of age at offense	All adjudicated juveniles < 14 years of age at offense do not register					25 yrs or Life
Adjudicated juveniles 14 years of age or older at offense IF Tier 1 or Tier 2 offense	All adjudicated juveniles 14 yrs of age or older at offense with past or future Tier 1 or 2 offenses do not register; Those with future Tier 3 Consensual (C1) offenses do not register; Those with Tier 3 Non-Consensual offenses must register for life (non-public registry)					25 yrs or Life
750.167(1)f)	Disorderly person engage in indecent/obscene public conduct not required to register	Not required to register				25 yr – Qrtly if 3 convictions
750.335a(1) and 750.335a(2)(a) only	Indecent Exposure without fondling not required to register	Not required to register				25 yr – Qtrly if 3 convictions
Offense (Including Attempted or Similar)	**Individuals that do not fit the offender age or victim age requirements for offenses below are not required to register. Individuals that do not commit an offense listed below are not required to register.**					
750.10a	Sexually Delinquent	Any Victim				25 yr – Qrtly
750.145a	Accosting/Enticing/ Soliciting Child		Any Victim			25 yr – Annual prior to 6/1/02. 25 yr – Qtrly thereafter
750.145b	Accosting/Enticing/ Soliciting Child – with Prior		Any Victim			25 yr – Qtrly 2nd offense
750.145c(2) or (3)	Child Sexually Abusive Material (2) – Entice/Coerce/Allow (3) -Distributes		Any Victim			Life – Qtrly

	Description	Tier 1 Adult only	Tier 2 Adult only	Tier 3 Adult	Tier 3 Adjudicated Juvenile (only if 14 or older at offense)	MI PA 295 of 1994 Requirement (Old Law)
750.145c(4)	Child Sexually Abusive Material (Possession)	Any Victim				25 yr – Annual prior to 12/30/02 25 yr – Qtrly thereafter
750.145d(1)(a) except 750.157c	Soliciting by Internet		Any Victim			No
750.158	Sodomy		Victim < 18 except C1 or C2 Above			25 yr - Qtrly
750.335a(2)(b)	Indecent Exposure – Fondling	Victim < 18				25 yr – Annual if prior 750.335a
750.338, 338a, 338b	Gross Indecency - Male/Female/Both		Victim 13 – 17 except C1 or C2	Victim <13	Victim <13	25 yr – Qtrly Juv - No
750.349	Kidnapping			Victim< 18	Victim < 18	Lifetime – Qtrly
750.349b	Unlawful Imprisonment	Victim < 18				No
750.350	Enticing Child (not parent)			Any Victim	Any Victim	Life – Qtrly
750.448	Soliciting for Prostitution		Victim < 18			25 yr – Annual
750.455	Pandering		Any Victim			25 yr - Qtrly
750.520b	CSC 1 – Sexual Penetration			Any Victim - except C1 Above	Any Victim – except C1 Above	Life – Qtrly
750.520c	CSC 2 – Sexual Contact		Victim > 18			25 yr – Qtrly
750.520c	CSC 2 – Sexual Contract		Victim 13 – 17	Victim < 13	Victim < 13	Life - Qtryl If Victim < 13 25 – Qtrly Victim 13 -17
750.520d	CSC 3 – Sexual Penetration			Any Victim – except C1 Above	Any Victim – except C1 Above	25 yr – Qtrly
750.520e	CSC 4 – Sexual Contract	Victim > 17	Victim 13 – 17	Victim < 13		25 yr – Qtrly
750.520g(1)	Assault with Intent to Commit Sexual Penetration			Any Victim – except C1 Above	Any Victim – except C1 Above	25 yr – Qtrly
750.520g(2)	Assault with Intent to Commit Sexual Contact	Victim > 17	Victim 13 – 17	Victim < 13	Victim < 13	25 yr – Qtrly
750.539j	Surveillance/Distribution Photos	Victim < 18				No
Any other non Tier 2 or 3 Offense	Any other offense that by it's nature constitutes a sexual offense against a minor (New Catch-All Provision)	Victim < 18				N/A
Tier 1 Offender with Subsequent Tier 1 Offense			Any Victim			Subsequent offense Life - Qtrly
Tier 2 Offender with Subsequent Tier 1 or 2 Offense				Any Victim		Subsequent offense Life - Qtrly

By: Thomas Robertson, Executive Director
Prosecuting Attorneys Coordinating Council

CHANGES TO MICHIGAN'S SEX OFFENDER REGISTRY
2011 PA 17-19
Effective July 1, 2011

2011 PA 17-19 amended Michigan's Sex Offender Registration Act (SORA) to comply with the requirements of the Federal Sex Offender Registration and Notification Act (SORNA). Information regarding SORNA is available on-line at:
http://www.ojp.usdoj.gov/smart/guidelines.htm

This memo addresses the major changes in a Frequently Asked Questions (FAQ) format.

A. WHAT IS A CONVICTION?

1. A judgment of conviction in a criminal court, including tribal or military courts. MCL 28.722(b)(i).

2. A conviction that has been set aside under MCL 780.621 to 624. MCL 28.722(b)(i).

3. Being assigned to youthful trainee status:

a. Before October 1, 2004 if the person did not successfully petition for removal from the registry before July 1, 2011. MCL 28.722(b)(ii)(a).

b. Before October 1, 2004 if the person is convicted of a felony after July 1, 2011. MCL 28.722(b)(ii)(b).

4. A juvenile disposition if the juvenile was age 14 or older and was adjudicated for a tier 3 offense. MCL 28.722(b)(iii).

B. WHO IS REQUIRED TO REGISTER?

Registration offenses are divided into three tiers.

1. TIER 1

a. Tier 1 offenders will only be on the law enforcement registry. MCL 28.728(4)(c).
b. Tier 1 offenders will register for 15 years. MCL 28.725(10).
c. Tier 1 offenses are:

1. MCL 750.145c(4) - Knowing possession of child sexually abusive material. MCL 28.722(s)(i).

2. MCL 750.335a(2)(b) - Indecent exposure with fondling if the victim is a minor. A minor is a person under 18 years of age. MCL 28.722(s)(ii).

3. MCL 750.349b - Unlawful imprisonment if the victim is a minor. MCL 28.722(s)(iii).

4. MCL 750.520e - 4 degree CSC if the victim th is 18 or older. MCL 28.722(s)(iv).

5. MCL 750.520g(2) - Assault with intent to commit CSC (sexual contact) if the victim is 18 or older. MCL 28.722(s)(iv).

6. MCL 750.539j - Video voyeurism if the victim is a minor. MCL 28.722(s)(v).

7. Any other violation that by its nature constitutes a sexual offense against a minor. MCL 28.722(s)(vi).

8. An offense committed by a sexually delinquent person. MCL 28.722(s)(vii).

9. An attempt or conspiracy to commit a tier 1 offense. MCL 28.722(s)(viii).

10. An offense substantially similar to a tier 1 offense under the law of the United States, another state or country, or tribal or military law. MCL 28.722(s)(ix).

2. TIER 2

a. Tier 2 offenders will be on the public registry. MCL 28.728(4).

b. Tier 2 offenders will register for 25 years. MCL 28.725(11).

c. Tier 2 offenses are:

1. A tier 1 offender subsequently convicted of another tier 1 offense. MCL 28.722(t)(i).

2. MCL 750.145a - Soliciting a person under the age of 16 for an immoral purpose. MCL 28.722(u)(i).

3. MCL 750.145b - Soliciting a person under the age of 16 for an immoral purpose; second offense. MCL 28.722(u)(ii).

3. MCL 750.145c(2) or (3) - Creation or distribution of child sexually abusive material. MCL 28.722(u)(iii).

4. MCL 750.145d(1)(a) - Using the Internet to commit various crimes against a minor. MCL 28.722(u)(iv).

5. MCL 750.158 - Sodomy against a minor. MCL 28.722(u)(v).

a. Unless the victim was between 13-16, and

b. The defendant was not more than 4 years older than the victim, and

c. The victim consented to the violation, or

d. The victim was 16 or 17 and was not under the custodial authority of the defendant at the time of the violation, and

e. The victim consented to the violation.

6. MCL 750.338, 338a or 338b - Gross indecency against a minor. MCL 28.722(u)(vi).

a. Unless the victim was between 13-16, and

b. The defendant was not more than 4 years older than the victim, and
c. The victim consented to the conduct, or

d. The victim was 16 or 17 and was not under the custodial authority of the defendant at the time of the violation, and

e. The victim consented to the conduct.

7. MCL 750.448 - Soliciting a minor to become a prostitute. MCL 28.722(u)(vii).

8. MCL 750.455 - Pandering. MCL 28.722(u)(viii).

9. MCL 750.520c - 2nd degree CSC committed against a victim 13 year of age or older. MCL 28.722(u)(ix & x).

10. MCL 750.520e - 4th degree CSC committed against a victim between 13 and 18 years of age. MCL 28.722(u)(ix).

11. MCL 750.520g(2) - Assault with intent to commit sexual contact committed against a victim between 13 and 18 years of age. MCL 28.722(u)(ix).

12. An attempt or conspiracy to commit a tier 2 offense. MCL 28.722(u)(xi).

13. An offense substantially similar to a tier 2 offense under the law of the United States, another state or country, or tribal or military law. MCL 28.722(u)(xii).

3. TIER 3

a. Tier 3 offenders will be on the public registry. MCL 28.728(4).

b. Tier 3 offenders will register for life. MCL 28.725(12).

c. Tier 3 offenses are:

1. A tier 2 offender subsequently convicted of another tier 1 or tier 2 offense. MCL 28.722(v)(i).

2. MCL 750.338, 750.338a, 750.338b - Gross indecency committed against a victim under age 13. MCL 28.722(w)(i).

3. MCL 750.349 - Kidnaping if the victim is a minor. MCL 28.722(w)(ii).

4. MCL 750.350 - Enticing a child under age 14. MCL 28.722(w)(iii).

5. MCL 750.520b, 750.520d and 750.520g(1) - 1st degree CSC, 3rd degree CSC and Assault with intent to commit sexual penetration. MCL 28.722(w)(iv).

a. Unless the victim was between 13-16, and

b. The defendant was not more than 4 years older than the victim, and

c. The victim consented to the conduct.

6. MCL 750.520c or 750.520g(2) - 2nd degree CSC or Assault with intent to commit sexual contact committed against a victim under 13. MCL 28.722(w)(v).

7. MCL 750.520e - 4th degree CSC if the defendant is over 17 and the victim is under 13. MCL 28.722(w)(vi).

8. An attempt or conspiracy to commit a tier 3 offense. MCL 28.722(w)(vii).

9. An offense substantially similar to a tier 3 offense under the law of the United States, another state or country, or tribal or military law. MCL 28.722(w)(viii).

C. WHAT ABOUT JUVENILE OFFENDERS?

1. Only juvenile offenders who are 14 or older at the time of the offense are required to register, and only for a tier 3 adjudication. MCL 28.722(b)(iii).

2. Juvenile offenders are only on the law enforcement registry. MCL 28.728(4)(b).

3. Juveniles convicted as an adult in circuit court are subject to adult registration rules. MCL 28.722(b)(i) & 28.722(b)(iii).

4. Juveniles convicted in a designated proceeding in juvenile court are subject to adult registration rules. MCL 28.728(4)(a).

D. HOW DO WE DETERMINE ROMEO AND JULIET STATUS?

1. If there is a dispute between the prosecution and defense regarding whether the defendant or juvenile is required to register because the defense claims the conduct falls within the Romeo and Juliet exception:

a. The court holds a post-conviction, pre-sentencing hearing or a post-adjudication, pre-disposition hearing. MCL 28.723a(1).

b. The defendant or juvenile must prove by a preponderance of the evidence that:

1. The victim was between the ages of 13 to 16.

2. The defendant or juvenile was not more than 4 years older than the victim.

3. The sexual conduct was consensual.

4. The victim was 16 or 17 and was not under the custodial authority of the defendant at the time of the violation, and

5. The victim consented to the conduct. MCL 28.723a(2).

c. The rules of evidence, except those relating to privileges and the rape shield law, do not apply. MCL 28.723a(3).

d. The victim has the right to attend and be heard, attend and be silent, or to refuse to attend. MCL 28.723a(5).

e. The Court's decision is a final order, appealable by right to the Court of Appeals. MCL 28.723a(6).

E. WHAT IF MY CASE IS PENDING ON JULY 1, 2011 WHEN THIS LAW TAKES EFFECT?

1. If a prosecution or juvenile proceeding is pending on July 1, the registration determination is made under Acts 17-19, and not the law in effect at the time of the offense. MCL 28.724(7).

F. WHEN AND HOW OFTEN DOES AN OFFENDER HAVE TO CHECK IN?

1. A tier 1 offender must report once a year between January 1-15. MCL 28.725a(3)(a).

2. A tier 2 offender must report twice a year between January 1-15 and July 1-15. MCL 28.725a(3)(b).

3. A tier 3 offender must report quarterly between January 1-15, April 1-15, July 1-15 and October 1-15. MCL 28.725a(3)(c).

4. When the person reports they must review and confirm or change their registration information. If their appearance has changed, they must obtain an updated photo. MCL 28.725a(4) & (5).

G. WHAT IS THE REGISTRATION FEE?

1. The fee is increased from $35 to $50. MCL 28.725a(6).

2. $30 must be forwarded to the MSP for deposit in the sex offenders registration fund. $20 is retained by the collecting agency. MCL 28.725b(1).

3. The fee can be waived for 90 days if the offender is indigent. MCL 28.725b(3).

4. An offender is indigent if he or she:

   a. Was found indigent by a court within the last 6 months, or

   b. Receives assistance under the DHS food assistance program, or

   c. Has an annual income below the current federal poverty guidelines. MCL 28.722(h).

H. WHERE DOES A HOMELESS PERSON REGISTER?

1. A homeless person registers in the city, village or township where the person spends the majority of his or her time. MCL 28.722(p).

I. WHEN DOES A NONRESIDENT HAVE TO REGISTER?

1. A nonresident who works or attends post secondary school in this state has to register and comply with all reporting and change of work or school address requirements. MCL 28.723(1), MCL 28.724a & MCL 28.725(2).

2. A non resident who commits a Tier 1-3 offense in this state must initially register, but he or she is not required to comply with continuing SORA reporting requirements. MCL 28.723(3).

J. WHAT INFORMATION IS ON THE REGISTRY?

1. The Acts create two registrys. A registry with information that is available only to law enforcement, and a public registry that can be accessed on-line with less information. The following information will **all** be on the law enforcement registry. *Information on the public registry is in italics.*

a. *Offender's legal name, any aliases, nicknames, ethnic or tribal names or any other names by which the individual is or has been known.* MCL 28.728(1)(a). *MCL 28.728(2)(a).*

b. Social security number and any alleged SSNs previously used by the offender. MCL 28.728(1)(b).

c. *Date of birth* and any alleged dates previously used by the offender. MCL 28.728(1)(c). *MCL28.728(2)(b).*

d. *The address where the offender resides* or will reside. MCL 28.728(1)(d). *MCL 28.728(2)(c).*

e. Name and address of any temporary lodging that will be used for more than 7 days. MCL 28.728(1)(e).

f. Name and *address of the offender's employer.* MCL 28.728(1)(f). *MCL 28.728(2)(d).*

g. Name and *address of any postsecondary school the offender is attending.* MCL 28.728(1)(g). *MCL 28.728(2)(e).*

h. All phone numbers registered to the offender or routinely used by the offender. MCL 28.728(1)(h).

i. All email or instant message addresses assigned to or routinely used by the offender, including all login names or other identifiers. MCL 28.728(1)(i).

j. *The license plate number, registration number and description of any motor vehicle, aircraft or vessel owned or regularly operated by the offender*, including the location at which the item is habitually stored or kept. MCL 28.728(1)(j). *MCL 28.728(2)(f).*

k. Driver license or state personal ID card number. MCL 28.728(1)(k).

l. A digital copy of the offenders passport and other immigration documents. MCL 28.728(1)(l).

m. Any occupational or professional licensing information. MCL 28.728(1)(m).

n. *A brief summary of the conviction*, including where it occurred and the original charge if the conviction was for a lesser offense. MCL 28.728(1)(n). *MCL 28.728(2)(g).*

o. *A complete physical description of the offender.* MCL 28.728(1)(o). *MCL 28.728(2)(h).*

p. *A photograph.* MCL 28.728(1)(p). *MCL 28.728(2)(i).*

q. Fingerprints and palm prints. MCL 28.728(1)(q).

r. An electronic copy of the offender's driver license or state ID card, including a photograph. MCL 28.728(1)(r) .

s. *The law text for the offender's registration offense.* MCL 28.728(1)(s). *MCL 28.728(2)(j).*

t. Any outstanding arrest warrant information. MCL 28.728(1)(t).

u. *Offender's tier classification and registration status.* MCL 28.728(1)(u). *MCL 28.728(2)(k) & (l).*

v. An indicator whether a DNA profile has been entered in CODIS. MCL 28.728(1)(v).

w. Offender's complete criminal history, including dates of all arrests and convictions. MCL 28.728(1)(w).

x. Offender's MDOC number, and the status of his or her parole, probation or release. MCL 28.728(1)(x).

y. Offender's FBI number. MCL 28.728(1)(y).

z. *Whether the offender's conviction has been set aside. MCL 28.728(10).*

K. WHEN DOES AN OFFENDER HAVE TO UPDATE HIS OR HER REGISTRATION INFORMATION?

1. An offender must immediately report the following changes in person to the registering authority.

a. A change of residence. MCL 28.725(1)(a).

b. A change in place of employment, or discontinuance of employment. MCL 28.725(1)(b).

c. Enrolls in an institution of higher education, or discontinues enrollment. MCL 28.725(1)(c).

d. A name change. MCL 28.725(1)(d).

e. Temporarily reside at a place other than his or her residence for more than 7 days. MCL 28.725(1)(e).

f. Establishing an email address. MCL 28.725(1)(f).

g. Purchases or begins to regularly operate a vehicle, or discontinues ownership or operation. MCL 28.725(1)(g).

h. When he or she plans to change residence to another state. MCL 28.725(6).

2. Immediately is defined as within 3 business days. MCL 28.722(g).

3. The registering authority is the law enforcement agency or sheriff's office having jurisdiction over the offender's residence, place of employment or institution of higher learning, or the nearest MSP post. MCL 28.722(o).

4. If an offender is moving out of the country, or will be traveling to another country for more than 7 days, he or she must notify the registering authority within 21 days before moving or traveling. MCL 28.725(7).

L. HOW IS A CURRENT REGISTRANT NOTIFIED OF ANY NEW REPORTING REQUIREMENTS?

1. The MSP must mail a notice to every registrant before July 1, 2011. MCL 28.725a(1).

M. ARE THE REGISTRATION PROVISIONS RETROACTIVE?

1. If a person was previously convicted of an offense for which registration would now be required, the person is not required to register, unless he or she is convicted of a felony after July 1, 2011. MCL 28.724(5).

N. WHAT DOES LAW ENFORCEMENT HAVE TO DO IF AN OFFENDER DOES NOT REGISTER OR UPDATE REGISTRATION INFORMATION?

1. The registering agency must do all of the following:

a. Determine whether the offender has absconded or is otherwise unavailable. MCL 28.728a(1)(a).

b. If notified by another state, US territory, or Indian tribe that an offender was supposed to appear and register or update registration information, and the offender does not appear, the registering agency must notify the MSP. MCL 28.728a(1)(b).

c. Revise the information in the law enforcement registry that the offender has absconded or is otherwise unlocatable. MCL 28.728a(1)(c) .

d. Seek an arrest warrant if the legal requirements for obtaining a warrant are satisfied. MCL 28.728a(1)(d).

e. Enter the offender into the National Crime Information Center. MCL 28.728a(1)(e).

2. After receiving notification from the registering agency, the MSP must do all of the following:

a. Notify the state, territory or Indian tribe that the offender failed to register. MCL 28.728a(2)(a).

b. Notify the US Marshall's service. MCL 28.728a(2)(a).

c. Update the National Sex Offender Registry of the offender's status as an absconder or as unlocatable. MCL 28.728a(2)(c) .

O. WHAT ARE THE PENALTIES FOR VIOLATIONS?

1. A willful violation of the act is a felony punishable by imprisonment for up to 4 years and/or a fine of up to $2,000. MCL 28.729(1)(a). It is an F felony under the guidelines. MCL 777.11b.

a. A second offense is a felony punishable by imprisonment for up to 7 years and/or a fine of up to $5,000. MCL 28.729(1)(b). It is a D felony under the guidelines. MCL 777.11b.

b. A third offense is a felony punishable by imprisonment for up to 10 years and/or a fine of up to $10,000. MCL 28.729(1)(b). It is a D felony under the guidelines. MCL 777.11b.

2. A failure to register is a misdemeanor punishable by imprisonment for up to 2 years and/or a fine of up to $2,000. MCL 28.729(2). It is an F felony under the guidelines. MCL 777.11b.

3. A willful failure to sign a registration and notice is a misdemeanor, punishable by imprisonment for up 93 days and/or a fine of up to $1,000. MCL 28.729(3).

4. A willful refusal or failure to pay the registration fee is a misdemeanor punishable by imprisonment for up to 90 days. MCL 28.729(4).

5. Divulging, using or publishing non-public SORA information is a misdemeanor punishable by imprisonment for up to 93 days and/or a fine of up to $1,000. MCL 28.730.

P. HOW DO WE COUNT THE REGISTRATION PERIOD?

1. The registration periods for tier 1, 2 or 3 offenses exclude any periods of incarceration or civil commitment. MCL 28.725(13).

2. If a person is required to register after July 1, 2011 for a conviction that occurred prior to July 1, any time from the date of that conviction to the date of registration, less time spent incarcerated, will count toward the applicable registration period. MCL 28.275(14).

Q. MY REGISTRATION PERIOD EXPIRED. DO I NEED TO DO ANYTHING TO BE REMOVED FROM THE REGISTRY?

1. If the MSP determines a person's registration period has expired, or that the offender is no longer required to register, the MSP must remove the offender within 7 days after making that determination. MCL 28.728(9).

R. WHEN CAN A PERSON PETITION FOR REMOVAL FROM THE REGISTRY?

1. A tier 1 offender with a clean record can petition for after 10 years. MCL 28.728c(1) & (12).

2. A tier 3 offender with a clear record, who is on the registry for a juvenile adjudication, can petition after 25 years. MCL 28.728c(2) & (13).

3. An offender who is on the registry under any of the following circumstances can petition immediately for removal from the registry. The court **shall** grant the petition if the offender proves any of the following. MCL 28.728c(3) & (14-15).

a. That he or she meets the "Romeo and Juliet" exception. MCL 728.8c(14)(a) & (b).

b. That he or she was convicted of gross indecency or 2nd degree CSC by a department of corrections employee, the victim was 16 or older, the act was consensual, and the victim was not under the offender's custodial authority. MCL 28.728c(14)(c).

c. That he or she was under 14 at the time of the offense, and was adjudicated as a juvenile. MCL 28.728c(15)(a).

d. That he or she is on the registry for an offense that no longer requires registration. MCL 28.728c(15)(b).

1. Those offenses would be indecent exposure and juveniles adjudicated for an offense that is not on tier 3.

4. The petition is filed in the county of conviction, or if the offender was convicted in another state or territory, in the county of the offender's residence. MCL 28.728c(4) & (7).

5. The prosecuting attorney must be served with the petition. MCL 28.728c(7).

6. A false statement in a petition is perjury. MCL 28.728c(6).

7. If the victim is known, the prosecuting attorney must notify the victim. MCL 28.728c(8).

a. The victim has the right to attend any hearing and make a statement. A victim cannot be required to attend a hearing against his or her will. MCL 28.728c(10).

8. The court **may** reduce the registration period to 10 years for a tier 1 offender or to 25 years for a juvenile offender if the court finds the following:

a. The appropriate time period has elapsed. MCL 728.8c(12)(a) & (13)(a).

b. The offender has not been convicted of a felony. MCL 728.8c(12)(b) & (13)(b).

c The offender has not been convicted of a listed offense. MCL 728.8c(12)(c) & (13)(c).

d. The offender has successfully completed probation, parole or supervised release without any revocation. MCL 728.8c(12)(d) & (13)(d).

e. The offender successfully completed a sex offender treatment program. This requirement may be waived if such programming was not a condition of probation, parole or supervised release. MCL 728.8c(12)(e) & (13)(e).

f. The petition shall not be granted if the court determines the offender is a continuing threat to the public. MCL 28.728c(11).

NOTE: this memorandum was put together by Tom Robertson, Executive Director of the Prosecuting Attorneys Association of Michigan. This version has been slightly modified for style, but is otherwise the product of Mr. Robertson's efforts.

Michigan State Police Handout

Sgt. Christopher Hawkins

Question 1:

D is convicted of felony embezzlement in August of 2011. A review of D's criminal history indicates he was convicted of producing child sexually abusive material [MCL 750.145c(2)] in August of 1981 and was incarcerated for exactly ten years for the offense. D is not currently on the Sex Offender Registry.

Will D be required to register now and, if so, for how long?

Question 2:

D is currently a registered sex offender. D committed an offense that resulted in a conviction of two counts of CSC 4th (victim over the age of 18) on November 1st, 1995. D has no subsequent criminal history.

Effective July 1, 2011 what Tier will D be placed in and how long will he have to register?

MACOMB COUNTY FELONY SENTENCING SEMINAR
SENTENCE LAW UPDATES, JUNE 2011
By: Anne Yantus

I. ***PENDING IN THE MICHIGAN SUPREME COURT***

Can the trial court amend the judgment of sentence (here, the order of probation) to include **sex offender registration** nearly two years after sentencing? Can the trial court find a catch-all offense (i.e., a crime that by its nature constitutes a sexual offense against an individual under the age of 18), where the defendant, convicted of child abuse, admitted "flicking" the boy's penis to get his attention? *People v Lee*, 488 Mich 953; 790 NW2d 823 (2010).

Can the trial court find predatory conduct against a vulnerable victim under **OV 10** where defendant, who was convicted of armed robbery, was lying in wait at night and assaulted a lone woman outside her locked vehicle in a deserted parking lot, but there was no evidence the woman was vulnerable apart from the location and circumstances of the crime? *People v Huston*, 288 Mich App 387 (2010), *lv gtd* 488 Mich 876; 788 NW2d 662 (2011). Put another way, does victim "vulnerability" include consideration of the victim's surrounding circumstances at the time of the offense, or is it limited to the victim's personal characteristics? Note: the Court of Appeals chose the latter interpretation.

Can the crime of assaulting a prison guard, classified as a Public Safety crime under the guidelines, be used to establish a pattern of crimes against the person for purposes of scoring **OV 13**? *People v Bonilla-Machado*, 486 Mich 907 (2010).

Did the trial court properly score 10 points under **OV 19** for interference with the administration of justice based on the defendant's conduct of throwing away the evidence and denying guilt? *People v Cooley*, 489 Mich 870; 795 NW2d 815 (2011).

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

II. ***NEW FROM THE MICHIGAN LEGISLATURE***

Boot Camp:

Defendants sentenced to their first prison term (but *not* as an habitual offender) for certain offenses may be eligible to participate in the Special Alternative Incarceration program, provided the sentencing judge does not object. Placement is statutorily prohibited for certain offenses (most life offenses, nearly all CSC offenses, manslaughter and various other offenses). The defendant's minimum sentence term must be 36 months or less (24 months or less for breaking and entering an occupied dwelling and home invasion). MCL 791.234a. *The boot camp statute has a new sunset date of 9/30/12.*

Defendants sentenced to the boot camp as part of a probationary term are not excluded if sentenced as an habitual offender for an otherwise eligible offense. MCL 771.3b. But when boot camp is ordered as a condition of probation, the top end of the sentencing guidelines range must be 12 months or more or the defendant must be sentenced for a probation violation. *Id.*

Parole Amendments:

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

Drunk Driving Amendments:

Effective October 31, 2010, the penalty for a *first-offense* misdemeanor drunk driving (but not second- or third-offense drunk driving) is increased if the offender's blood alcohol content is .17 or higher. 2008 PA 461, 462. The maximum possible sentence is 180 days (93 days for regular first offense), and the maximum fine is not less than $200 nor more than $700 (not less than $100 and not more than $500 with regular first offense). There is also mandatory license suspension for one year (45 days with no driving, last 320 days with restrictive license requiring breath alcohol ignition interlock device).

Effective October 31, 2010, for all drunk driving offenses except first offense drunk driving with a blood alcohol level of less than .17, the court must order a one-year treatment program. 2008 PA 462.

Increased Crime Victim Rights Fee:

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

III. ***NEW FROM THE UNITED STATES SUPREME COURT***

Juvenile Offenders:

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

Deportation Consequences:

Defense counsel must provide advice to defendant on immigration consequences before the plea in order to ensure a voluntary plea. *Padilla v Kentucky*, 130 S Ct 1473; 176 L Ed 2d 284 (2010).

Note: The Circuit Court in Kalamazoo includes this advisement on the written Advice of Rights form for circuit court pleas: "A noncitizen defendant who offers a plea of guilty or nolo contendere risks deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court will allow the defendant a reasonable amount of time to consider the appropriateness of the plea in light of this advisement."

IV. ***NEW MICHIGAN CASE LAW (NON-GUIDELINES)***

Juveniles and Sex Offender Registration:

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

But in a decision limiting *Dipiazza* to its facts, the Court recently held SORA is not punishment, nor cruel or unusual punishment, as applied to a juvenile offender adjudicated of second-degree CSC involving a non-consensual act against an unwilling victim, even if it could be said the defendant had completed all rehabilitated programs and was non-dangerous. The indirect consequences of public registration under SORA such as harassment, assault, job loss eviction and dislocation are not punishment. *In re T.D.*, ___ Mich App ___ (Docket No. 294716, 5/26/11).

Likewise, it is not cruel and unusual punishment to require sex offender registration for the crime of child enticement, although the crime contains no sexual component, as a) the SORA statutes require registration for some crimes in order to protect the safety and welfare of children even where there is no sexual component, b) because sex offender registration is not punishment, and c) because the *Dipiazza* case is distinguishable. *People v Fonville*, ___ Mich App ___ (Docket No. 294554, 1/25/11).

Plea Advice on Sex Offender Registration:

But according to the *Fonville* decision, defense counsel must provide advice to the defendant prior to the guilty plea that sex offender registration will be a consequence of the plea (if SORA is applicable), and failure to give this advice affects whether the plea is knowingly made. Although not deciding whether SORA consequences are collateral or direct, the Court concludes advice on the consequences of SORA must be given as sex offender registration is a "particularly severe consequence" that is intimately related to the criminal process and because registration is an "automatic result" for certain defendants. *People v Fonville, supra*.

Note: The Michigan Supreme Court has directed the Berrien County Prosecutor to respond to a pending application for leave to appeal to address whether "the Court of Appeals correctly decided *People v Fonville*, ___ Mich App ___ (Docket No. 294554, decided January 25, 2011)." *People v Freeze*, ___ Mich ___ (Docket No. 142177, 4/28/11).

Removal from Sex Offender Registry:

To file a timely petition for removal from the sex offender registry under MCL 28.728(c)(4), a juvenile offender adjudicated prior to October 1, 2004, must file the petition before October 1, 2007, or within three years of discharge from court jurisdiction. Where the instant juvenile was adjudicated in 1999, and the court terminated jurisdiction in 2000, the petition for removal was untimely in 2008. Moreover, with limited exceptions not applicable to this defendant, there is no opportunity for removal from the registry for juveniles convicted of CSC fourth-degree. *In the Matter of Suligman*, ___ Mich App ___ (Docket No. 294832, 2/1/11).

Amendment of Judgment of Sentence to Add Sex Offender Registration:

The trial court did not err in ordering registration for the crime of third degree child abuse (not a listed offense, but arguably a catchall offense) more than one year after sentencing where the prosecutor raised the issue at sentencing, the court did not order registration when it imposed a probationary term, but the court indicated it would allow the prosecutor to file a post-sentence motion to revisit the issue. The Court of Appeals concludes registration is "a ministerial function," and the trial court has jurisdiction to order it so long as the court has jurisdiction over the case. *People v Lee*, 288 Mich App 739; 794 NW2d 862 (2010), *lv gtd* 488 Mich 953 (2010).

Sexually Delinquent Person:

Where defendant is sentenced for gross indecency as a sexually delinquent person, a single conviction and sentence is appropriate under MCL 750. 338b because MCL 750.10a is a definitional statute only and does not provide for a separate conviction and sentence. *People v Craig*, 488 Mich 861; 788 NW2d 13 (2010).

There is no absolute right to a separate jury for the question of whether defendant should be convicted of being a sexually delinquent person in addition to conviction of the underlying sexual offense, and the trial court must exercise discretion on a case by case basis in granting separate juries, partially overruling *People v Helzer*, 404 Mich 410 (1978). *People v Breidenbach*, 489 Mich 1; ___ NW2d ___ (2011).

Tanner Rule:

Two-thirds rule of *People v Tanner*, 387 Mich 683 (1972), does not apply when the maximum sentence is life or any term of years. *People v Washington*, 489 Mich 871; 795 NW2d 816 (2011) (court disavows earlier conflicting order in *People v Floyd*, 481 Mich 938 (2008), and affirms earlier statements in *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n. 14 (2006), and *People v Harper*, 479 Mich 599, 617 n 31 (2007). See also, *People v Lewis*, ___ Mich ___ (Docket No. 142819, 6/1/11) (same).

Probation Revocation:

Trial court failed to make sufficient findings of fact of a violation of probation that was premised on a failure to maintain employment "as directed by" the probation officer where the court adduced no evidence regarding how or when the probation officer directed the minor defendant to seek employment and the Michigan Supreme Court questioned whether a condition of

probation that the defendant attend high school and maintain employment of 30 hours per week would be legally possible given the restrictions of Michigan's youth employment law, MCL 409.11. *People v Kumasi*, 489 Mich 863; 795 NW2d 149 (2011).

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

Jail Credit:

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

Although the defendant was entitled to no jail credit at the time of sentencing because the offense was committed while on parole, he is entitled to credit at *resentencing* for the time he served for this offense between the sentencing and resentencing dates. *People v McDaniel*, 480 Mich 1162; 746 NW2d 867 (2008).

Financial Penalties:

Where there was no record evidence to support the order of costs of prosecution of $1,235, and there was no way to determine whether the costs (following a jury trial) were based on impermissible charges such as the prosecutor's wages, the matter was remanded for a hearing to determine the appropriate costs. *People v Dillworth*, __ Mich App ___ (Docket No. 294785, 1/25/11).

Full restitution is proper despite the existence of a civil settlement between the victim and the defendant that included a negotiated settlement amount and release from further claims. *People v Bell*, 276 Mich App 342; 741 NW2d 57 (2007).

Statutorily mandated restitution is not offset by a civil judgment. The trial court erred in reducing the restitution order by the amount the victim was awarded in a civil suit against the defendant. *People v Dimovski*, 286 Mich App 474; 780 NW2d 896 (2009).

Restitution amount must be based on the actual loss to the complainant, not the replacement cost paid by the insurer. *People v Bell*, 276 Mich App 342; 741 NW2d 57 (2007)*; In re McEvoy*, 267 Mich App 55; 704 NW2d 78 (2005). ***But effective July 1, 2009, the restitution statutes were amended to provide for restitution based on the "fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain,***

then the replacement value of the property shall be utilized in lieu of the fair market value." MCL 769.1a(3)(b); MCL 780.766(3)(b).

Presentence Report:

MCR 6.425 was amended to provide for two days' notice of the presentence report. The earlier provision that precluded copies and required the parties to return the report at the time of sentencing was stricken effective July 1, 2010. ADM File No. 2008-39. Admin Order 2008-39.

The trial court did not abuse its discretion in rejecting the defendant's challenge to the victim impact statement in the presentence report that claimed the victim suffered an injury to his arm while attempting to apprehend the defendant where the trial judge concluded the statement was the victim's subjective recollection of what happened. The Court also concludes the presentence report may note a history of drug abuse dating back to 1980 without mentioning periods of abstinence while in prison. Moreover, the presentence report may include the agent's subjective opinion that defendant was "casing" houses on the night of the instant offense (as conclusions drawn from the facts may not be challenged). Finally, defendant did not present an 'effective challenge" to information contained in the report where the defendant merely claimed the police officer failed to identify himself at the time of the offense, but did not support this challenge. *People v Lucey*, 287 Mich App 267; 787 NW2d 137 (2010).

V. ***NEW MICHIGAN CASE LAW – SENTENCING GUIDELINES:***

General Application:

The decision in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), that the offense variables must be scored based on the sentencing offense alone unless language within the variable instructs otherwise, is to be given limited retroactive effect. "[T]he retroactive effect of *McGraw* is limited to cases pending on appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved." *People v Mushatt*, 486 Mich 934; 782 NW2d 202 (2010).

Where the trial court erred in scoring OV 13 (pattern of crimes) and "the resulting change in the defendant's total OV score produces a lower applicable guidelines range, [] the defendant is therefore entitled to resentencing." *People v Williams*, 486 Mich 1077; 784 NW2d 206 (2010).

Where the error in scoring PRV 7 (concurrent felony convictions) did not exist until defendant prevailed on appeal on a claim of insufficient evidence with respect to two of his three convictions, and where the sentencing guidelines range would changed based on a score of zero points under PRV 7, resentencing is necessary because the trial court sentenced using inaccurate information. Moreover, defendant properly preserved the error by requesting a remand for resentencing in his brief on appeal (rather than filing a premature motion to remand). *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010).

Ten Year Gap:

Zero points should have been scored under PRV 1 where there was a ten-year gap between convictions. *People v Detloff*, ___ Mich ___ (Docket No. 142319, 6/17/11).

Where trial counsel (and appellate counsel) failed to recognize a ten-year gap in the prior criminal history that would preclude the scoring of prior record variables 1, 2 and 5, and where the mistake resulted in a sentence above the appropriate range, counsel provided in effective assistance of counsel and the defendant is entitled to resentencing. *People* v *Anderson*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2011 (Docket No. 296732) (error raise via Standard 4 brief filed by the defendant).

PRVs Are Scored for Second-Drug Offense:

The prior record variables are scored even where the sentence may be enhanced as a second drug offense under MCL 333.7413(2). *People v Peltola*, ___ Mich ___ (Docket No. 140524, 6/14/11).

PRV 2:

A felony conviction from Indiana remains a felony for purposes of scoring the Michigan sentencing guidelines even if the sentencing peculiarities in Indiana cause the sentence to mimic the sentence for a misdemeanor. *People v Meeks*, ___ Mich App ___ (Docket No. 297030, 6/16/11).

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

PRV 5:

Two points are properly scored under PRV 5 for a conviction of minor operating a vehicle with any bodily alcohol content, i.e., zero tolerance provision under MCL 257.625(6). *People v Bulger*, ___ Mich App ___ (Docket No. 288312, 11/30/10).

PRV 6:

No error in scoring five points for defendant's misdemeanor bond status – although the bond had been revoked – where the misdemeanor was still pending and therefore defendant had a relationship with the criminal justice system when he committed the instant offense. *People v Johnson*, ___ Mich App ___ (Docket No. 295664; 6/14/11).

OV 1*:*

Trial court committed plain error in scoring OV 1 for methadone that was not used against the child as a weapon. *People v Carr*, ___ Mich ___ (Docket No. 141849, 3/23/11).

Fifteen points properly scored under OV 1 where testimony at trial and information in the presentence report indicated defendant pointed gun at victim's face or brandished gun during robbery, even if jury convicted of unarmed robbery rather than armed robbery. *People v Harverson*, ___ Mich App ___ (Docket No. 293014, 12/28/10).

OV 2:

Five points properly scored under OV 2 for nature of the weapon where testimony at trial and information in presentence report indicated defendant pointed gun at victim's face or brandished gun during robbery, even if jury convicted of unarmed robbery rather than armed robbery. *People v Harverson*, ___ Mich App ___ (Docket No. 293014, 12/28/10).

OV 3:

Where the sentencing offense was first-degree home invasion and defendant's accomplice was fatally shot by the homeowner, error to score 100 points for death of a "victim" as the co-felon was not a "victim" because he was not harmed by the defendant's criminal activity or by the crime committed (and his death resulted from the actions of the homeowner, not the commission of a crime). *People v Laidler*, ___ Mich App ___ (Docket No. 294147, 295111, 12/28/2010).

In lieu of granting leave to appeal, the defendant's sentence is vacated and the trial court at resentencing is to reconsider the scoring of OV3 in light of *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009) (holding that the offense variables are properly scored by reference only to the sentencing offense except where the language of a particular variable specifically provides otherwise). *People v Lenderman*, 485 Mich 921; 773 NW2d 664 (2009).

OV 4:

OV4 was properly scored at 10 points where the presentence report indicated that the victim suffered from depression and that his personality had changed as a result of continuing poor health resulting from the crime. *People v Ericksen*, 288 Mich App 192; 793 NW2d 120 (2010).

OV 7:

Where defendant was present and armed during the commission of the offense, but did not commit, take part in, or encourage others to commit acts that amounted to sadism, torture or excessive brutality, it was error to score 50 points. The fact that defendant held a gun during the offense, and may have pointed it (although the evidence was conflicting on this point) was not enough to justify the assessment of 50 points. *People v Hunt*, ___ Mich App ___ (Docket No. 292639, 10/19/10).

OV 8:

Movement of the victim from a common area to the bedroom to effectuate the CSC crimes was merely incidental movement and did not amount to asportation under OV 8 for purposes of scoring 15 points. *People* v *Thompson*, 488 Mich 888; 788 NW2d 677 (2010).

OV 9:

It is proper to count the decedent, a passenger in the decedent's car and the occupants of another car as victims under OV 9 where the individuals in both cars were part of the collision resulting from defendant's drunk driving causing death. *People v Lechleitner*, ___ Mich App ___ (Docket No. 293577, 12/7/10).

OV 9 should have been scored at 10 points reflecting 2 or more individuals placed in danger or injury or loss of life in a armed robbery case where the defendant took money from the first victim, and then commandeered a vehicle and forced that driver to take him to another community; as armed robbery is a transactional offense which includes the defendant's conduct in leaving the scene of the crime. *People v Mann*, 287 Mich App 283; 786 NW2d 876 (2010).

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

OV 9 was properly scored for multiple victims where the sentencing offense involved "K," but there was evidence that "M" and "P" would sometimes spend the night at defendant's home with "K," and court finds reasonable conclusion from trial testimony that the other boys were in the home sleeping when "K" was assaulted. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

OV 10:

The victim's vulnerability must be based on characteristics personal to the victim and not on the circumstances of the crime such as a woman alone in a parking lot at night outside her car. *People v Huston*, 288 Mich App 387; *lv gtd* 488 Mich 876; 788 NW2d 662 (2010). Note: Leave granted by Michigan Supreme Court.

Ten points may not be scored under OV 10 for exploitation of a "domestic relationship" where the parties had neither a familial nor cohabitating relationship. The fact that the victim had previously left clothes at the defendant's apartment did not establish a cohabitating relationship. *People v Jamison*, ___ Mich App ___ (Docket No. 297154, 4/26/11).

The trial court did not abuse its discretion in assessing 10 points for exploitation of a vulnerable victim in a case of first-degree criminal sexual conduct where the 24-year-old defendant manipulated the victim who he knew was only 16 or 17 years old and a virgin into a position where he could engage in nonconsensual sexual intercourse and where he admitted that she was too immature to make a decision to have sex, and where it was readily apparent that she was vulnerable and susceptible to physical restraint, persuasion, or temptation. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010).

OV 11:

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 Hobbs*, ___ Mich ___; 783 NW2d 716 (2010).

OV 12:

OV 12 is scored for acts that are separate from the sentencing offense; error to score for larceny that was necessarily part of sentencing offense of unarmed robbery. *People v Light*, ___ Mich App ___ (Docket 293746, 11/23/10).

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

Conduct that can be scored under OV 12 must be scored under that 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; 777 NW2d 464 (2009).

Conduct subject to scoring under OV 12 must be considered under that variable before it may be scored under OV 13, and conduct already scored under OV 12 may not be scored under OV 13. *People v Williams* 486 Mich 1077; 784 NW2d 206 (2010).

The trial court properly scored 25 points for three or more crimes against the person that occurred within 24 hours and did not result in conviction where defendant was convicted of sexually assaulting "K," and there was evidence that he possessed numerous sexually abusive photos of "K," "M" and "P" at the same time. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2010).

No abuse of discretion in scoring zero points where third possible felonious act involved a mere allegation of wrongdoing and prosecutor did not present the testimony of the complaining witness or the police officer who took the statement. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010).

OV 13:

For crimes like conspiracy that have special scoring rules under MCL 7771.18 and MCL 777.21(4), the court should consider the nature of the underlying offense when determining whether the offense is a crime against the person or property for purposes of scoring OV 13. *People v Jackson*, ___ Mich App ___ (Docket No. 294946, 2/17/11).

A juvenile adjudication constitutes "criminal activity" even if there is no "conviction," and therefore it is proper to score OV 13 for a juvenile adjudication. *People v Harverson*, ___ Mich App ___ (Docket No. 293014, 12/28/10).

All conduct that can be scored under OV 12 must be scored under that offense variable before proceeding to score OV 13, and conduct already taken into account under OV 12 may not be scored within OV 13. *People v Williams*, 486 Mich 1077; 784 NW2d 206 (2010); *People v Bemer*, 286 Mich App 26; 777 NW2d 464 (2009).

The trial court did not abuse its discretion in scoring OV 13 at 25 points where although the defendant had been convicted of two felonies against a person within the five-year period, the evidence was insufficient to show that he committed a third felonious criminal act against a person where the defendant admitted he had been accused of criminal sexual conduct against another individual but he had not been charged nor convicted of that conduct and the prosecution did not introduce any testimony to support that alleged criminal conduct. *People v Phelps*, 288 Mich App 123; 791 NW2d 732 (2010).

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

OV 15:

In lieu of granting leave to appeal, the defendant's sentence is vacated and the trial court at resentencing is to reconsider the scoring of OV15 in light of *People v McGraw*, 484 Mich 120 (2009) (holding that the offense variables are properly scored by reference only to the sentencing offense except where the language of a particular variable specifically provides otherwise). *People v Gray*, 485 Mich 934; 773 NW2d 911 (2009).

OV 19:

OV 19 may be scored for aggravating conduct that occurs after the sentencing offense is completed; ten points properly scored where defendant threatened witness days after manslaughter offense was completed. *People v Smith*, 488 Mich 193; 793 NW2d 666 (2010).

OV19 was properly scored on the basis that the defendant asked others to dispose of the knife used to stab the victim and to lie about his whereabouts in an attempt to create a false alibi. Moreover, *People v McGraw*, 484 Mich 120 (2009) does not apply to the scoring of OV 19. *People v Ericksen*, 288 Mich App 192; 793 NW2d 120 (2010).

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

GUIDELINES DEPARTURES:

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

There was no error in failing to depart downward from the guidelines range where the trial judge sentenced at the bottom of the range, the judge considered the totality of the circumstances, and there was no error in the scoring of the guidelines or reliance on inaccurate information. *People v Roberts*, ___ Mich App ___ (294212, 5/10/11).

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

Defendant's post-sentence efforts at rehabilitation *may* be considered as the basis for a downward departure from the now advisory federal sentencing guidelines. *Pepper v United States*, 131 S Ct 1229; 179 L Ed 2d 196 (2011).

VI. ***LIFETIME ELECTRONIC MONITORING***

Monitoring Applies to CSC First- and Second-Degree with Victim under 13:

Individuals convicted of first-degree CSC and second-degree CSC must be monitored if the offender was at least 17 years old and the victim was under the age of 13 at the time of the offense. MCL 750.520b(2)(d); MCL 750.520c(2)(b) (effective 8-28-06).[1]

No Monitoring if Sentenced to Probation:

Monitoring is not required, however, if the defendant is sentenced to probation (with or without a jail term). 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; ___ NW2d ___ (2010).

[1] While there has been argument by the Oakland County Prosecutor that monitoring applies to *all* CSC first-degree convictions (i.e., with adults or children), the Court of Appeals has twice concluded that monitoring applies only where the victim is under the age of 13. *People v Quintana*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295324); *People v Bowman*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2010 (Docket No. 292415), *lv den* 489 Mich 898 (2011). The MDOC policy directive on lifetime monitoring was amended in January 2011 to require a victim under the age of 13 in light of the *Bowman* decision. Policy Directive 06.04.100 (B) (effective 1/24/11).

Two-Year Felony for Violation of Monitoring Laws:

MCL 750.520n(c) sets forth a two-year felony conviction for an offender who (a) "[i]ntentionally removes, defaces, alters, destroys, or fails to maintain" the monitoring equipment, (b) fails to notify the Michigan Department of Corrections (hereinafter MDOC) of damaged equipment, and/or (c) fails to reimburse MDOC for the cost of monitoring.

The sentence may run consecutively to any term of imprisonment imposed for another crime that arises out of the same transaction. MCL 750.520n(4).

From: Larry MacDonald - Supervisor, Macomb County Probation Department

FELONY DRUG COURT ENTRY PROCEDURE

Step 1: If the originating judge agrees, either the defense counsel, probation officer, Drug Court Assessor or Supervisor can complete the *Eligibility Screening* form.

Step 2: *Eligibility Screening* form needs to be delivered to the Drug Court office on the 5th floor/Court Administration. The form may also be faxed to 586.469.5430 attention Gloria Kmiec, Drug Court Supervisor.

Step 3: If basic eligibility is met, the assistant prosecutor and the defense counsel negotiate a plea and the originating judge will take the plea under advisement and order the pre-sentence report.

Step 4: A court date will be assigned on the record to the originating judge. The date should be 4 weeks in the future to allow completion of the PSI.

Step 5: The Drug Court staff will complete a full assessment. If the defendant is on bond s/he will need to set appointment with the Drug Court Supervisor by calling 586.469.5031.

Step 6: If the defendant is deemed an acceptable Drug Court candidate after the assessment, the case will be scheduled by the Drug Court Supervisor before one of the Drug Court Judges (Judge Diane Druzinski or Judge John Foster) for sentencing to the Drug Court. The case will be transferred from the originating judge at the time of sentencing. The originating judge will get a copy of the assessment with notification of new date and time for sentencing.

Or

If the defendant is deemed to not be an acceptable Drug Court candidate after the assessment and pre-sentence reports are completed, the case will proceed before the originating judge.

From: Larry MacDonald - Supervisor, Macomb County Probation Department

PROBATION ENHANCEMENT PROGRAM

There is a segment of the probation population that engages in non-compliant behavior (technical violations) that does not elevate to new criminal charges. This population often fails to make the connection between these repeated technical violations and their inability to successfully complete a probation term. Traditional responses have at times been unsuccessful in reversing these non-compliant behaviors. Technical violators may require a structured environment that limits their ability to engage in non-compliant behavior coupled with therapeutic interventions designed to increase their cognitive and coping skills.

The Probation Enhancement Program (PEP) is designed to provide residential programming for technical probation violators who would otherwise be sentenced to prison. Community Programs Inc. (CPI) is providing residential programming for up to 180 days. The objectives of the program are to reduce anti-social thinking, criminal behavior patterns, and misuse of drugs and/or alcohol. This will be accomplished by increasing the offender's level of knowledge of relapse, recidivism and prevention strategies thereby facilitating the probationer's ability to successfully reintegrate back to the community. The Hazelden New Directions model currently used in the RSAT (Residential Substance Abuse Treatment) program will be the guide for this program. Six modules are used:

Intake and Orientation
Criminal and Addictive Thinking
Drug and Alcohol Education
Socialization
Relapse Prevention
Release and Reintegration Preparation

Target Population:
Repeat Technical Probation Violators, as determined by the local judiciary.

Eligibility:

- Probation Violation Decision Guide score of level II violation with a response range of III, **OR**
  Female Violators with a Violation Decision Guide score of level I or level II and response range of II or III.
- COMPAS Prescreen must contain results of Moderate to High for Violence and Recidivism scales. Low risk offenders (COMPAS Prescreen score) may be referred with a Supervisor's Over-ride documented in OMNI case notes.
- No suicide attempts within the past year.
- No pending felony charges.
- CPI will accept pregnant women up to their second trimester with some restrictions; probation officers should contact CPI for specific information.
- CPI will accept offenders with mental health or physical health issues with some restrictions; probation officers should contact CPI for specific information.

If you have an offender (client) that you believe qualifies and would benefit, contact the court liaison agent, or the supervising probation officer.

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