MICHIGAN SENTENCING GUIDELINES BOOT CAMP

Presented by The Thomas M. Cooley Law School and the Criminal Defense Resource Center of the State Appellate Defender Office

Friday, September 9, 2011

Agenda

Introduction to the Michigan Statutory Sentencing Guidelines

- the judicial guidelines vs. current statutory guidelines;
- prison cells, straddle cells and intermediate sanction cells;
- guidelines departures; mandatory minimum terms;

How to Score the Sentencing Guidelines:

- identifying the crime group and crime class;
- special offenses & attempts;
- scoring the prior record variables;
- scoring the offense variables;

Hypothetical Case Scoring Exercise

Sentence Enhancement:

- Habitual offenders
- Second Drug Offenders
- Repeat CSC Offenses and Special CSC Sentences
- Repeat Felony-Firearm Sentences

Consecutive Sentencing:

- Mandatory
- Discretionary
- Same Transaction Offenses

Probation:

- Availability
- Length

Diversion:

- HYTA (Holmes Youthful Trainee Act)
- 7411 (MCL 333.7411)

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

About our Speakers

Aaron Mead has been an assistant prosecuting attorney in the appellate division of the Berrien County Prosecutor's Office for 15 years. He has spoken on various issues in criminal law to the Michigan Court of Appeals, the Midwest Association of Forensic Scientists, and the Prosecuting Attorneys Association of Michigan. Last year, he was co-leader of a sentencing seminar presented to the Berrien County Bar Association.

William Vailliencourt is an Assistant Prosecuting Attorney for the Livingston County Prosecutor's Office in Howell, Michigan. He is a graduate of the University of Michigan and the Washington and Lee University School of Law in Lexington, Virginia. Mr. Vailliencourt has been a prosecutor for more than eighteen years with experience handling all phases of felony prosecutions from investigation through trial and appeal. Since 2003, he has focused primarily on appeals and has argued numerous cases before the Court of Appeals and the Michigan Supreme Court. He lectures regularly for the Prosecuting Attorneys Association of Michigan on legal issues and trial advocacy and has served as faculty for the National College of District Attorneys at the National Advocacy Center in Columbia, South Carolina. He currently serves on the State Bar of Michigan's Committee on Standard Criminal Jury Instructions.

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

MICHIGAN FELONY SENTENCING SEMINAR

Cooley Law School, September 9, 2011

1:30 –1:55 Introduction to Guidelines
Anne Yantus, SADO

1:55 -2:40 How to Score the Guidelines and PRVs
Bill Vailliencourt, Livingston Prosecutor's Office

2:40 -3:30 How to Score the OVs
Aaron Mead, Berrien Prosecutor's Office

3:30 -3:45 BREAK

3:45 -3:55 Offense Variable Hypothetical
Anne Yantus

3:55 -4:05 Consecutive Sentencing & Sentence Enhancement
Bill Vailliencourt and Aaron Mead

4:05 -4:30 Diversion and Probation
Anne Yantus

INTRODUCTION TO THE MICHIGAN SENTENCING GUIDELINES

The Judicial Sentencing Guidelines (1983-1998):

To address the problem of disparity in sentencing as well as prison overcrowding and rioting, the Michigan Supreme Court appointed a sentencing guidelines advisory committee to draft judicial sentencing guidelines in 1979. These guidelines were adopted for use on a voluntary basis for most felony matters in 1983. One year later, use of the judicial guidelines became mandatory, although they did not apply to all felonies (they were drafted for the most common felonies only). The judge could depart from the recommended range by articulating reasons for the departure on the record. The sentence was reviewed initially for a sentence that "shocks the conscience" of the court, *People v Coles,* 417 Mich 523; 339 NW2d 440 (1983), but the Michigan Supreme Court later settled on a proportionality test. *People v Milbourn*, 435 Mich 630; 460 NW2 1 (1990).

> *Note:* The Judicial Sentencing Guidelines still apply to crimes committed before January 1, 1999. To find a copy of the manual go to www.sado.org. Look under the CDRC tab and click on Training, then click on Brief Bank, click on Hot Topics and Issues under Appellate Sentencing Issues. You will need to be a SADO subscriber to access the on-line manual.

Legislative Sentencing Guidelines (January 1, 1999 -)

The Michigan Legislature enacted statutory sentencing guidelines effective January 1, 1999. MCL 769.34. Unlike the judicial sentencing guidelines, the new legislative sentencing guidelines provide for mandatory sentence ranges with departures only for substantial and compelling reasons. MCL 769.34(1)(&(3). *See also, People v Hegwood,* 465 Mich 432; 636 NW2d 127 (2001); *People v Babcock,* 469 Mich 247; 666 NW2d 231 (2003). Even if the court finds a substantial and compelling reason to depart, the departure must be proportionate to the offense and the offender. *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008). The trial judge must state the departure reasons on the record and must also justify the extent of the departure on the record. *Id.*

The sentencing court may *not* depart from the legislative sentencing guidelines for reason of "gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion." MCL 769.34(3)(a).

The sentencing court cannot base a departure on a reason already scored within the guidelines range unless that reason has been given inadequate weight by the guidelines:

> The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in

> determining the appropriate sentence range unless the court find from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [MCL 769.34(3)(b).]

The trial court does not depart from the legislative sentencing guidelines when imposing a mandatory minimum term of imprisonment that is higher than the guidelines range. "Imposing a mandatory minimum sentence is not a departure under this section." MCL 769.34(2)(a).

The sentencing court need not state "additional substantial and compelling" reasons for a departure where the sentence is imposed pursuant to a valid plea bargain. *People v Wiley,* 472 Mich 153; 693 NW2d 800 (2005).

Legislative Guidelines Apply to:

The guidelines apply to all felony offenses committed on or after January 1, 1999. MCL 769.34(1)&(2). They apply as well to habitual offender sentences. MCL 777.21(3). They also apply to probation violation sentences (at least where the underlying crime occurred on or after 1-1-99). *People v Hendrick*, 472 Mich 555; 697 NW2d 511 (2005). And both the Mchigan Supreme Court and Court of Appeals have held that the new guidelines apply to sentencing as a second drug offender and permit, but do not require, the sentencing judge to double the guidelines range for second drug offenders. *People v Lowe*, 484 Mich 718; 773 NW2d 1 (2009); *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005). *See also*, MCL 777.18.

The legislative sentencing guidelines also apply when the defendant is sentenced as a repeat CSC offender under MCL 750.520f (requiring a 5-year mandatory minimum term). *People v Wilcox*, 486 Mich 60; 781 NW2d 784 (2010).

The legislative sentencing guidelines apply as well when the defendant is a sexually delinquent person, at least prior to the amendment of that statute on February 1, 2006 (2005 PA 300). *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007). It is unclear whether the legislative guidelines apply to post-February 1, 2006 offenses in light of the fact that the sexually delinquent person statute was amended to provide that "the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life." MCL 750.335a. The former version provided that the violation "*may* be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life" (emphasis added).

Version of Guidelines in Effect on Date of Offense:

The guidelines in effect on the date the crime was committed are the guidelines that should be used at sentencing. MCL 769.34(2).

Preparation of Sentencing Information Report:

The SIR (Sentencing Information Report – the form used to calculate the guidelines range - need only be prepared for the offense carrying the highest crime class in cases of multiple convictions requiring concurrent sentences. MCL 771.14(2)(e)(ii); *People v Mack,* 265 Mich App 122; 695 NW2d 342 (2005). *But see*, *People v Johnigan,* 265 Mich App 463; 696 NW2d 724 (2005) (Opinion of Sawyer, J, disagreeing with *Mack* analysis). If multiple convictions carry the same statutory maximum penalty, the court may use the guidelines for either offense. If multiple convictions may or must result in consecutive sentencing, the guidelines must be scored for each individual conviction. MCL 771.14(2)(e)(i).

Intermediate Sanctions, Straddle Cell and Prison Cells:

Once the guidelines are scored, the recommended range can be found by using the appropriate sentencing grid. The grid is determined by the Crime Classification given to the sentencing offense (e.g., CSC first-degree is Class A). Each sentencing grid is divided into cells, and the appropriate cell is determined by locating the intersection of the PRV level and the OV level.

There are three types of sentencing cells. Intermediate sanction cells, straddle cells and prison cells.

Intermediate Sanction Cell:	Upper limit of range is 18 months or less. This is a prison lockout cell; the court cannot impose prison without a departure.
Straddle Cell:	Upper limit of range is more than 18 months, lower limit is 12 months or less.
Prison Cell:	Lower limit of range is more than 12 months.

The McGraw Decision and Scoring OVs:

Unless otherwise directed by language within the guidelines, the offense variables are to be scored based on conduct that relates solely to the sentencing offense. *People v McGraw,* 484 Mich 120; 771 NW2d 655 (2009). *See also*, *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008). In *McGraw*, the defendant was scored points under OV 9 for multiple victims based on his flight from police following the crime of breaking and entering a building. The sentencing offense was the breaking and entering offense and there were no victims present at the time of the offense (and less than four victims of property loss even if not present). The *McGraw* Court held it was error to score the victims of the fleeing and eluding offense under Offense Variable 9 when the sentencing offense was the breaking and entering offense. The Court noted there was no language in OV 9 extending coverage of this variable to post-offense conduct.

Similarly, in *People v Sargent, supra*, the defendant was scored points under OV 9 for the victim of the sentencing offense, as well as another victim of an uncharged similar offense. The Court held that only the victim of the sentencing offense could be scored under OV 9. The Court noted that the offense involving the other uncharged victim was not "the offense" being scored by the guidelines and occurred on an entirely different occasion.

> *Note*: Because the legislative sentencing guidelines are created by statute, the appropriate statutory subsection should always be reviewed for questions as to applicability, scoring and even interpretation of the guidelines. *See*, MCL 777.1 – 777.69.

Appellate Review of Scoring Errors and Sentences:

The statutory lanuage of MCL 769.34(10), which precludes reversal of a sentence falling within the guidelines range unless there is an error in the scoring of the guidelines or inaccurate information, does not preclude review of constitutional errors occurring at sentencing even if the sentence falls within the recommended range. *People v Conley*, 270 Mich App 301; 715 NW2d 377 (2006). Likewise, a defendant may challenge a sentence as cruel and unusual even when it falls within the recommended sentencing guidelines range, but a sentence falling within the recommended range is presumed to be proportionate and a proportionate sentence is not cruel and unusual punishment. *People v Powell*, 278 Mich App 318; 750 NW2d 607 (2008).

A defendant may raise a challenge to the scoring of the guidelines for the first time on appeal, with review for plain error, if the guidelines scoring error will result in a sentence that is outside the appropriate guidelines range. *People v Kimble,* 470 Mich 305; 684 NW2d 669 (2004). The *Kimble* decision also recognized that a guidelines error may be raised at sentencing or by post-conviction motion for resentencing or a post-conviction motion to remand. *See also*, *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010), and MCR 6.429(C) and MCL 769.34(10). If an appropriate objection is raised at sentencing or by post-conviction motion, the appellate court may review a scoring error that does not result in a sentence outside the appropriate range. MCL 769.34(10); *People v Kimble, supra.* If there is error in the scoring of the guidelines that will change the range and the sentence still falls within the corrected range, the defendant is nevertheless entitled to resentencing. *People v Francisco,* 474 Mich 82; 711 NW2d 44 (2006). If there is error but the range does not change, the defendant is not entitled to resentencing. *People v McGee*, 280 Mich App 680; 761 NW2d 743 (2008).

The standards for appellate review of a departure sentence are set forth in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008), and more generally in MCL 769.34.

HOW TO SCORE THE GUIDELINES[1]

IDENTIFY THE CRIME GROUP

The guidelines break up felony offenses into six different categories, MCL 777.5. Those categories are:

1. Crimes Against A Person
2. Crimes Against Property
3. Crimes Involving A Controlled Substance
4. Crimes Against Public Order
5. Crimes Against Public Trust
6. Crimes Against Public Safety

See MCL 777.11 - 777.18. If the felony is not included in one of the categories, it is not covered and the sentencing guidelines do not apply.

IDENTIFY THE CRIME CLASS

Each felony offense covered by the guidelines is also given a specific Crime Class (Class A through H). The Crime Class corresponds to a specific sentencing grid. *See* MCL 777.62 - 777.69. Second degree murder is in its own sentencing class and has its own grid. MCL 777.61.

For multiple convictions:

- Score the guidelines for the highest crime class. MCL 771.14(2)(e)(iii)
- Score all convictions for which a consecutive sentence is authorized or required, MCL 771.14(2)(e)(i)

SPECIAL OFFENSES AND ATTEMPTS

ATTEMPTS (MCL 777.19)

- The guidelines apply to an attempt to commit a felony if the felony is covered by the guidelines. An attempt to commit a Class A, B, C, or D offense is as Class E offense. An attempt to commit a Class E, F, or G offense is a Class H offense.
- The guidelines do not apply to an attempt to commit a Class H offense.

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[1]The Sentencing Guidelines Manual, prepared by the Michigan Judicial Institute, is online at: http://courts.michigan.gov/mji/resources/sentencing-guidelines/sg.htm

- Attempts have the same Crime Group as the underlying offense.

SPECIAL OFFENSES (MCL 777.18)

Conspiracy. Crime Class is determined by the underlying felony. *See* MCL 777.21(4)(b). Although the Crime Group is defined as a Crime Against Public Safety, you must score the offense variables applicable to a Crime Against Public Safety *and* the offense variables applicable to the crime group of the underlying offense. *See* MCL 777.21(4)(a). For example, if the offense being scored is a Conspiracy to Commit Second Degree Home Invasion, score the offense variables identified for a Crime Against Public Safety and a Crime Against A Person.

Subsequent Drug Offenses. Crime Class is determined by the underlying felony, which will almost always be a Crime Involving A Controlled Substance. *See* MCL 777.21(4)(b). Although the Crime Group is defined as a Crime Against Public Trust, you must score the offense variables applicable to a Crime Against Public Trust *and* the offense variables applicable to the crime group of the underlying offense. *See* MCL 777.21(4)(a).

- The PRVs must be scored. Although this seems to be a common sense proposition, it required a Supreme Court opinion. *See People v Peltola*, ___ Mich ___ (Case No. 140524, June 14, 2011).

- The court will possess the discretion to double both the applicable guidelines range and the maximum sentence under MCL 333.7413(2). *See People v Lowe*, 484 Mich 718; 773 NW2d 1 (2009).

OTHER OFFENSES

Possession of Marijuana - 2nd offense. There are no guidelines for this offense because the underlying offense is a misdemeanor that is not covered by the guidelines.

Sexually Delinquent Persons. The guidelines apply to being a sexually delinquent person, at least prior to the amendment of that statute on February 1, 2006. *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007). It is unclear, however, whether the guidelines apply to post-February 1, 2006 offenses.

PRIOR RECORD VARIABLES

GENERAL RULES

- All prior record variables are scored for every offense. MCL 777.21(1)(b).

- Convictions that were obtained in violation of the constitutional right to counsel cannot be considered. *See, e.g., People v Alexander (After Remand)*, 207 Mich App 227, 229-230; 523 NW2d 653 (1994).

- Foreign convictions cannot be used to score the PRVs, but can be considered in determining whether to depart from guidelines. *People v Price*, 477 Mich 1; 723 NW2d 201 (2006).

- Assignment to youthful trainee status (MCL 762.11 *et seq*) is considered a conviction and can be used to score the PRVs. MCL 777.50(4)(a)(i).

- Expunged convictions can be used to score the PRVs. MCL 777.50(4)(a)(ii).

- Adjudications under MCL 333.7411 cannot be considered. *People v James,* 267 Mich App 675, 678-680; 705 NW2d 724 (2005). But if 7411 status is revoked and a conviction is entered, then the adjudication becomes a conviction that can be used to score the PRVs.

    - the same analysis would apply to other deferred adjudication statutes such as MCL 750.350a (parental kidnapping) or MCL 769.4a (domestic violence).

- Version of guidelines used is controlled by offense date. MCL 769.34(2).

- Prior convictions are convictions that exist before Defendant committed the sentencing offense.

    - Conviction date is the date of the plea or verdict, not sentencing.

- The trial court must find the applicable facts. If the factual findings support scoring points, the court must score the highest number of points permissible. A court does not have "discretion" to decide how many points to score. The statute mandates that the variables be scored and that the highest number of points be assigned. *People v Johnson*, ___ Mich App ___ (Docket No. 295664, June 14, 2011), *slip op* at 6, *lv pending*; *People v Houston*, 473 Mich 399, 408-409; 702 NW2d 530 (2005)(guidelines require that highest number of points be scored).

THE 10 YEAR GAP RULE

MCL 777.50(1): "In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication."

MCL 777.50(2) instructs how to determine if there's a 10 year crime free period:

- Determine the length of time between the offense date for the sentencing offense and the date that the defendant was discharged from probation or prison or parole (whichever is later) on his immediately preceding conviction. If that period of time is 10 years or more, then those prior convictions cannot be used to score the PRVs. If that period of time is *not* more than 10 years, then repeat that calculation, comparing the offense date of the conviction with the discharge date of the next immediately preceding conviction to determine if there is a 10 year crime free period. Only those convictions occurring before a 10 year crime free period are not scored. *See People v Billings*, 283 Mich App 538, 551-552; 770 NW2d 893 (2009).

  - if a discharge date is not available, the instructions state to use the length of the probation period or the length of the minimum term of incarceration to calculate the discharge date.

  - the 10 year crime free period is broken by *any* criminal conviction arising within the 10 year period, even a traffic misdemeanor offense. *Compare People v Reyna*, 184 Mich App 626, 631-633; 459 NW2d 75 (1990)(analyzing similar rule under judicial guidelines).

  Practice Pointer: You need to check the defendant's driving record because it might reflect a misdemeanor conviction that does not appear on their CCH.

PRV 1 - PRIOR HIGH SEVERITY CONVICTIONS (MCL 777.51)

"High severity felony conviction" is defined by MCL 777.51(2) and includes:

A. A crime listed in offense class M2, A, B, C, or D.

B. A felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D.

C. A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.

D. A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of 10 years or more.

PRV 2 - PRIOR LOW SEVERITY FELONY CONVICTIONS (MCL 777.52)

"Low severity felony conviction" is defined by MCL 777.52(2) and includes:

A. A crime listed in offense class E, F, G, or H.

B. A felony under a law of the United States or another state that corresponds to a crime listed in offense class E, F, G, or H.

C. A felony that is not listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of *less than 10 years*.

D. A felony under a law of the United States or another state that does not correspond to a crime listed in offense class M2, A, B, C, D, E, F, G, or H and that is punishable by a maximum term of imprisonment of *less than 10 years*.

- Felony Firearm convictions are scored under PRV 2. *See People v Dent*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2010 (Docket No 290832).
- Out-of-state felony convictions were analyzed in *People v Meeks*, ___ Mich App ___ (Docket No. 297030, June 16, 2011). The other state's law will determine if the conviction was for a felony. If so, then compare the underlying conduct to Michigan law to determine which Michigan felony the out-of-state conviction corresponds to.

- Two year high court misdemeanors are considered felonies for purposes of the guidelines. *See* MCL 761.1(g)("As used in this act [the Code of Criminal Procedure]: 'Felony' means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.") Thus, MCL 777.52(2)(d) requires scoring a "felony" that is not listed in the guidelines and that is punishable by less than 10 years imprisonment.

PRV 3 - PRIOR HIGH SEVERITY JUVENILE ADJUDICATIONS (MCL 777.53)

- PRV 3 counts "prior high severity juvenile adjudications" which are defined as "a juvenile adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the sentencing offense was committed."

- Same scoring rules as PRV 1 (high severity convictions).

PRV 4 - PRIOR LOW SEVERITY JUVENILE ADJUDICATIONS (MCL 777.54)

- Same definition of "juvenile adjudication" as PRV 3.

- Same scoring rules as PRV 2 (low severity convictions).

PRV 5 - PRIOR MISDEMEANOR CONVICTIONS OR JUVENILE ADJUDICATIONS (MCL 777.55)

- Count misdemeanors "only if it is an offense against a person or property, a controlled substance offense, or a weapon offense. Do not count a prior conviction used to enhance the sentencing offense to a felony." MCL 777.55(2)(a).

- Count all prior misdemeanor OWI, OUIL, OUID convictions EXCEPT those prior misdemeanor convictions used to enhance the sentencing offense to a felony. MCL 777.55(2)(b).

    - Prior felony convictions used to enhance still can be scored under PRVs 1-4.

- Specific Offenses

    - MIP's are not controlled substance offenses. *People v Endres*, 269 Mich App 414, 418-420; 711 NW2d 398 (2006).
    - Minor Operating with BAC is scored. *People v Bulger*, ___ Mich App ___ (Docket No. 288312, November 30, 2010).
    - Disorderly Person? Under *People v Gagnon*, 129 Mich App 678; 341 NW2d 867 (1983), conviction requires proof that defendant endangered a person or property.

- Prior convictions include violations of "a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States." MCL 777.55(3).

PRV 6 - RELATIONSHIP TO CRIMINAL JUSTICE SYSTEM (MCL 777.56)

Points are assessed based on Defendant's status at the time the sentencing offense was committed:

A. The offender is a prisoner of the department of corrections or serving a sentence in jail;

B. The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation;

C. The offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony;

D. The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor;

E. The offender has no relationship to the criminal justice system

- Includes YTA status, MCL 333.7411, MCL 769.4a, and other deferrals.

- Probation period is tolled while a defendant is on absconder status. *People v Ritter*, 186 Mich App 701; 464 NW2d 919 (1991).

- Where a defendant's circumstances do not fit precisely within one of the specified categories, it is error to categorize a defendant as having "no relationship to the criminal justice system" when it is obvious that some relationship exists. A defendant whose bond has been forfeited is considered to be on bond for purposes of PRV 6. *People v Johnson*, ___ Mich App ___ (Docket No. 295664, June 14, 2011), *lv pending*.

- What about juvenile offenders? Incarcerated in a juvenile facility? Juvenile proceedings "are not criminal proceedings." MCL 712A.1(2); *In re Carey*, 241 Mich App 222; 615 NW2d 742 (2000)("they are closely analogous to the adversary criminal process."). But statute refers to "awaiting adjudication or sentencing."

PRV 7 - SUBSEQUENT OR CONCURRENT FELONY CONVICTIONS (MCL 777.57)

- Any conviction that is not a prior conviction, i.e., one that occurred before Defendant committed the sentencing offense, will be a subsequent or concurrent conviction. MCL 777.57(2)(a).

    - Concurrent, multiple convictions are scored. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

- Score only felony convictions.

- Do not score Felony Firearm. MCL 777.57(2)(b).

- Do not score a concurrent felony conviction under PRV 7 if a mandatory consecutive sentence, or a consecutive sentence under MCL 333.7401(3), will result from that conviction. MCL 777.57(2)(c).

GUIDELINES HYPOTHETICAL (PRIOR RECORD VARIABLES)

Score the Prior Record Variables based on the following criminal history: Assume the sentencing offense occurred on January 1, 2011.

JUVENILE HISTORY:

No. 1 of 2
Offense Date: 8/27/79
Charge: Tobacco- Possession/Use by Minor
Final Charge: Tobacco-Possession/Use by Minor
Disposition: 11/04/79 Warned and Dismissed

No. 2 of 2
Offense Date: 11/10/79
Charge: Open Intoxicants
Final Charge: Open Intoxicants
Disposition: 2/07/80 $15 fine

ADULT HISTORY:

No. 1 of 5
Offense Date: 09/28/80
Charge: Breaking and Entering Occupied Dwelling
Final Charge: Breaking and Entering Occupied Dwelling
Conviction: Pled guilty as charged, 10/26/00
Sentence: 12 months probation HYTA, 11/28/80
Discharge: 11/28/81

No. 2 of 5
Offense Date: 12/15/91
Charge: Possession of Marijuana (misdemeanor)
Final Charge: Possession of Marijuana
Conviction: Pled guilty as charged, 12/29/91
Sentence: 5 days probation with 7411 status, 12/29/91
Discharged: 01/03/92

No. 3 of 5
Offense Date: 05/16/92
Charge: Home Invasion Second Degree
Final Charge: Attempt Home Invasion Second Degree
Conviction: Pled guilty to reduced charge of attempted home invasion second degree 6/24/92
Sentence: 2 years probation, 7/26/92
Discharge: 7/26/94

No. 4 of 5
Offense Date: 9/30/04
Charge: Driving With Suspended License (misdemeanor)
Final Charge: Driving With Suspended License
Conviction: Pled guilty as charged, 10/22/04
Sentence: $100 fine, $150 costs, 10/22/04

No. 5 of 5
Offense Date: 1/01/11
Charge: Forgery (Instant Offense)
Final Charge: Forgery
Conviction: Pled guilty as charged, 03/15/11
Sentence:

PRVs and OVs – Crimes Against a Person

PRV 1
Prior High Severity Felony Convictions
(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
75	3 or more prior high severity convictions.	A **"prior high severity felony conviction"** is a conviction for any of the following crimes if the conviction was entered before the commission date of the sentencing offense: • a crime listed in class M2, A, B, C, or D (or a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D), or • **(effective January 9, 2007)*** a felony that is not listed in ***any*** crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in ***any*** class) that is punishable by a maximum term of imprisonment of 10 years or more. MCL 777.51(2). *2006 PA 655.
50	2 prior high severity convictions.	
25	1 prior high severity conviction.	
0	No prior high severity convictions.	

PRV 2
Prior Low Severity Felony Convictions
(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
30	4 or more prior low severity convictions.	A **"prior low severity felony conviction"** is a conviction for any of the following crimes if the conviction was entered before the commission date of the sentencing offense: • a crime listed in class E, F, G, or H (or a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H), or • **(effective January 9, 2007)*** a felony that is not listed in ***any*** crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in ***any*** class) that is punishable by a maximum term of imprisonment of less than 10 years. MCL 777.52(2). *2006 PA 655.
20	3 prior low severity convictions.	
10	2 prior low severity convictions.	
5	1 prior low severity conviction.	
0	No prior low severity convictions.	

PRV 3

Prior High Severity Juvenile Adjudications

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

Pts	The offender has:	Instructions
50	3 or more prior high severity juvenile adjudications.	A **"prior high severity juvenile adjudication"** is an adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the commission date of the sentencing offense: • a crime listed in class M2, A, B, C, or D (or a felony under federal law or the law of another state that corresponds to a crime listed in class M2, A, B, C, or D), or • **(effective January 9, 2007)*** a felony that is not listed in ***any*** crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in ***any*** class) that is punishable by a maximum term of imprisonment of 10 years or more. MCL 777.53(2). *2006 PA 655.
25	2 prior high severity juvenile adjudications.	
10	1 prior high severity juvenile adjudication.	
0	No prior high severity juvenile adjudications.	

PRV 4

Prior Low Severity Juvenile Adjudications

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

Pts	The offender has:	Instructions
20	6 or more prior low severity juvenile adjudications.	A **"prior low severity juvenile adjudication"** is an adjudication for conduct that would be any of the following if committed by an adult, if the order of disposition was entered before the commission date of the sentencing offense: • a crime listed in class E, F, G, or H (or a felony under federal law or the law of another state that corresponds to a crime listed in class E, F, G, or H), or • **(effective January 9, 2007)*** a felony that is not listed in ***any*** crime class (or a felony under federal law or the law of another state that does not correspond to a crime listed in ***any*** class) that is punishable by a maximum term of imprisonment of less than 10 years. MCL 777.54(2). *2006 PA 655.
15	5 prior low severity juvenile adjudications.	
10	3 or 4 prior low severity juvenile adjudications.	
5	2 prior low severity juvenile adjudications.	
2	1 prior low severity juvenile adjudication.	
0	No prior low severity juvenile adjudications.	

PRVs and OVs – Crimes Against a Person

PRV 5
Prior Misdemeanor Convictions and Prior Misdemeanor Juvenile Adjudications
(All "prior convictions" must satisfy the 10-year gap requirements of MCL 777.50.)

Pts	The offender has:	Instructions
20	7 or more prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	A **"prior misdemeanor conviction"** is a conviction: • for a misdemeanor offense under Michigan law or the law of a political subdivision of Michigan, or under the law of another state or a political subdivision of another state, or under the law of the United States, • if the conviction was entered before the commission date of the sentencing offense. MCL 777.55(3)(a). A **"prior misdemeanor juvenile adjudication"** is a juvenile adjudication: • for conduct that, if committed by an adult, would be a misdemeanor under Michigan law or the law of a political subdivision of Michigan, or under the law of another state or a political subdivision of another state, or under the law of the United States, • if the order of disposition for the juvenile adjudication was entered before the commission date of the sentencing offense. MCL 777.55(3)(b).
15	5 or 6 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	
10	3 or 4 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	
5	2 prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	
2	1 prior misdemeanor conviction or prior misdemeanor juvenile adjudication.	
0	No prior misdemeanor convictions or prior misdemeanor juvenile adjudications.	

Special Instructions for PRV 5:

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

PRV 6
Offender's Relationship to the Criminal Justice System

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

PRV 7
Subsequent or Concurrent Felony Convictions

Pts	The offender has:	Instructions
20	2 or more subsequent or concurrent felony convictions.	• A conviction for felony-firearm may not be counted under PRV 7. MCL 777.57(2)(b). • A concurrent felony conviction that will result in a mandatory consecutive sentence may not be counted under PRV 7. MCL 777.57(2)(c). • **(Effective March 1, 2003)*** a concurrent felony conviction that will result in a consecutive sentence under MCL 333.7401(3)* may not be counted under PRV 7. MCL 777.57(2)(c). * 2002 PA 666.
10	1 subsequent or concurrent felony conviction.	
0	No subsequent or concurrent felony convictions.	

Sentencing Grid for Class E Offenses—MCL 777.66

Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)–(c))

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75– Points		
I 0-9 Points	0	3*	0	6*	0	9*	5	23	7	23	9	23	
		3*		7*		11*		28		28		28	HO2
		4*		9*		13*		34		34		34	HO3
		6*		12*		18*		46		46		46	HO4
II 10-24 Points	0	6*	0	9*	0	11*	7	23	10	23	12	24	
		7*		11*		13*		28		28		30	HO2
		9*		13*		16*		34		34		36	HO3
		12*		18*		22		46		46		48	HO4
III 25-34 Points	0	9*	0	11*	0	17*	10	23	12	24	14	29	
		11*		13*		21		28		30		36	HO2
		13*		16*		25		34		36		43	HO3
		18*		22		34		46		48		58	HO4
IV 35-49 Points	0	11*	0	17*	5	23	12	24	14	29	19	38	
		13*		21		28		30		36		47	HO2
		16*		25		34		36		43		57	HO3
		22		34		46		48		58		76	HO4
V 50-74 Points	0	14*	5	23	7	23	14	29	19	38	22	38	
		17*		28		28		36		47		47	HO2
		21		34		34		43		57		57	HO3
		28		46		46		58		76		76	HO4
VI 75+ Points	0	17*	7	23	12	24	19	38	22	38	24	38	
		21		28		30		47		47		47	HO2
		25		34		36		57		57		57	HO3
		34		46		48		76		76		76	HO4

Intermediate sanction cells are marked by asterisks, straddle cells are shaded, and prison cells are unmarked.

The statutory percentage increases for habitual offenders are rounded down to the nearest whole month. The cell range may be less than the maximum possible minimum sentence by a fraction of a month.

SCORING OFFENSE VARIABLES

GENERALLY

Highest applicable score applies

Every OV instructs that it is to be scored by determining which of its scoring categories apply and by "assigning the number of points attributable to the one that has the highest number of points." MCL 777.31 – 777.49a.

Evidence must support the score

Evidence in the record must support an OV score; the prosecutor's representation of the facts is not enough. *People v Endres*, 269 Mich App 414; 711 NW2d 398 (2006).

Score based on the sentencing offense

In *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), the Court concluded that the offense variables must be scored based on the sentencing offense alone unless language within the variable instructs otherwise.

OV 1 – AGGRAVATED USE OF WEAPON

Weapon defined

A "weapon" need not be a conventional weapon, nor need it suggest planning on the defendant's part. It can be anything actually used as a weapon (in this case, a glass mug). *People v Lange*, 251 Mich App 247; 650 NW2d 691 (2002).

Victim defined

Count each person placed in danger of injury or loss of life as a victim. MCL 777.31(2)(a).

Cutting or stabbing weapon – MCL 777.31(1)(a), (c)

Neither a shotgun nor a brass statue is a cutting or stabbing weapon. *People v Wilson*, 252 Mich App 390; 652 NW2d 488 (2002).

Harmful chemical or biological substance – MCL 777.31(1)(b)

HIV-positive blood is a harmful biological substance. *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007).

Heated cooking oil is not a harmful chemical substance. *People v Blunt*, 282 Mich App 81; 761 NW2d 427 (2009).

Multiple offenders – MCL 777.31(2)(b)

The provision that requires the same score to be given to multiple offenders applies only where the offenders are convicted of the same offense. *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004); *People v Johnston*, 478 Mich 903; 732 NW2d 531 (2007).

The provision that requires the same score to be given to multiple offenders does not mean that a court must duplicate a score given to another offender if that score was erroneous. *People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002). If there was no error in the score for the previously sentenced offender, however, a court subsequently sentencing another offender is bound by the prior score. *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004).

OV 2 – LETHAL POTENTIAL OF WEAPON USED OR POSSESSED

Harmful chemical substance – MCL 777.32(1)(a)

Heated cooking oil is not a harmful chemical substance. *People v Blunt*, 282 Mich App 81; 761 NW2d 427 (2009).

Potentially lethal weapon – MCL 777.32(1)(e)

The magnitude of the victim's injuries showed that the weapon used to strike him (it was unclear whether this was a bat, a pipe, or a club) was potentially lethal, supporting a score of 1 point under OV 2. *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007).

Multiple offenders – MCL 777.32(2)

The provision that requires the same score to be given to multiple offenders applies only where the offenders are convicted of the same offense. *People v Johnston*, 478 Mich 903; 732 NW2d 531 (2007).

OV 3 – PHYSICAL INJURY TO VICTIM

Victim defined

"Victim," for purposes of OV 3, is not limited to the victim of the charged offense, but includes anyone harmed by the defendant's crime. Thus, defendant was properly scored 25 points for a manslaughter by fire that resulted in life-threatening or permanent incapacitating injury to another person. *People v Albers*, 258 Mich App 578; 672 NW2d 336 (2003).

Where the defendant and a co-felon broke into a house and the co-felon was fatally shot by the homeowner, the co-felon was not a victim because he was not harmed by the defendant's criminal activity or by the crime itself. *People v Laidler*, ___ Mich App ___COA #294147, 295111 (12/28/10). The Michigan Supreme Court has granted leave on this issue, and on whether, even if the co-felon was not a victim, the defendant could properly be scored 100 points for OV 3 "on the theory that 'death result[ed] from the commission of a crime and homicide is not the sentencing offense.' See MCL 777.33(2)(b)" (Order, #142442-3, 4/29/11).

Life threatening or permanent incapacitating injury – MCL 777.33(1)(c)

Medical testimony is not required to show a life-threatening or permanent incapacitating injury. *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007).

Bodily injury – MCL 777.33(1)(d), (e)

"Bodily injury" includes pregnancy resulting from a crime. *People v Cathey*, 261 Mich App 506; 681 NW2d 661 (2004).

Multiple offenders – MCL 777.33(2)(a)

The provision that requires the same score to be given to multiple offenders applies only where the offenders are convicted of the same offense. *People v Johnston*, 478 Mich 903; 732 NW2d 531 (2007).

The provision that requires the same score to be given to multiple offenders does not mean that a court must duplicate a score given to another offender if that score was erroneous. If there was no error in the score for the previously sentenced offender, however, a court subsequently sentencing another offender is bound by the prior score. *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004).

Do not score 100 points if homicide is the sentencing offense – MCL 777.33(2)(b)

Homicide means any crime in which the death of a human being is an element of that crime. MCL 777.1(c).

Although 100 points cannot be scored in a homicide case, 25 points *should* be scored for the life-threatening injury that produced the death. *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005).

OV 4 – PSYCHOLOGICAL INJURY TO VICTIM

Serious psychological injury – MCL 777.34(1)(a)

No error in scoring for serious psychological injury based on trial court's observation of the complainant while testifying at trial and based on testimony that the complainant was "pretty angry" and had tried to block out the sexual abuse by a person he considered a father figure. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

OV 4 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).

The victim's expression of fearfulness is enough to support a score of 10 points under OV 4. *People v Davenport (After Remand)*, 286 Mich App 191; 779 NW2d 257 (2009); *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004).

Ten points were properly scored under OV 4 where a videotape of the sex crime showed that one victim's attitude "took a disturbing turn" during the incident, causing that victim to begin to make violent threats against another victim, which showed that the first victim was rendered unable to comprehend the gravity of his actions. *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005).

Evidence of the victim's disrupted life, nightmares, and plans to seek treatment supported a score of 10 points under OV 4. *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004).

The forceful snatching of the victim's purse did not lead the Court of Appeals to infer serious psychological injury; since there was no evidence of such injury, scoring ten points under OV 4 was error. *People v Hicks*, 259 Mich App 518; 675 NW2d 599 (2003).

OV 5 – PSYCHOLOGICAL INJURY TO MEMBER OF VICTIM'S FAMILY

Crimes for which OV 5 is scored

OV 5 is only scored for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1).

"Homicide" means any crime in which the death of a human being is an element of that crime. MCL 777.1(c).

OV 6 – OFFENDER'S INTENT TO KILL OR INJURE ANOTHER INDIVIDUAL

Crimes for which OV 6 is scored

OV 6 is only scored for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. MCL 777.22(1).

"Homicide" means any crime in which the death of a human being is an element of that crime. MCL 777.1(c).

Scoring after a jury trial

OV 6 is to be scored consistently with a jury verdict unless the sentencing judge has information that was not presented to the jury. MCL 777.36(2)(a). NOTE: This limitation applies only to OV 6.

OV 7 – AGGRAVATED PHYSICAL ABUSE

Focus: offender's conduct

The focus of OV 7 is the offender's conduct, not the victim's experience. Thus, an offender can be scored even if the victim was unconscious when the offender committed the acts supporting the score. *People v Kegler*, 268 Mich App 187; 706 NW2d 744 (2005).

Where defendant did not take part in or encourage his co-felons to commit the beating that constituted excessive brutality, it was error to score 50 points against him; for OV 7, only the defendant's actual participation should be scored. *People v Hunt*, 290 Mich App 317; ___ NW2d ___ (2010).

Victim defined

Count each person placed in danger of injury or loss of life as a victim. MCL 777.37(2).

Sadism, torture, excessive brutality, conduct designed to substantially increase fear and anxiety a victim suffers during offense – MCL 777.37(1)(a)

The defendant's actions of cocking the gun and repeatedly threatening the lives of his victims during a robbery supported a finding that he engaged in conduct designed to substantially increase the fear and anxiety the victims suffered during the offense. *People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002).

Actual physical abuse need not have occurred for an offender to receive 50 points under OV 7. *People v Mattoon*, 271 Mich App 275; 721 NW2d 269 (2006).

OV 8 – VICTIM ASPORTATION OR CAPTIVITY

Victim defined

Count each person placed in danger of injury or loss of life as a victim. MCL 777.38(2)(a).

Does not apply to sentencing for kidnapping

Score 0 points if the sentencing offense is kidnapping. MCL 777.38(2)(b).

Asportation – MCL 777.38(1)(a)

Asportation means movement of a victim beyond that which is incidental to the commission of the crime. *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003); *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010).

The offender need not use force to accomplish the asportation. *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003); *People v Cox*, 268 Mich App 440; 709 NW2d 152 (2005).

No error in scoring fifteen points for placing victims in place of greater danger where the CSC defendant took one young victim to a trailer on his property, another riding on a dirt bike far from the house, and another on a tree stand where others were less likely to see him. *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009).

No error in scoring 15 points where the victim was transported from a friend's house to an unfamiliar house, where she was involved in sexual encounters with three men she barely knew. *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004).

Holding captive – MCL 777.38(1)(a)

Since points are scored for holding a victim captive "beyond the time necessary to commit the offense," the sentencing court is to consider conduct outside the duration of the sentencing offense. *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

OV 9 – NUMBER OF VICTIMS

Score based on sentencing offense

OV 9 may only be scored on the basis of conduct occurring during the sentencing offense. The defendant's flight from the police after breaking and entering a building was not a permissible basis for scoring OV 9. *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

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

OV 9 should have been scored at 10 points, reflecting 2 or more individuals placed in danger or injury or loss of life, in an 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; 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).

Victim defined

Count each person placed in danger of injury or loss of life or property as a victim. MCL 777.39(2)(a).

Scoring of OV 9 is not limited to the defendant's intended victims; it includes others who were placed in danger by the commission of the offense. *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004); *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002).

OV 9 was improperly scored at 10 points in a case of first-degree CSC, 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 drew a 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).

Multiple deaths – MCL 777.39(1)(a)

Score 100 points for multiple deaths only in homicide cases. MCL 777.39(2)(b).

"Homicide" means any crime in which the death of a human being is an element of that crime. MCL 777.1(c).

OV 10 – EXPLOITATION OF VULNERABLE VICTIM

Victim defined

An exploited victim must be a victim of the sentencing offense. *People v Hindman*, 472 Mich 875; 693 NW2d 384 (2005).

Where the defendant believed he was communicating via the internet with a 14-year-old but was actually communicating with a special agent for the Attorney General, the agent did not qualify as a vulnerable victim. *People v Russell (On Remand)*, 281 Mich App 610; 760 NW2d 841 (2008).

Predatory conduct – MCL 777.40(1)(a)

OV 10 may only be scored for predatory conduct if (1) the defendant engaged in pre-offense conduct, (2) directed at one or more victims who suffered from a readily apparent vulnerability, and (3) victimization was the defendant's primary purpose for engaging in that conduct. *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008).

Since predatory conduct is, by definition, "preoffense" conduct, the rule of *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), does not apply. (That is, the court should consider conduct that occurs before the commission of the sentencing offense.)

To score 15 points, a victim need not be inherently vulnerable; vulnerability can arise from the circumstances of the offense, such as darkness or isolation. Also, the victim need not be specified when the predatory conduct begins, as, for example, when the offender lies in wait. *People v Huston*, 489 Mich 451; ___ NW2d ___ (2011).

The timing and location of the assault are factors of predatory conduct before the offense, including watching a victim and waiting for a chance to be alone with the victim. *People v Apgar*, 264 Mich App 321; 690 NW2d 312 (2004).

Fifteen points were properly scored for grooming activity that involved less intrusive forms of sexual touching designed to desensitize the victims to more serious acts. *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009).

Fifteen points were properly scored for harboring a mentally ill victim and showing him pornography before committing CSC. *People v Cox*, 268 Mich App 440; 709 NW2d 152 (2005).

No error in scoring 15 points for predatory conduct based on evidence that the defendant befriended young victims and became their confidant to lure them to his home, where he provided them with video games, alcohol, cigarettes, and pornography before molesting them. *People v Waclawski*, 286 Mich App 634; 780 NW2d 321 (2009).

Exploitation of age – MCL 777.40(1)(b)

In an order granting peremptory relief, the Michigan Supreme Court agreed with the dissenting judge in the Court of Appeals that OV 10 was improperly scored in an assault case for exploitation of the victim's age simply because the defendant was nearly 30 and the victim was 16 (without evidence showing the defendant exploited the victim's youth in perpetrating the crime). *People v James Taylor*, 486 Mich 904; 780 NW2d 833 (2010).

Ten points were properly scored for exploiting youth and a domestic relationship where the 14-year-old victim was living with the 67-year-old defendant, who was in the process of adopting her. *People v Phillips*, 251 Mich App 100; 649 NW2d 407 (2002).

The trial court did not abuse its discretion in assessing 10 points for OV 10, reflecting exploitation of a vulnerable victim in a case of first-degree CSC, 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, 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).

Exploitation of domestic relationship – MCL 777.40(1)(b)

Starting a fight out of jealousy arising from a prior domestic relationship constitutes exploitation of the domestic relationship. *People v Wilson*, 252 Mich App 390; 652 NW2d 488 (2002).

Ten points were properly scored for exploiting youth and a domestic relationship where the 14-year-old victim was living with defendant, who was in the process of adopting her. *People v Phillips*, 251 Mich App 100; 649 NW2d 407 (2002).

Not just any dating relationship constitutes a domestic relationship under OV 10. There must be a familial or cohabitating relationship. Merely being permitted to keep some of one's belongings at someone else's house does not establish a cohabitating relationship. *People v Jamison*, ___ Mich App ___ COA #297154 (4/26/11).

OV 11 – CRIMINAL SEXUAL PENETRATION

Penetrations arising out of the sentencing offense – MCL 777.41(2)(a)

A penetration "arises" out of the sentencing offense when it has a connective relationship, a cause and effect relationship, with the offense of "more than an incidental sort." It is not enough that the penetrations involved the same defendant and victim. *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006).

NOTE: There have been several MSC orders reversing scores under OV 11. See, e.g., *People v Thompson*, 474 Mich 861; 703 NW2d 189 (2005); *People v Goodman*, 480 Mich 1052; 743 NW2d 890 (2008); *People v Minter*, 475 Mich 865; 714 NW2d 296 (2006). In some of these cases, the COA opinion shows that the penetrations involved occurred on different dates. Neither the MSC nor the COA has held that a penetration occurring on a separate date can never arise out of the sentencing offense. But one can infer from these cases that a significant time span between the sentencing offense and a penetration is a factor tending to weigh against a finding of the connective relationship required by *Johnson*.

Penetration forming the basis of a CSC 1 or CSC 3 offense – MCL 777.41(2)(c)

Although the one penetration that forms the basis of a first- or third-degree CSC cannot be scored, other penetrations arising out of the sentencing offense may be scored even if they resulted in additional convictions. *People v Cox*, 268 Mich App 440; 709 NW2d 152 (2005); *People v McLaughlin*, 258 Mich App 635; 672 NW2d 860 (2003).

OV 12 – CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS

Must score conduct under OV 12 if possible

All conduct that can be scored under OV 12 must be scored under that offense variable before proceeding to score OV 13. The trial court erred when it concluded it could score the conduct at issue under the variable yielding the highest total points. *People v Bemer*, 286 Mich App 26; 777 NW2d 464 (2009). *See also, People v Williams* 486 Mich 1077; 784 NW2d 206 (2010) (conduct subject to scoring under OV 12 must be considered there before it can be scored under OV 13, and conduct already scored under OV 12 may not be scored under OV 13).

Scorable acts

A felonious criminal act is contemporaneous if it occurred within 24 hours of the sentencing offense, and it has not and will not result in a separate conviction. MCL 777.42(2)(a).

Felony-firearm is not scored under OV 12. MCL 777.42(2)(b).

Do not score conduct scored in OV 11. MCL 777.42(2)(c).

By definition, OV 12 contemplates conduct beyond the sentencing offense. *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

Only acts that do not establish the sentencing offense are considered. Thus, it was error when sentencing a defendant for armed robbery to score a "larceny" under OV 12 when the larceny was the taking involved in the robbery itself. *People v Light*, ___ Mich App ___;COA #293746 (11/23/10).

Crimes against a person – MCL 777.42(1)(a), (b), (d)

The trial court erred in assessing 25 points for OV 12, reflecting 3 contemporaneous felonious acts within 24 hours involving crimes against a person, on the basis of charges of disseminating sexually explicit matter to a minor because those offenses are designated as crimes against public order. *People v Wiggins*, 289 Mich App 126; 795 NW2d 232 (2010).

The trial court properly scored 25 points for three or more crimes against a person that occurred within 24 hours and did not result in conviction where the 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).

OV 13 – CONTINUING PATTERN OF CRIMINAL BEHAVIOR

Must score conduct under OV 12 if possible

All conduct that can be scored under OV 12 must be scored under that offense variable before proceeding to score OV 13. The trial court erred when it concluded it could score the conduct at issue under the variable yielding the highest total points. *People v Bemer*, 286 Mich App 26; 777 NW2d 464 (2009).

Evidence required to support score

The trial court properly scored OV 13 at zero 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. 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).

Conviction not required

Pending charges may be considered in determining a pattern of felonious criminal activity. *People v Wilkens*, 267 Mich App 728; 705 NW2d 728 (2005).

Juvenile adjudications may be considered in determining a pattern of felonious criminal activity. *People v Harverson*, ___ Mich App ___; COA #293014 (12/28/10).

Crimes against a person – MCL 777.43(1)(c), (d)

The offense of assaulting a guard, classified as a Public Safety crime under the guidelines, may not be considered a crime against the person for purposes of scoring OV 13. *People v Bonilla-Machado*, ___ Mich ___; ___ NW2d ___ (140510, 7/26/11).

Only crimes with the offense category "person" can be considered as crimes against a person. *People v Wiggins*, 289 Mich App 126; 795 NW2d 232 (2010) (so holding for OV 12 and noting that the same reasoning would apply to OV 13).

To decide whether to score a conspiracy conviction, the court must look to the nature of the conspiracy. Because the defendant's conviction was for conspiring to commit home invasions, and a home invasion is a crime against a person, the conspiracy was properly scored as a crime against a person. *People v Jackson*, ___ Mich App ___;COA #294964 (2/17/11).(Question: Since the Legislature has designated conspiracy as an offense against public order, MCL 777.16h, does *Jackson* survive *Bonilla-Machado*, above?)

Five-year period – MCL 777.43(2)(a)

The five-year period considered must include the date the sentencing offense was committed. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006).

By definition, OV 13 contemplates conduct beyond the sentencing offense. *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

NOTE: Effective 01-16-09 there is a new 25-point category in OV 13 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." This conduct is also now a distinct felony, with a gang defined as a group of 5 or more people that identifies itself with some unifying method of membership identity, defined membership criteria, and an established command structure. MCL 750.411v.

OV 14 – OFFENDER'S ROLE

Determining if offender was a leader

Consider the entire criminal transaction. MCL 777.44(2)(a).

Because the entire criminal transaction must be considered, courts are specifically directed to consider conduct beyond the sentencing offense. *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009).

If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader. MCL 777.44(2)(b).

OV 15 – AGGRAVATED CONTROLLED SUBSTANCE OFFENSES

Delivery of a controlled substance – MCL 777.45(2)(a)

Delivery of a controlled substance for purposes of OV 15 includes injecting someone with it. *People v Havens*, 268 Mich App 15; 706 NW2d 210 (2005).

OV 16 – PROPERTY OBTAINED, DAMAGED, LOST, OR DESTROYED

Property obtained

The amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement may be considered. MCL 777.46(2)(c).

The value of property obtained unlawfully is included in OV 16 even where the property was eventually returned to its owner undamaged. *People v Leversee*, 243 Mich App 337; 622 NW2d 325 (2000).

Conduct beyond the sentencing offense

In multiple offender or multiple victim cases; the statute allows aggregated values including property involved in uncharged offenses or charges dismissed under a plea agreement. MCL 777.46(2)(a); *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). Although not mentioned in *McGraw*, the statute also allows such aggregation even where there are no multiple offenders or victims. MCL 777.46(2)(c).

The statute also directs court to consider whether there was wanton or malicious damage "beyond that necessary to commit the crime" for which the offender has not and will not be charged. MCL 777.46(1)(a).

OV 17 – DEGREE OF NEGLIGENCE EXHIBITED

Crimes for which OV 17 is scored

OV 17 is scored only if the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1).

OV 18 – OPERATOR ABILITY AFFECTED BY ALCOHOL OR DRUGS

Crimes for which OV 18 is scored

OV 18 is scored only if the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive. MCL 777.22(1), (5).

OV 19 – THREAT TO SECURITY OF PENAL INSTITUTION OR COURT OR INTERFERENCE WITH ADMINISTRATION OF JUSTICE OR RENDERING OF EMERGENCY SERVICES

Not limited to duration of sentencing offense

Points may be assessed under OV 19 for conduct that occurred after the completion of the sentencing offense. *People v Smith*, 488 Mich 193; 793 NW2d 666 (2010).

People v McGraw, 484 Mich 120 (2009), does not apply to scoring of OV 19. *People v Ericksen*, 288 Mich App 192; 793 NW2d 120 (2010).

Force or threat of force to interfere with administration of justice – MCL 777.49(b)

Fifteen points were properly scored where the defendant threatened to kill the victim, whom he knew would be the primary witness against him if charges were filed. It was not necessary for the defendant to have intended to interfere with the administration of

justice, since it is sufficient under MCL 777.49(b) if the threat "results in the interference with the administration of justice." There was evidence that the threat had this result, either by dissuading the victim from coming forward sooner or by affecting the victim's testimony. *People v Endres*, 269 Mich App 414; 711 NW2d 398 (2006).

Fifteen points were properly scored where the defendant fought with and threatened a store's loss prevention officers who were statutorily authorized to arrest him for retail larceny. *People v Passage*, 277 Mich App 175; 743 NW2d 746 (2007).

Interference or attempted interference with administration of justice – MCL 777.49(c)

Interference with the administration of justice encompasses more than interfering with the judicial process itself. The defendant's giving a false name to the police when he was stopped for drunk driving was interference with the administration of justice. *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004).

Ten points were properly scored where the defendant told his victims not to tell anyone what he had done or he would go to jail. *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009).

Ten points were properly scored where the defendant committed perjury, even though the perjury was the charge for which he was being sentenced; OV 19 contains no exception for crimes that inherently involve interference with the administration of justice. *People v Underwood*, 278 Mich App 334; 750 NW2d 612 (2008).

OV 19 was properly scored on the basis that the defendant asked others to dispose of the knife used to stab the victim and to lie about his whereabouts in an attempt to create a false alibi. *People v Ericksen*, 288 Mich App 192; 793 NW2d 120 (2010).

OV 20 – TERRORISM

Act of terrorism using explosive device – MCL 777.49a(1)(a)

The scoring of 100 points for OV 20, reflecting terrorism, was in error where the defendant threatened by e-mail to cause harm using an explosive device, which is one of the enumerated substances or devices, but the e-mail threats were not themselves "dangerous to human life" and did not constitute an act of terrorism as defined by MCL 750.543b(a). *People v Osantowski*, 481 Mich 103; 748 NW2d 799 (2008).

SENTENCING GUIDELINES OV HYPOTHETICAL

Defendant Johnny Smith has been charged with two counts of criminal sexual conduct in the first-degree (penetration with a person under the age of 13). The victim/complainant testified at the preliminary examination that on June 13, 2006, the defendant penetrated her vagina with his penis and also performed oral sex on her. She further testified that the defendant had previously touched her breasts one year earlier during the summer of 2005. The defendant is her step-father and has lived in the same home with her for several years. She did not immediately report the incident because she was fearful her mother would side with her step-father.

The defendant is going to plead guilty pursuant to a plea bargain. According to the bargain, the defendant will plead guilty to one count of first-degree CSC in exchange for dismissal of the second count. The prosecutor also will not charge a count of second-degree CSC for the touching that occurred in 2005 (although consider whether this conduct will be scored within the guidelines).

1. Is there a mandatory minimum term?

2. Score the Offense Variables, paying particular attention to OVs 11, 12 and 13.

3. This is a Crime against the Person, Class A offense. What is the recommended range if the defendant has Prior Record Level C and is being sentenced as a third habitual offender?

OV 1
Aggravated Use of a Weapon

Pts		Instructions
25	A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon. MCL 777.31(1)(a).	• Each person in danger of injury or loss of life is counted as a victim for purposes of scoring OV 1. MCL 777.31(2)(a). • In cases involving multiple offenders, if one offender is assigned points for the use or the presence of a weapon, all offenders must be assigned the same number of points. MCL 777.31(2)(b). • Do not score five points if the sentencing offense is a conviction of MCL 750.82 (felonious assault) or MCL 750.529 (armed robbery). MCL 777.31(2)(e). • Score five points if an offender used an object to suggest that he or she had a weapon. MCL 777.31(2)(c). • Score five points if an offender used a chemical irritant, a chemical irritant or smoke device, or an imitation harmful substance or device. MCL 777.31(2)(d). • "Harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," "harmful radioactive device," and "imitation harmful substance or device" are defined in MCL 750.200h. MCL 777.31(3)(a). • "Incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.31(3)(b).
20	The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.31(1)(b).	
15	A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon. MCL 777.31(1)(c).	
10	The victim was touched by any other type of weapon. MCL 777.31(1)(d).	
5	A weapon was displayed or implied. MCL 777.31(1)(e).	
0	No aggravated use of a weapon occurred. MCL 777.31(1)(f).	

OV 2
Lethal Potential of Weapon Possessed or Used

Pts		Instructions
15	The offender possessed or used a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, or harmful radioactive device. MCL 777.32(1)(a).	• In cases involving multiple offenders, if one offender is assessed points for possessing a weapon, all offenders must be assessed the same number of points. MCL 777.32(2). • "Harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," and "harmful radioactive device" are defined in MCL 750.200h. MCL 777.32(3)(a). • A "fully automatic weapon" is a firearm that ejects an empty cartridge and loads a live cartridge from the magazine for the next shot without requiring renewed pressure on the trigger for each successive shot. MCL 777.32(3)(b). • A "pistol," "rifle," or "shotgun" includes a revolver, semi-automatic pistol, rifle, shotgun, combination rifle and shotgun, or other firearm made in or after 1898 that fires fixed ammunition. A "pistol," "rifle," or "shotgun" does not include a fully automatic weapon or short-barreled shotgun or short-barreled rifle. MCL 777.32(3)(c). • An "incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.32(3)(d).
15	The offender possessed or used an incendiary device, an explosive device, or a fully automatic weapon. MCL 777.32(1)(b).	
10	The offender possessed or used a short-barreled rifle or a short-barreled shotgun. MCL 777.32(1)(c).	
5	The offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon. MCL 777.32(1)(d).	
1	The offender possessed or used any other potentially lethal weapon. MCL 777.32(1)(e).	
0	The offender possessed or used no weapon. MCL 777.32(1)(f).	

OV 3
Degree of Physical Injury to a Victim

Pts		Instructions
100	A victim was killed. MCL 777.33(1)(a).	• In cases involving multiple offenders, if one offender is assessed points for death or physical injury, all offenders must be assessed the same number of points. MCL 777.33(3)(a). • Score 100 points if death results from the commission of the offense and homicide is not the sentencing offense. MCL 777.33(2)(b). Any crime in which the death of a person is an element of the crime is a "homicide." MCL 777.1(c). • Score 50 points under this variable if death results from an offense or attempted offense that involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and any of the following apply: – the offender was under the influence of or visibly impaired by the use of alcohol, a controlled substance, or a combination of alcohol and a controlled substance, MCL 777.33(2)(c)(i); – the offender had an alcohol content of 0.08 grams* or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, MCL 777.33(2)(c)(ii); or – the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212 or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(iv), MCL 777.33(2)(c)(iii). • Do not score five points if "bodily injury" is an element of the sentencing offense. MCL 777.33(2)(d). • "Requiring medical treatment" refers to an injury's need for treatment not whether a victim was successful in obtaining treatment. MCL 777.33(3). **Effective October 1, 2013, the alcohol content level increases to 0.10 grams or more.*
50	A victim was killed. MCL 777.33(1)(b). *(35 points for offenses committed before September 30, 2003. 2003 PA 134.)*	
25	Life threatening or permanent incapacitating injury occurred to a victim. MCL 777.33(1)(c).	
10	Bodily injury requiring medical treatment occurred to a victim. MCL 777.33(1)(d).	
5	Bodily injury not requiring medical treatment occurred to a victim. MCL 777.33(1)(e).	
0	No physical injury occurred to a victim. MCL 777.33(1)(f).	

OV 4
Degree of Psychological Injury to a Victim

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

OV 5

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

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

Pts		Instructions
15	Serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(a).	• Assess 15 points if the family member's serious psychological injury may require professional treatment. The fact that treatment has not been sought is not determinative. MCL 777.35(2). • Any crime in which the death of a person is an element of the crime is a "homicide." MCL 777.1(c).
0	No serious psychological injury requiring professional treatment occurred to a victim's family member. MCL 777.35(1)(b).	

OV 6

Intent to Kill or Injure Another Individual

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

Pts		Instructions
50	The offender had premeditated intent to kill or the killing was committed while committing or attempting to commit arson, criminal sexual conduct in the first or third degree, child abuse in the first degree, a major controlled substance offense, robbery, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, or kidnapping or the killing was the murder of a peace officer or a corrections officer. MCL 777.36(1)(a).	• Unless the sentencing court has information that was not presented to the jury, an offender's OV 6 score must be consistent with the jury's verdict. MCL 777.36(2)(a). • Ten points must be scored if a killing is intentional within the definition of second-degree murder or voluntary manslaughter but the death took place in a combative situation or in response to the decedent's victimization of the offender. MCL 777.36(2)(b). • Any crime in which a person's death in an element of the crime is a "homicide." MCL 777.1(c).
25	The offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result. MCL 777.36(1)(b).	
10	The offender had intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm or there was gross negligence amounting to an unreasonable disregard for life. MCL 777.36(1)(c).	
0	The offender had no intent to kill or injure. MCL 777.36(1)(d).	

PRVs and OVs – Crimes Against a Person

OV 7
Aggravated Physical Abuse

Pts		Instructions
50	A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(a).	• Each person placed in danger of injury or loss of life is a victim for purposes of scoring OV 7. MCL 777.37(2). • "Sadism" is "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). • Effective April 22, 2002, 2002 PA 137 deleted "terrorism"* from OV 7's list of behaviors meriting points. Although "terrorism" was eliminated from consideration under OV 7, the conduct previously defined as "terrorism" remains in OV 7's statutory language as "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). **"Terrorism" is now addressed by OV 20. MCL 777.49a.*
0	No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. MCL 777.37(1)(b).	

OV 8
Victim Asportation or Captivity

Pts		Instructions
15	A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense. MCL 777.38(1)(a).	• Each person in danger of injury or loss of life is a victim for purposes of scoring OV 8. MCL 777.38(2)(a). • Zero points must be scored if the sentencing offense is kidnapping. MCL 777.38(2)(b).
0	No victim was asported or held captive. MCL 777.38(1)(b).	

OV 9
Number of Victims

Pts		Instructions
100	Multiple deaths occurred. MCL 777.39(1)(a).	• A "victim" for purposes of scoring OV 9 is each person placed in danger of injury or loss of life or **(effective March 30, 2007)*** loss of property. MCL 777.39(2)(a). • 100 points are scored only in homicide cases. MCL 777.39(2)(b). Any crime in which a person's death is an element of the crime is a "homicide." MCL 777.1(c). *2006 PA 548.
25	10 or more victims were placed in danger of physical injury or death. **(Effective March 30, 2007.)** 20 or more victims were placed in danger of property loss. MCL 777.39(1)(b).	
10	2 to 9 victims were placed in danger of physical injury or death. **(Effective March 30, 2007.)** 4 to 19 victims were placed in danger of property loss. MCL 777.39(1)(c).	
0	Fewer than 2 victims were placed in danger of physical injury or death. **(Effective March 30, 2007.)** Fewer than 4 victims were placed in danger of property loss. MCL 777.39(1)(d).	

OV 10
Exploitation of a Victim's Vulnerability

Pts		Instructions
15	Predatory conduct was involved. MCL 777.40(1)(a).	• Do not automatically score points for victim vulnerability just because one or more of the factors addressed by OV 10 are present in the circumstances surrounding the sentencing offense. MCL 777.40(2). • "Predatory conduct" is an offender's preoffense conduct directed at a victim for the primary purpose of victimization. MCL 777.40(3)(a). • To "exploit" a victim is to manipulate a victim for the offender's selfish or unethical purposes. MCL 777.40(3)(b). • A victim's "vulnerability" is the victim's readily apparent susceptibility to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(c). • "Abuse of authority status" means the offender used a victim's fear of or deference to an authority figure to exploit the victim. Examples of an authority figure include, but are not limited to, a teacher, parent, or physician. MCL 777.40(3)(d).
10	The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status. MCL 777.40(1)(b).	
5	The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious. MCL 777.40(1)(c).	
0	The offender did not exploit a victim's vulnerability. MCL 777.40(1)(d).	

PRVs and OVs – Crimes Against a Person

OV 11
Criminal Sexual Penetration

Pts		Instructions
50	Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a).	• All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11. MCL 777.41(2)(a). • Multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OVs 12 or 13.* MCL 777.41(2)(b). However, if any conduct is scored under this variable, that conduct must not be scored under OV 12 and may only be scored under OV 13 if the conduct is related to the offender's membership in an organized criminal group. MCL 777.42(2)(c); MCL 777.43(2)(c). • The one penetration on which a first- or third-degree criminal sexual conduct offense is based must not be counted for purposes of scoring OV 11. MCL 777.41(2)(c). **OV 12 addresses criminal acts that occur within 24 hours of the sentencing offense and will not result in a separate conviction. OV 13 accounts for an offender's pattern of criminal conduct over a period of five years regardless of outcome.*
25	One criminal sexual penetration occurred. MCL 777.41(1)(b).	
0	No criminal sexual penetrations occurred. MCL 777.41(1)(c).	

OV 12
Number of Contemporaneous Felonious Criminal Acts

Pts		Instructions
25	Three or more contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(a).	• A felonious criminal act is contemporaneous if both of the following circumstances exist: – the criminal act occurred within 24 hours of the sentencing offense, MCL 777.42(2)(a)(i), and – the criminal act has not and will not result in a separate conviction, MCL 777.42(2)(a)(ii). • Conduct scored in OV 11 must not be scored under this variable. MCL 777.42(2)(c). • Violations of MCL 750.227b (possession of a firearm during the commission of a felony) should not be counted when scoring this variable. MCL 777.42(2)(b).
10	Two contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42(1)(b).	
10	Three or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(c).	
5	One contemporaneous felonious criminal act involving a crime against a person was committed. MCL 777.42(1)(d).	
5	Two contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(1)(e).	
1	One contemporaneous felonious criminal act involving any other crime was committed. MCL 777.42(1)(f).	
0	No contemporaneous felonious criminal acts were committed. MCL 777.42(1)(g).	

PRVs and OVs – Crimes Against Property

OV 13
Continuing Pattern of Criminal Behavior

Pts		Instructions
50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a).	• To score this variable, all crimes within a period of five years, including the sentencing offense, must be counted without regard to whether the offense resulted in a conviction. MCL 777.43(2)(a). • The existence of an organized criminal group may be inferred from the facts surrounding the sentencing offense, and the group's existence is more important than the presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication demonstrated by the criminal group. MCL 777.43(2)(b). • Do not consider conduct scored in OVs 11 or 12 unless the offense was related to membership in an organized criminal group. MCL 777.43(2)(c). • Do not consider conduct scored in OVs 11 or 12 unless the offense was related to membership in an organized criminal group or **(effective January 16, 2009)** that are gang-related.* MCL 777.43(2)(c). • Score 50 points only if the sentencing offense is first-degree criminal sexual conduct. MCL 777.43(2)(d). • **(Effective March 1, 2003.)** Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring this variable. MCL 777.43(2)(e). • Only one crime involving the same controlled substance may be counted under this variable. For example, conspiracy and a substantive offense involving the same amount of controlled substances cannot both be counted under OV 13. Similarly, possession and delivery of the same amount of controlled substances may not be counted as two crimes under OV 13. MCL 777.43(2)(f). *2008 PA 562.
25	**(Effective January 16, 2009.)*** The offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from a gang. MCL 777.43(1)(b).	
25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(c) (formerly MCL 777.43(1)(b)).	
10	**(Effective until February 28, 2003.)** The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property. MCL 777.43(1)(c).	
10	**(Effective March 1, 2003, through January 15, 2009.)** The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(*i*) to (*iii*) or 333.7403(2)(a)(*i*) to (*iii*). MCL 777.43(1)(c). **(Effective January 16, 2009.)*** The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of MCL 333.7401(2)(a)(*i*) to (*iii*) or 333.7403(2)(a)(*i*) to (*iii*) of the Public Health Code, 1978 PA 368, MCL 333.7401 and 333.7403. MCL 777.43(1)(d) (formerly MCL 777.42(1)(c)).	
10	**(Effective until January 15, 2009.)** The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. MCL 777.43(1)(d).	

continued on next page

PRVs and OVs – Crimes Against Property

OV 13
Continuing Pattern of Criminal Behavior

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

OV 14
Offender's Role

Pts		Instructions
10	The offender was a leader in a multiple offender situation. MCL 777.44(1)(a).	• Consider the entire criminal transaction in which the sentencing offense occurred when determining the offender's role. MCL 777.44(2)(a). • In cases involving three or more offenders, more than one offender may be considered a leader. MCL 777.44(2)(b).
0	The offender was not a leader in a multiple offender situation. MCL 777.44(1)(b).	

PRVs and OVs – Crimes Involving a Controlled Substance

OV 15
Aggravated Controlled Substance Offenses

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

Pts		Instructions
100	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 1,000 or more grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv). MCL 777.45(1)(a).	• Deliver" is the actual or constructive transfer of a controlled substance from one person to another person without regard to remuneration. MCL 777.45(2)(a). • A "minor" is an individual 17 years of age or less. MCL 777.45(2)(b). • "Trafficking" is the sale or delivery of actual or counterfeit controlled substances on a continuing basis to another person or persons for further distribution. MCL 777.45(2)(c). **continued on next page**
75	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 450 grams or more but less than 1,000 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv). MCL 777.45(1)(b).	
50	The offense involved the manufacture, creation, delivery, possession, or possession with intent to manufacture, create, or deliver of 50 or more grams but less than 450 grams of any mixture containing a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(iv). MCL 777.45(1)(c).	
25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender. MCL 777.45(1)(d).	
25	The offense involved the sale or delivery of a controlled substance other than marijuana or a mixture containing a controlled substance other than marijuana by the offender who was 18 years of age or older to a minor who was 3 or more years younger than the offender.	
20	The offense involved the sale, delivery, or possession with intent to sell or deliver 225 grams or more of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2.	
15	The offense involved the sale, delivery, or possession with intent to sell or deliver 50 or more grams but less than 225 grams of a controlled substance classified in schedule 1 or 2 or a mixture containing a controlled substance classified in schedule 1 or 2.	
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants. MCL 777.45(1)(e).	
10	The offense involved the sale, delivery, or possession with intent to sell or deliver 45 kilograms or more of marijuana or 200 or more of marijuana plants.	

OV 15

Aggravated Controlled Substance Offenses

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

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

OV 16
Degree of Property Damage

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

Pts		Instructions
10	Wanton or malicious damage occurred beyond that necessary to commit the crime for which the offender is not charged and will not be charged. MCL 777.46(1)(a).	• In cases involving multiple offenders or multiple victims, the appropriate point total may be determined by aggregating the value of property involved in the offense, including property involved in uncharged offenses or property involved in charges dismissed under a plea agreement. MCL 777.46(2)(a). • Use the value of the property to score this variable in cases where the property was unlawfully obtained, lost to the lawful owner, or destroyed. If the property was damaged, use the amount of money necessary to restore the property to its pre-offense condition. MCL 777.46(2)(b). • Money or property involved in admitted but uncharged offenses or in charges dismissed under a plea agreement may be considered in scoring this variable. MCL 777.46(2)(c).
10	The property had a value of more than $20,000.00 or had significant historical, social, or sentimental value. MCL 777.46(1)(b).	
5	The property had a value of $1,000.00 or more but not more than $20,000.00. MCL 777.46(1)(c).	
1	The property had a value of $200.00 or more but not more than $1,000.00. MCL 777.46(1)(d).	
0	No property was obtained, damaged, lost, or destroyed or the property had a value of less than $200.00. MCL 777.46(1)(e).	

OV 17
Degree of Negligence Exhibited

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

Pts		Instructions
10	The offender showed a wanton or reckless disregard for the life or property of another person. MCL 777.47(1)(a).	• If points are assessed against the offender for OV 6, ten points may not be scored under this variable. MCL 777.47(2). • Definitions for "aircraft," "ORV," "snowmobile," "vehicle," and "vessel" are referenced in MCL 777.1.
5	The offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown. MCL 777.47(1)(b).	
0	The offender was not negligent. MCL 777.47(1)(c).	

PRVs and OVs – Crimes Against a Person

OV 18

Degree to Which Alcohol or Drugs Affected the Offender

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

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

Pts		Instructions
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(a).	• For purposes of scoring OV 18, "any bodily alcohol content" is either of the following: – an alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine,* MCL 777.48(2)(a), or – any presence of alcohol within a person's body from the consumption of alcohol except for alcohol consumption as part of a generally recognized religious service or ceremony, MCL 777.48(2)(b). • Definitions for "aircraft," "ORV," "snowmobile," "vehicle," and "vessel" are referenced in MCL 777.1. **continued on next page**
20	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.20 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.	
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(b).	
15	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.15 grams or more but less than 0.20 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.	
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while the offender was under the influence of alcoholic or intoxicating liquor, a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance; or while the offender's body contained any amount of a controlled substance listed in schedule 1 under MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in MCL 333.7214(a)(iv); or while the offender had an alcohol content of 0.08 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine or, beginning October 1, 2013, the offender had an alcohol content of 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. MCL 777.48(1)(c).	
10	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive when his or her bodily alcohol content was 0.10 grams or more but less than 0.15 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or while he or she was under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.	
5	The offender operated a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while he or she was visibly impaired by the use of alcoholic or intoxicating liquor or a controlled substance, or a combination of alcoholic or intoxicating liquor and a controlled substance, or was less than 21 years of age and had any bodily alcohol content. MCL 777.48(1)(d).	

OV 18
Degree to Which Alcohol or Drugs Affected the Offender

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

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

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

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

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

OV 20
Terrorism

Pts		Instructions
100	The offender committed an act of terrorism by using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(a).	• For purposes of scoring this variable, the terms "act of terrorism" and "terrorist" are defined in MCL 750.543b. MCL 777.49a(2)(a). • "Harmful biological substance," "harmful biological device," "harmful chemical substance," "harmful chemical device," "harmful radioactive material," and "harmful radioactive device" are defined in MCL 750.200h. MCL 777.49a(2)(b). • "Incendiary device" includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device. MCL 777.49a(2)(c). • For purposes of OV 20, "terrorist organization" is defined in MCL 750.543c. MCL 777.49a(2)(d).
50	The offender committed an act of terrorism without using or threatening to use a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device. MCL 777.49a(1)(b).	
25	The offender supported an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(c).	
0	The offender did not commit an act of terrorism or support an act of terrorism, a terrorist, or a terrorist organization. MCL 777.49a(1)(d).	

Sentencing Grid for Class A Offenses—MCL 777.62

Includes Ranges Calculated for Habitual Offenders (MCL 777.21(3)(a)–(c))

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-19 Points	21	35	27	45	42	70	51	85	81	135	108	180	
		43		56		87		106		168		225	HO2
		52		67		105		127		202		270	HO3
		70		90		140		170		270		360	HO4
II 20-39 Points	27	45	42	70	51	85	81	135	108	180	126	210	
		56		87		106		168		225		262	HO2
		67		105		127		202		270		315	HO3
		90		140		170		270		360		420	HO4
III 40-59 Points	42	70	51	85	81	135	108	180	126	210	135	225	
		87		106		168		225		262		281	HO2
		105		127		202		270		315		337	HO3
		140		170		270		360		420		450	HO4
IV 60-79 Points	51	85	81	135	108	180	126	210	135	225	171	285	
		106		168		225		262		281		356	HO2
		127		202		270		315		337		427	HO3
		170		270		360		420		450		570	HO4
V 80-99 Points	81	135	108	180	126	210	135	225	171	285	225	375/L	
		168		225		262		281		356		468/L	HO2
		202		270		315		337		427		562/L	HO3
		270		360		420		450		570		750/L	HO4
VI 100+ Points	108	180	126	210	135	225	171	285	225	375/L	270	450/L	
		225		262		281		356		468/L		562/L	HO2
		270		315		337		427		562/L		675/L	HO3
		360		420		450		570		750/L		900/L	HO4

The statutory percentage increases for habitual offenders are rounded down to the nearest whole month. The cell range may be less than the maximum possible minimum sentence by a fraction of a month.

SENTENCE ENHANCEMENT and CONSECUTIVE SENTENCING

I. Habitual Offender Provisions

MCL 769.10-13

Permissible Enhancement of Maximum Sentence:

50% (Second Habitual), *100%* (Third Habitual), *15 Years/Life* (Fourth Habitual)

Notice: Written Notice Within 21 Days of Arraignment on Information or 21 Days From Filing of Information, if Arraignment is Waived

Discretionary Enhancement: Resentencing is Required if Judge Erroneously Believes the Maximum Possible Sentence is Mandatory; *People v Mauch*, 23Mich App 723; 179 NW2d 184 (1970).

Enhancement Permitted for Prior Felony or Prior Attempt to Commit a Felony, MCL 769.10-13.

Two-Year Misdemeanor Offenses Are Considered Felonies for Purposes of Habitual Offender Enhancement, *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985).

Court May Enhance with One-Year Misdemeanor that Constitutes Attempt to Commit a Felony (i.e., Attempted Resisting and Obstructing a Police Officer); *People v Slocum*, 156 Mich App 198; 401 NW2d 271 (1987).

No Ten-Year Rule for Habitual Offenders, *People v Zinn*, 217 Mich App 340; 551 NW 2d 704 (1996).

Prosecutor May Amend Notice After Filing to Replace Conviction But Not Increase Level of Enhancement, *People v Ellis*, 224 Mich App 752; 569 NW2d 917 (1997); *People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002).

Each Felony Conviction That Arises Out of a Single Criminal Transaction Counts as a Separate Felony Conviction for Enhancement Purposes. *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), overruling *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987).

Statutory Sentencing Guidelines Apply to Habitual Offender Sentences, MCL 777.21(3). Upper Limit of Guidelines Range is Increased by *25%* for second habitual offenders, *50%* for third habitual offenders and *100%* for fourth habitual offenders. (Note the difference in permissible enhancement between maximum sentences and minimum sentences.)

No Boot Camp/SAI Program for Habitual Offenders sentenced to prison, MCL 791.234a(2)(viii), but possible for habitual offender sentenced to probation. MCL 771.3b).

II. Controlled Substance Second Offense Provisions

MCL 333.7413

Permissible Enhancement: Double the Penalty.

Notice: No Notice Required Before Conviction, But Must Have Reasonable Opportunity to Contest Accuracy of Priors at Sentencing; *People v Eason*, 435 Mich 228; 458 NW2d 17 (1990).

Discretionary Enhancement: Court May Double Minimum and Maximum Terms of Sentence, But Not Required to Do So. *People v Lowe*, 484 Mich 718; 773 NW2d 1 (2009); *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005).

Possession of Marijuana as a Second Controlled Substance Offense is Not a Felony for Purposes of Consecutive Sentencing Under the Public Health Code, *People v Wyrick,* 474 Mich 947; 707 NW2d 188 (2005).

Note: There is a separate enhancement provision for repeat Delivery of Controlled Substance to Minors, MCL 333.7413(3), and there is a separate provision for repeat Manufacture/Delivery/Possession with Intent/ Simple Possession and Conspiracy to Commit Same over 50 but less than 1,000 grams, MCL 333.7413(1) (Mandatory Life)

III. Felony-Firearm Offenses

MCL 750.227b

Permissible Enhancement: First Offense is Mandatory 2 Years (Determinate Sentence); Second Offense is Mandatory 5 Years (Determinate Sentence); Third Offense is Mandatory 10 Years (Determinate Sentence).

Notice: Separate Conviction With Right to Jury Trial for First Offense, No Notice Required for Second or Third Offenses, But Must Have Reasonable Opportunity to Contest Accuracy at Sentencing, *People v Williams*, 215 Mich App 234; 544 NW2d 480 (1996).

Mandatory Enhancement: Must Run Consecutively to Term of Imprisonment Imposed for Underlying Felony.

For Second or Third Felony-Firearm Offense, New Offense Must Have Occurred After Prior Conviction(s), *People v Stewart*, 441 Mich 89; 490 NW2d 327 (1992). (Caution: There is language in *Stewart* that the two prior felony-firearm convictions must arise out of "separate criminal incidents" in order to support the third felony-firearm conviction. Does this portion of the holding survive in light of *People v Gardner*, 482 Mich 41 (2008)?).

Probation is Not a Term of Imprisonment and Does Not Permit Consecutive Sentencing with Felony-Firearm Sentence, *People v Brown*, 220 Mich App 680; 560 NW2d 80 (1996).

Felony-Firearm Sentence May Not Run Consecutively to a Misdemeanor Offense, *People v Bonham*, 182 Mich App 130; 451 NW2d 530 (1989).

Felony-Firearm Sentence Runs Consecutively to Underlying Felony Sentence, but Concurrently With Other Felony Sentences, *People v Clark*, 463 Mich 459; 619 NW2d 538 (2000).

Mandatory Minimum Term of 25 Years for CSC First-Degree Involving Minor Under 13 years, MCL 750.520b(2)(b) (Effective August 28, 2006).

Mandatory Life Imprisonment Without Parole for CSC First-Degree Involving Minor Under 13 Years, if Prior Conviction for First, Second, Third or Fourth Degree CSC or Assault With Intent to Commit Sexual Contact or Penetration, But Only IfPrior Conviction Involved Minor Under 13 Years (Effective August 28, 2006).

V. Other Repeat Offender Statutes

- Domestic Violence, MCL 750.81; MCL 750.81a.
- Retail Fraud, MCL 750.356c- MCL 750.356d.
- Larceny Offenses, MCL 750.356; MCL 750.356a, MCL 750.362a
- OUIL Third Offense, MCL 257.625(9)

Note: Effective January 3, 2007, OUIL Third Offense (now Operating While Intoxicated, Third Offense) no longer requires all offenses within a ten year period. 2006 PA 564.

VI. Consecutive Sentencing

Notice: Consecutive Sentencing Does Not Depend on Any Notice or Charging Requirement. *People v St. John*, 230 Mich App 644; 585 NW2d 849 (1998).

All Sentences in Michigan Must Run Concurrently Unless There is Express Statutory Authority for Consecutive Sentencing, *People v Sawyer*, 410 Mich 531; 302 NW2d 534 (1981).

Two-Year Misdemeanor Offenses Constitute Felony Offenses for Purposes of Consecutive Sentencing, *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985).

Where Consecutive Sentencing is Discretionary, Judge Last In Time Has Authority to Impose Consecutive Sentence, *People v Chambers*, 430 Mich 217; 421 NW2d 903 (1988).

A. Mandatory Consecutive Sentencing:

Incarcerated or Escape, MCL 768.7a(1); MCL 750.193(1); MCL 750.195(2); MCL 750.197(2)

Parole, MCL 768.7a

- Does Not Include Misdemeanors
- May Not Include Federal Supervised Release
- Includes Out of State Parole

Note: A consecutive sentence must be imposed for a person who commits a felony on parole even if the new sentence is a jail sentence.

Major Controlled Substance Offense Committed During Pending Felony Charges, MCL 768.7b(b).

Felony-Firearm, MCL 750.227b.

B. Discretionary Consecutive Sentencing:

Crime Committed While On Bond or Pending Disposition of Other Felony Charge, MCL 768.7b(a).

Certain Controlled Substance Offenses and "Another Felony" Sentence, MCL 333.7401(3).

C. Consecutive Sentencing Not Permitted:

Crimes Committed While On Probation (Legislation Never Passed)

D. Selected Offenses with Discretionary Consecutive Sentencing for Multiple Offenses Arising Out of Same Transaction:

- CSC First-Degree and Other Offenses, MCL 750.520b(3).
- Carjacking and Other Offenses, MCL 750.529a.
- Home Invasion First-Degree and Other Offenses, MCL 750.110a(8).

- Juror or Witness Intimidation/Bribery and Other Offenses, MCL 750.119(3); MCL 750.120a(6); MCL 750.122(11).
- Homicide Involving Operation of Motor Vehicle and Other Offense, MCL 769.36.
- Assault of Police Officer and Other Offenses, MCL 750.81d.
- Obstructing Criminal Investigation and Other Offenses, MCL 750.483a.

E. Miscellaneous Discretionary Consecutive Sentencing Provisions:

- Computer Use and Underlying Offense, MCL 752.797(4).
- Internet Use and Underlying Offense, MCL 750.145d(3).
- Multiple Deaths Arising Out of Operation of Motor Vehicle, MCL 769.36

Note: There are other statutes permitting discretionary consecutive sentencing depending on the nature of the sentencing offense. The specific penal statute should always be consulted as there may be language permitting discretionary consecutive sentencing in the penal statute itself.

STATUTORY DIVERSION PROGRAMS

Some offenders are eligible to be treated under statutory diversion programs which, if successfully completed, result in dismissal of the charge or reduction of the charge from a felony to a misdemeanor. There are several statutory diversion programs in existence (e.g., domestic violence, MCL 769.4a; parental kidnapping, MCL 750.350a; drug court, MCL 600.1060), but the two most commonly used are 7411 and HYTA.

Absent a specific statutory provision permitting dismissal or reduction of a charge, the trial court does not have authority to dismiss the charge over the prosecutor's objection. See *Genesee County Prosecutor v Genesee Circuit Judge*, 391 Mich 115; 215 NW2d 145 (1974).

Controlled Substance Offenders (7411 Diversion)

Eligibilty:

Defendants charged for the first time with possession or use of Schedule 3, 4, or 5 drugs, possession of less than 25 grams of Schedule 1 or 2 drugs; or for the first or second time with possession or use of an imitation controlled substance, may be sentenced to probation without a judgment of guilt and discharged upon successful completion of probation. MCL 333.7411.

Plea/Trial:

7411 status may be imposed following a guilty plea, no contest plea or trial verdict. The defendant must consent to 7411 status. The trial judge has discretion to impose 7411 status, but the court is not required to grant the request.

Can Be Used Only Once:

Although the defendant may receive 7411 status only once and must have no prior drug convictions (except for the second conviction of possession or use of an imitiation controlled substance, as indicated above), a defendant who is simultaneously convicted of another drug offense when requesting 7411 status is not precluded from receiving 7411 status. *People v Ware,* 239 Mich App 439; 608 NW2d 94 (2000).

Probation:

As part of the 7411 status, the court must place the individual on probation.with certain terms and conditions. There is nothing in the statute that precludes jail as a condition of probation.

Discharge and Dismissal:

A defendant is permitted only one discharge and dismissal under this statute. If the defendant receives a successful discharge and dismissal, there is no adjudication of guilt, no conviction, and the offender should not suffer a disqualification or disability imposed by law upon conviction of a crime. MCL 333.7411(1). Successful discharge and dismissal does not count as a felony conviction for purposes of the concealed pistol licensing act. *Carr v Midland County Concealed Weapons Licensing Board*, 259 Mich App 428; 674 NW2d 709 (2003). Moreover, successful discharge and dismissal does not count as a prior conviction when scoring the statutory sentencing guidelines for a subsequent offense. *People v James*, 267 Mich App 675; 705 NW2d 724 (2005).

But the defendant is not entitled to destruction of the arrest and fingerprint card. *People v Benjamin,* 283 Mich App 536; 769 NW2d 748 (2009).

Holmes Youthful Trainee Act (HYTA or YTA)

Eligibility:

MCL 762.11 *et seq,* the Holmes Youthful Trainee Act (HYTA or YTA), provides an important form of alternative sentencing for defendants who commit offenses between their 17th and 21st birthdays.[1] Where the offense occurs after the defendant's 21st birthday, the defendant may not be assigned to HYTA status. See *People v Dolgorukov,* 191 Mich App 38; 477 NW2d 118 (1991). HYTA does not apply to first-degree murder or a major controlled substance offense, any offenses carrying a potential life sentence, most criminal sexual conduct offenses (although there are some exceptions for consensual conduct in statutory rape cases), and traffic offenses. It may be used in cases of misdemeanors. *People v Mahler,* 156 Mich App 779; 402 NW2d 93 (1986). The consent of the defendant and his or her legal guardian is necessary.

Must Plead Guilty:

A defendant must plead guilty to be assigned to HYTA status, but no judgment of conviction may be entered. A defendant is not eligible for YTA status following a no contest plea. *People v Harns*, 227 Mich App 573; 576 NW2d 700 (1998), *vacated in part on other grds* 459 Mich 895; 587 NW2d 504 (1998). Likewise, a defendant convicted after trial may not be placed on HYTA status. *People v Dash*, 216 Mich App 412 (1996).

May Be Used More than Once:

The trial court may grant YTA status for an individual convicted of more than one offense. *People v Giovannini,* 271 Mich App 409; 722 NW2d 237 (2006).

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[1] The statute also allows HYTA placement of individuals over the age of 14 and less than 17 years old if jurisdiction is waived to the circuit court. MCL 762.15

Probation, Jail or Prison:

If the offense carries a maximum penalty of more than one year, the court must: (a) place the individual on probation not to exceed 3 years or (b) commit the individual to the Dept. of Corrections for custodial supervision and training for a period not to exceed 3 years, or (c) commit the individual to the county jail for not more than one year. MCL 762.13. The statute does not specifically address the option of a probationary term with jail incarceration, but subsection (4) of the statute appears to allow this.

There is nothing that precludes the trial judge from modifying a condition of probation or granting an early discharge. *People v Bobek*, 217 Mich App 524; 553 NW2d 18 (1996).

If HYTA status is subsequently revoked, the defendant is entitled to credit for any time spent in jail or prison as a condition of HYTA status. MCL 762.12.

Discharge and Dismissal:

Once the defendant is placed on HYTA status, further court proceedings may be closed to the public. *People v Bobek*, 217 Mich App 524; 553 NW2d 18 (1996). While an early discharge is permitted, a discharge after 28 days because the media learned of the HYTA status of a celebrity defendant was viewed as an abuse of discretion on the part of the trial judge. *Id.*

If the assignment to HYTA is successfully completed, the charged offense is not deemed a conviction, no civil disability attaches, and proceedings are closed to public inspection. MCL 762.14. Nevertheless, a HYTA diversion may be counted as a prior conviction under the legislative sentencing guidelines when sentencing for a new offense, MCL 777.50(4)(a)(i), and HYTA diversions may be scored under the federal sentencing guidelines. *United States v Shor*, 549 F3d 1075 (2008). But for purposes of Michigan's habitual offender laws found at MCL 769.10 *et seq.*, there does not appear to be any authority for counting HYTA diversions as a prior conviction for sentence enhancement purposes.

PROBATIONARY SENTENCES

Probationary sentences are available for most crimes, although the statutory sentencing guidelines will provide guidance as to when an intermediate sanction (which may include probation with or without jail) is an appropriate sentence.

The court has discretion to amend the conditions of probation at any time, although it may not add a condition of confinement without a hearing. MCL 771.2(2); *People v*

Jackson, 168 Mich App 280; 424 NW2d 38 (1988). Conditions of probation are addressed in MCL 771.3. The revocation of probation is addressed in MCL 771.4. The termination/discharge of a probationary order is found in MCL 771.5

Eligibility for Probation:

Probation cannot be imposed for murder, treason, armed robbery, nearly all major controlled substance offenses,[2] and first and third degree criminal sexual conduct. MCL 771.1(1). It is available for all other offenses.

Length of Probation Term:

The maximum probation period for misdemeanor offenses is 2 years, and for felony offenses the maximum is 5 years, MCL 771.2(1). A 2-year offense specifically designated as a misdemeanor (commonly known as a "high court" misdemeanor) in the penal code is nevertheless considered a felony for purposes of the length of probation under the code of criminal procedure. *People v Smith*, 423 Mich 427; 378 NW2d 384 (1985).

There are two exceptions to the five-year limitation for probationary terms. The first involves conviction of aggravated stalking. By statute, the court can place an individual convicted of aggravated stalking on probation "for any term of years, but not less than 5 years." MCL 750.411i(4); MCL 771.2a(2). The second exception exists for certain sex offenses and offenses involving minors. According to MCL 771.2a(6), the court "may" place an individual on probation for "any term of years but not less than five years" for an offense contained on the sex offender registry list. The list is found at MCL 28.722 and includes all major sex offenses and a number of offenses that involve minors, but does not include conviction of fourth degree criminal sexual conduct where the offender is between the ages of 17 and 21 and is not more than five years older than the victim.

There are also two exceptions to the two-year limitation on probationary terms for misdemeanor offenses. Effective December 29, 2006, a probationary term of up to five years is permitted for misdemeanor child abuse under MCL 750.136b. See MCL 771.2a(3). Moreover, a probationary term not to exceed five years is permitted for non-aggravated stalking (which includes both misdemeanor and felony offenses) under MCL 750.411h(3). See MCL 771.2a(1).

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2. Major controlled substance offense is defined by MCL 761.2 as all violations of MCL 333.7401(2)(a), and violations of MCL 333.7403(2)(a)(i) to (iv), and conspiracy to commit those offenses. Possession of less than 25 grams of a Schedule 1 or 2 drug is *not* a major controlled substance offense.