

## **Sexual Assault Benchbook**

### **May-August 2009 Updates**

Updates have been issued for the Sexual Assault Benchbook. A summary of each update appears below. The updates have been integrated into the website version of the benchbook; consequently, some of the page numbers may have changed. Clicking on the links below will take you to the page(s) in the benchbook where the updates appear. The text added or changed in each update is underlined.

### **Chapter 5: Bond and Discovery**

#### **[5.14\(B\) Discovery in Sexual Assault Cases](#)**

A witness's informal and mutual agreement with law enforcement officials and the prosecution (that charges against the witness would be reduced in exchange for his testimony against the defendant) constituted evidence favorable to the defendant because of its impeachment value and should have been disclosed under *Brady v Maryland*, 373 US 83 (1963). *Akrawi v Booker*, 572 F3d 252, 263-264 (CA 6, 2009).

### **Chapter 6: Specialized Procedures Governing Preliminary Examinations and Trials**

#### **[6.7\(F\) Special Protections For Victims and Witnesses While Testifying](#)**

“[T]o determine whether a trial court infringes on a defendant’s right to confrontation when it allows witness testimony to be taken through two-way interactive video technology[,] [t]he trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant’s constitutional right to confrontation and that it preserves all of the other elements of the Confrontation Clause.” *People v Buie*, \_\_\_ Mich App \_\_\_, \_\_\_ (2009).

### **Chapter 7: General Evidence**

#### **[7.6 Former Testimony of Unavailable Witness](#)**

The admission of a nontestifying DNA analyst’s laboratory reports violated the defendant’s Sixth Amendment right to confrontation absent a showing that the DNA analyst was unavailable to testify and that the defendant had a prior opportunity for cross-examination.

*People v Payne*, \_\_\_ Mich App \_\_\_, \_\_\_ (2009).

“[I]n order to determine whether a sexual abuse victim’s statements to a SANE (Sexual Assault Nurse Examiner) are testimonial, the reviewing court must consider the totality of the circumstances of the victim’s statements and determine whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE’s questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency.”

*People v Spangler*, \_\_\_ Mich App \_\_\_, \_\_\_ (2009).

A gunshot victim’s responses to police questioning 30 minutes after, and six blocks away from, the shooting regarding “what had happened, who had shot him, and where the shooting had occurred[,]” constituted testimonial hearsay because “the ‘primary purpose’ of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator[,]” as opposed to “enable police assistance to meet an ‘ongoing emergency.’”

*People v Bryant*, 483 Mich 132, 143 (2009).

### **7.13 Polygraphs**

“[G]enerally, a court may neither solicit nor consider polygraph-examination results for sentencing, *People v Towns*, 69 Mich App 475, 478 (1976), and the consideration of polygraph results is generally considered error that requires resentencing, *People v Allen*, 49 Mich App 148, 151-152 (1973).” (Parallel citations omitted.) *People v Anderson*, 284 Mich App 11, 16 (2009).

## **Chapter 8: Scientific Evidence**

### **8.7 Sexual Assault Evidence Collection Kits and SANES**

A note has been added to see Section 7.6 for information regarding whether statements made by a victim to a Sexual Assault Nurse Examiner (SANE) constitute testimonial evidence for purposes of the Confrontation Clause of the Sixth Amendment.

## **Chapter 9: Post-Conviction and Sentencing Matters**

### **9.6 Post-Conviction Request for DNA Testing**

A defendant does not have a constitutional due process right to postconviction access to the State’s evidence for DNA testing. *Dist Attorney’s Office for the Third Judicial Dist et al. v Osborne*, 557 US \_\_\_, \_\_\_ (2009).

## Chapter 11: Sex Offender Identification and Profiling Systems

### 11.2(A)(2) Sex Offenders Registration Act

Aggravated assault, MCL 750.81a, constituted a listed offense under MCL 28.722(e)(xi), where the defendant assaulted the seven-year-old victim by touching her underneath her underwear on numerous occasions. *People v Anderson*, 284 Mich App 11, 14-15 (2009).

*People v Golba*, 273 Mich App 603 (2007), and *People v Althoff (On Remand)*, 280 Mich App 524 (2008), are binding. *People v Anderson*, 284 Mich App 11, 13 (2009).

### 11.4(B)(1) DNA Identification Profiling System

2008 PA 380, effective July 1, 2009, amended MCL 750.520m to require that an individual arrested for a violent felony as described in MCL 791.236 provide a DNA sample under the statute. The amendment also provides that a DNA sample taken under MCL 750.520m(1)(a) (individual arrested for a violent felony as defined in MCL 791.236) may be transmitted to the Department of State Police upon collection.



A tacit agreement between the prosecution and a witness concerning potential or actual leniency related to the witness's criminal conduct is favorable evidence subject to disclosure under *Brady v Maryland*, 373 US 83 (1963). *Bell v Bell*, 460 F3d 739, 753 (CA 6, 2006). Upon the defendant's request, disclosure of an "agreement for testimony in connection with the case" is required under MCR 6.201(B)(5).

A witness's informal and mutual agreement with law enforcement officials and the prosecution (that charges against the witness would be reduced in exchange for his testimony against the defendant) constituted evidence favorable to the defendant because of its impeachment value and should have been disclosed under *Brady v Maryland*, 373 US 83 (1963). *Akrawi v Booker*, 572 F3d 252, 263-264 (CA 6, 2009).

Discovery applies to all parties in felony cases. Under MCR 6.201(A)(1)–(6), a party must disclose to other parties, upon request, any of the following:

- ◆ The names and addresses of all lay and expert witnesses that may be called at trial, or in the alternative, a party may disclose the name of the witness and make the person available for interview by the opposing party. The witness list may be amended without leave of the court up to 28 days before trial.
- ◆ Any written or recorded statement concerning the case made by a lay witness who may be called at trial, except that a defendant is not required to disclose his or her own statement.
- ◆ The curriculum vitae of an expert witness who may be called at trial, and either a report by that expert or a written description of the substance of that expert's proposed testimony, the expert's opinion, and the information on which the expert's opinion is based.
- ◆ Any criminal record that may be used at trial to impeach a witness.
- ◆ For any witness who may be called at trial, a list or description of criminal convictions known to the defense attorney or the prosecuting attorney concerning that witness.
- ◆ A description of and an opportunity to inspect any tangible physical evidence, including any document, photograph, or other paper, that may be introduced at trial. On request, a party must provide copies of any document, photograph, or other paper. The party required to provide those copies may request a hearing on any question of the costs of reproduction. For good cause, a party may be given the opportunity to test, without destruction, any tangible physical evidence.

Without a showing of good cause, a trial court is not authorized to order discovery of an item not set forth in MCR 6.201. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 448 (2006). Because a videotape of a defendant's post-arrest Datamaster breath tests is not a subject of mandatory



If the court grants the party’s motion to use a videotaped deposition, the deposition must comply with the following requirements of MCL 600.2163a(14) and MCL 712A.17b(13):

- ◆ The direct and cross-examination of the witness must proceed in the same manner as if the witness testified at trial; and
- ◆ The court must order that the witness, during his or her testimony, not be confronted by the respondent or defendant, but the respondent or defendant must be permitted to hear the testimony of the witness and to consult with his or her attorney.

To preserve a defendant’s constitutional right under the Sixth Amendment to be present at trial and to confront witnesses face to face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child or developmentally disabled witness. *Pesquera, supra* at 309-310. In *Maryland v Craig*, 497 US 836, 855-856 (1990), the United States Supreme Court described the necessary findings:

“The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than ‘mere nervousness or excitement or some reluctance to testify’ . . . .”\* [Citations omitted.]

\*See *In re Vanidestine*, 186 Mich App 205, 209-212 (1990) (*Craig* applied to juvenile delinquency case).

The same considerations are applicable “to determine whether a trial court infringes on a defendant’s right to confrontation when it allows witness testimony to be taken through two-way interactive video technology.” *People v Buie*, Mich App \_\_\_\_\_, (2009). “The trial court must hear evidence and make case-specific findings that the procedure is necessary to further a public policy or state interest important enough to outweigh the defendant’s constitutional right to confrontation and that it preserves all of the other elements of the Confrontation Clause,” *i.e.*, oath, cross-examination, and the

opportunity for the trier of fact to observe the witness’s demeanor. *Buie, supra* at \_\_\_\_\_. In *Buie, supra* at \_\_\_\_\_, the trial court permitted a doctor and a DNA expert to testify at trial via two-way interactive video technology. The Court of Appeals remanded the case because the record was silent as to evidence or trial court findings that the video-conferencing procedure was necessary, and what important public policy or state interest was being furthered. *Id.* at \_\_\_\_\_.

In Michigan, in addition to the constitutional right to be present at trial and to confront witnesses, defendants in felony cases also have a *statutory* right to be “personally present” at trial. MCL 768.3 provides in pertinent part:

“No person indicted for a felony shall be tried unless personally present during the trial . . . .”

In *People v Krueger*, 466 Mich 50 (2002), the Michigan Supreme Court reversed defendant’s CSC-I and attempted CSC-II convictions against his five-year-old daughter, concluding that the trial court violated his statutory right to be “personally present” at trial under MCL 768.3. Pursuant to a pretrial prosecution motion under MCL 600.2163a, the trial court removed defendant (and not the complainant) from the courtroom over his objection and made him watch the complainant’s testimony via closed-circuit television. Defendant was allowed to take notes while viewing the testimony and to confer with counsel during the one recess that was called. In addition, the trial court explained to the jury that defendant would not be present in the courtroom during the testimony, and that arrangements had been made so that defendant could view the testimony from another room. On appeal, defendant claimed that these procedures violated both his statutory and constitutional rights to be present at trial. The Supreme Court, after applying principles of statutory construction, which included applying the ordinary meaning of the words “personally” and “present,” held that “[g]iven these definitions, there can be no doubt that when a defendant is physically removed from the courtroom during trial, he is not personally present as required by MCL 768.3. Under the facts of this case, the statute was violated.” *Krueger, supra* at 53-54. Importantly, the Supreme Court also stated that the right to be personally present at trial is not absolute:

“We are not suggesting that a defendant’s statutory right to be personally present under MCL 768.3 is absolute. Rather, the facts of this case do not present a situation where the statutory right can be abrogated. We recognize, also, that a defendant’s constitutional right to be present at trial is not absolute. . . . For example, a defendant can lose his Confrontation Clause right to be present in the courtroom under the Sixth Amendment where he continues disruptive behavior after being warned to refrain. . . . However, the facts that would lead to a defendant’s removal . . . are not applicable here. There is no allegation that defendant’s behavior presented an obstacle to the trial judge’s ability to conduct the trial. Thus, we do not address

prosecutorial purposes, the information satisfies *Crawford*'s definition of a "testimonial statement." The *Lonsby* Court stated:

"Because the evidence was introduced through the testimony of Woodford, who had no first-hand knowledge about Jackson's observations or analysis of the physical evidence, defendant was unable, through the crucible of cross-examination, to challenge the objectivity of Jackson and the accuracy of her observations and methodology. Moreover, because Woodford could only speculate regarding Jackson's reasoning, defendant could not question or attack Jackson's preliminary test results or the soundness of her judgment in failing to conduct additional tests. Therefore, the introduction of Jackson's hearsay statements through the testimony of Woodford falls squarely within *Crawford*'s prohibition of testimonial hearsay that is reasonably expected to be used by the prosecution at trial. Because there is no showing that Jackson was unavailable to testify and that defendant had a prior opportunity to cross-examine her, the admission of the evidence violated defendant's Confrontation Clause rights, as defined by the United States Supreme Court in *Crawford*." [Footnotes omitted.] *Lonsby, supra* at 392–393.

See also *People v Payne*, Mich App \_\_\_\_\_, \_\_\_\_\_ (2009), holding that the admission of a nontestifying DNA analyst's laboratory reports violated the defendant's Sixth Amendment right to confrontation. "[T]he nontestifying analyst who generated the reports . . . must have known that the purpose was to ultimately establish the perpetrator's identity through DNA evidence." *Payne, supra* at \_\_\_\_\_. The Court of Appeals found that because the witnesses who actually testified concerning the laboratory reports "had not personally conducted the testing, had not personally examined the evidence collected from the victims, and had not personally reached any of the scientific conclusions contained in the reports," the laboratory reports constituted inadmissible testimonial hearsay, absent a showing that the DNA analyst who authored the reports was unavailable to testify and that the defendant had a prior opportunity for cross-examination. *Id.* at \_\_\_\_\_.

Admission of an unavailable witness's statement does not violate the Confrontation Clause if the defendant caused the witness to be unavailable. In *United States v Garcia-Meza*, 403 F3d 364, 370 (CA 6, 2005), the defendant admitted killing his wife but argued that he did not possess the requisite intent to be convicted of first-degree murder. The trial court admitted as excited utterances the victim's statements made to police after a prior assault. The defendant argued that the victim's statements were inadmissible under *Crawford v Washington*, 541 US 36 (2004). The Sixth Circuit rejected this argument and stated:



affidavit of the circumstances of the assault, in this case, the police questioning first occurred in the neighbor's home, and there is no indication of a continuing danger. Rather, the victim's statement recorded by the neighbor and her oral statements to the police recounted how potentially criminal past events began and progressed. *Davis, supra* at [\_\_\_\_]. Although portions of these statements could be viewed as necessary for the police to assess the present emergency, and, thus, nontestimonial in character, we conclude that, on the record before us, these statements are generally testimonial under the standards set forth in *Davis*. 'Objectively viewed, the primary, if not indeed the sole, purpose of [this] interrogation was to investigate a possible crime—which is, of course, precisely what the officer[s] *should* have done.' [*Id.*] Accordingly, the victim's written statement and her oral statements to the police are inadmissible." *Walker, supra* at \_\_\_\_.

The Court determined that the error in admitting the testimonial statements was not harmless and remanded the case for further proceedings.

See also *People v Bauder*, 269 Mich App 174, 188–189 (2005) (citing *Walker* and *Geno*,\* the Court of Appeals held that the victim's statements to friends, co-workers, and defendant's relatives in the weeks before her death were not testimonial statements and their admission did not violate defendant's right to confrontation).

"[I]n order to determine whether a sexual abuse victim's statements to a SANE (Sexual Assault Nurse Examiner) are testimonial, the reviewing court must consider the totality of the circumstances of the victim's statements and determine whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency." *People v Spangler*, \_\_\_\_ Mich App \_\_\_\_, \_\_\_\_ (2009). The Court set out the following nonexhaustive list of factual indicia to assist in deciding whether a victim's statements are testimonial:

"1) the reason for the victim's presentation to the SANE, e.g., to be checked for injuries, to be checked for signs of abuse;

"2) the length of time between the abuse and the presentation;

"3) what, if any, preliminary questions were asked of the victim or the victim's representative, or what preliminary conversations took place, before the official interview or examination;

"4) where the interview or examination took place, e.g., a hospital emergency room, another location in the hospital, an off-site location;

\**People v Walker*, 265 Mich App 530 (2005), lv gtd 472 Mich 928 (2005), and *People v Geno*, 261 Mich App 624 (2004).

“5) the manner in which the interview or examination was conducted;

“6) whether the SANE conducted a medical examination and, if so, the extent of the examination, and whether the SANE provided or recommended any medical treatment;

“7) whether the SANE took photographs or collected any other evidence;

“8) whether the victim’s statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made;

“9) whether the SANE completed a forensic form during or after the interview or examination;

“10) whether the victim or the victim’s representative signed release or authorization forms, or was privy to any portion of the forensic form, before or during the interview or examination;

“11) whether individuals other than the victim and the SANE were involved in the interview or examination and, if so, the level of their involvement;

“12) if and when law enforcement became involved in the case, how they became involved, and the level of their involvement; and

“13) how SANEs are utilized by the particular hospital or facility where the interview or examination took place.” *Spangler*, Mich App at \_\_\_\_.

In *Spangler*, Mich App at \_\_\_\_, the Court remanded the case because the trial court erred in excluding the victim’s statements to the SANE based solely on the forensic form completed by the SANE, and in “failing to consider whether the circumstances of the [victim’s] statements, viewed objectively and in their totality, indicated that the statements were testimonial.”

The admission of an unavailable witness’ former testimonial statement does not violate the Confrontation Clause if the statement is admitted to impeach a witness. *People v McPherson*, 263 Mich App 124 (2004). In *McPherson*, the defendant was convicted of murder. A co-defendant made a statement to police that identified the defendant as the shooter. Prior to trial, the co-defendant died but his statement was admitted at trial. In applying the U.S. Supreme Court’s holding in *Crawford v Washington*, 541 US 36 (2004), the Court of Appeals found the co-defendant’s statement to police was “testimonial.” However, the Court indicated that *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. In *McPherson*, the statement of the co-defendant was admitted not for its substance, but to impeach the defendant. The Court

The Court summarized the similarities between the instant case and *Crawford*:

“Both declarants were actively separated from the defendant—officers forcibly prevented [the defendant in Amy’s assault] from participating in the interrogation. Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.” *Davis (Hammon)*, *supra* at \_\_\_ (emphasis in original).

See also *People v Bryant*, 483 Mich 132, 143 (2009) (gunshot victim’s responses to police questioning 30 minutes after, and six blocks away from, the shooting regarding “what had happened, who had shot him, and where the shooting had occurred[,]” constituted testimonial hearsay because “the ‘primary purpose’ of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator[,]” as opposed to “enable police assistance to meet an ‘ongoing emergency’”).

For purposes of MRE 804(a), “unavailability” is to be understood according to its ordinary meaning. *Meredith*, *supra* at 66. The requirement of “unavailability” was further discussed in *People v Adams*, 233 Mich App 652 (1999). In *Adams*, the defendant was charged with assault with intent to murder, felony firearm, felon in possession of a firearm, and fourth-offense habitual offender. The complainant was his former girlfriend. After the initial preliminary examination date was rescheduled, the mother of the defendant’s new girlfriend shot at the complainant. At the preliminary examination, the complainant was reluctant and fearful to testify, but did so anyway. She was subpoenaed to appear at trial. On the morning of trial, she met with the prosecutor, who described her as “very nervous about being here.” She then left without warning before the proceedings began. After an unsuccessful two-hour search, the prosecutor asked the court to either adjourn the trial or to declare her unavailable and admit into evidence her preliminary examination testimony under MRE 804(b)(1). Stating that the complainant may have simply changed her mind about pursuing the charges, the trial court dismissed the charges. The prosecutor appealed. The Court of Appeals reversed, finding that the complainant’s abrupt departure and evasion from detection made her “unavailable” under the “ordinary meaning of the word” for purposes of MRE 804(a)(2). The Court further found that the complainant’s preliminary examination testimony was admissible under MRE 804(b)(1), and that use of the former testimony would not violate the defendant’s constitutional right to confront witnesses. *Adams*, *supra* at 658-660.



standardization among scientists, it is also based on the belief that “the trier of fact will give disproportionate weight to the results and consider the evidence as conclusive proof of guilt or innocence.” *People v Ray*, 431 Mich 260, 265 (1988).

Notwithstanding this policy of exclusion, a defendant’s statements made *before, during, or after* the administration of a polygraph examination are not excludable per se as evidence under federal or state law or public policy. *Id.* at 268. However, such statements must be voluntary and not violate a defendant’s Fifth Amendment or Sixth Amendment right to counsel.

In *People v McElhaney*, 215 Mich App 269 (1996), a CSC defendant requested and was given a post-indictment polygraph examination. Before the examination, the polygrapher, a Michigan State Police Sergeant, advised defendant of his *Miranda* rights, which defendant waived by signing a written waiver. The polygrapher also told defendant that, although counsel was not allowed to be present in the examination room, defendant could stop the questioning at any time to consult with his attorney. In a post-polygraph examination, the polygrapher told defendant he did not believe that defendant was being truthful. Defendant then admitted to “accidentally” inserting his finger into the nine-year-old victim’s vagina. On appeal of his three CSC-I convictions, defendant claimed that his right to counsel under the Fifth and Sixth Amendments was violated by the post-indictment interrogation. On the Sixth Amendment issue, the Court of Appeals held that since defendant chose to initiate communications with the police, the advisement of *Miranda* rights was sufficient to effectuate a “voluntary, knowing, and intelligent waiver of defendant’s Sixth Amendment right to counsel.” *Id.* at 276-277. On the Fifth Amendment issue, the Court deferred to the credibility determination made by the trial court: that defendant did not specifically request counsel during the polygraph examination, as he said he did, and that he knowingly and voluntarily waived his *Miranda* rights before making any statements. *Id.* at 278.

### **C. Polygraph Results Must Not Be Considered at Sentencing**

“[G]enerally, a court may neither solicit nor consider polygraph-examination results for sentencing, *People v Towns*, 69 Mich App 475, 478 (1976), and the consideration of polygraph results is generally considered error that requires resentencing, *People v Allen*, 49 Mich App 148, 151-152 (1973).” (Parallel citations omitted.) *People v Anderson*, 284 Mich App 11, 16 (2009).



## Section 8.8

\*SANEs also use medscopes, or adapted dental cameras, which take digital images. Compared to colposcopes, medscopes are generally easier to use, more portable, and less expensive. See Littel, *Sexual Assault Nurse Examiner (SANE) Programs: Improving the Community Response to Sexual Assault Victims* (US DOJ: Washington D.C., April 2001), p 12-13.

– use a colposcope\* when examining for genital trauma. A colposcope is an optical instrument that magnifies and enhances visualization to allow detection of microlacerations, bruises, and other injuries that may be undetectable to the naked eye. A colposcope may be equipped with a fiber optic light source and a camera to photodocument genital injuries.

- ◆ To treat the victim for any sexually transmitted diseases, and to provide information regarding STDs and HIV.
- ◆ To provide emergency contraception to the victim.
- ◆ Offer post-exposure HIV prophylaxis when there is evidence of direct contact of the victim’s vagina, anus, or mouth with the perpetrator’s semen or blood.
- ◆ Maintain detailed chain of custody on all evidence.
- ◆ To testify in court.

**Note:** See Section 7.6 for information regarding the admissibility of statements made by a victim to a SANE under the Confrontation Clause of the Sixth Amendment.

The foregoing responsibilities were taken from Lang, *Sexual Assault Nurse Examiner Resource Guide for Michigan Communities* (Michigan Coalition Against Domestic and Sexual Violence, 1999), p 9-12. For more information on SANEs and SANE Programs, see *Id.*

## 8.8 Drug-Facilitated Sexual Assault

Along with force, coercion, fraud, disguise, position of authority, and the exploitation of a victim’s age or mental incapacity, perpetrators of sexual assault also use alcohol and drugs to incapacitate their victims and to facilitate sexual assaults. **Alcohol is still the most frequently used substance to facilitate a sexual assault.** See Michigan Sexual Assault Systems Task Force, *The Response to Sexual Assault: Removing Barriers to Services and Justice* (April 2001), p 46. However, other substances like GHB and Rohypnol are also frequently used for their more extreme pharmacological effects, such as amnesia, reduction of sexual inhibitions, impairment of judgment, and loss of consciousness, to name but a few.

### A. Common Characteristics of Drug-Facilitated Sexual Assault

In a memorandum distributed to rape crisis professionals, healthcare providers, law enforcement personnel and other interested persons, an attorney for the U.S. Department of Justice identified some common characteristics of drug-facilitated sexual assault cases:



If reimbursement cannot be obtained from the victim’s insurance or if insurance is not available, a health care provider may seek payment from the Crime Victim Services Commission (CVSC) and/or another entity. MCL 18.355a(4).

A health care provider that is reimbursed by a victim’s insurance carrier or another entity may not submit any portion of the claim reimbursable by the insurance carrier or other entity to the CVSC. MCL 18.355a(5) and (6).

## J. Sex Offenders Registration Act

Michigan’s “Sex Offenders Registration Act,” MCL 28.721 et seq., requires an individual “convicted” of a “listed offense,” or an individual required to be registered as a sex or child offender in another state or country, to register as a sex offender if the individual meets the Act’s residency requirements. For more information on the Act and its requirements, see Section 11.2. If an offender required to register under the Sex Offenders Registration Act willfully violates the Act, the parole board must revoke the offender’s parole. MCL 791.240a(2).

Effective July 20, 2006, 2006 PA 316 amended MCL 791.240a to require revocation of a sex offender’s parole under certain circumstances. If an offender required to register under the Sex Offenders Registration Act willfully violates the Act, the parole board must revoke the offender’s parole. MCL 791.240a(2).

## 9.6 Post-Conviction Request for DNA Testing

A defendant does not have a constitutional due process right to postconviction access to the State’s evidence for DNA testing. *Dist Attorney’s Office for the Third Judicial Dist et al. v Osborne*, 557 US \_\_\_\_\_, \_\_\_\_\_ (2009).

A defendant serving a prison sentence for a felony,\* if convicted of that felony at trial and *before* January 8, 2001, may petition the circuit court to order two kinds of relief: (1) DNA testing of biological material that was identified during the investigation that led to the defendant’s conviction; and, (2) a new trial based on the results of the DNA testing. MCL 770.16(1). Effective January 6, 2009, all petitions must be filed no later than January 1, 2012. *Id.*

\*A “felony” is defined as an offense expressly designated as a felony, or one where the offender is subjected to death or imprisonment for more than one year. MCL 761.1(g).

Under certain circumstances, a defendant convicted of a felony at trial *on or after* January 8, 2001, may also petition the court to order DNA testing of biological material identified during the investigation leading to his or her

\*2008 PA 410, effective January 6, 2009.



explicit references to oral sex and sexual intercourse.” *Golba*, *supra* at 611-612.

Because the defendant’s computer use conviction was based on conduct involving sex and a 16-year-old student, the *Golba* Court concluded that the defendant’s offense “by its nature constitute[d] a sexual offense against an individual who is less than 18 years of age,” and therefore, that MCL 28.722(e)’s catch-all provision, MCL 28.722(e)(xi), required the defendant to register under SORA. See also *People v Anderson*, 284 Mich App 11, 14-15 (2009) (aggravated assault, MCL 750.81a, constituted a listed offense under MCL 28.722(e)(xi), where the defendant assaulted the seven-year-old victim by touching her underneath her underwear on numerous occasions).

“[I]n determining whether the violation ‘by its nature constitutes a sexual offense against an individual who is less than 18 years of age[,]’ the court must consider the particular facts of a violation. MCL 28.722(e)(xi); *People v Althoff*, \_\_\_ Mich App \_\_\_, \_\_\_ (2008), citing *People v Golba*, 273 Mich App 603, 610-611 (2007). According to the *Althoff* Court,

“[A] sentencing court may consider all record evidence in determining if a defendant must register under [the] SORA, so long as the defendant has the opportunity to challenge relevant factual assertions and any challenged facts are substantiated by a preponderance of the evidence. The court may order the presentment of additional proofs if the evidence of record is insufficient to reach a determination. Pursuant to MRE 1101(b)(3), the rules of evidence would not apply to a hearing held to determine if a defendant must register under [the] SORA.” *Althoff*, *supra* at \_\_\_.

See *People v Anderson*, 284 Mich App 11, 13 (2009), in which the Court of Appeals held that *People v Golba*, 273 Mich App 603 (2007), and *People v Althoff (On Remand)*, 280 Mich App 524 (2008), are binding.

### 3. “Municipality”

“Municipality” means “a city, village, or township of this state.” MCL 28.722(f).

### 4. “Residence”

“Residence” means “that place at which a person habitually sleeps, keeps his or her personal effects, and has a regular place of lodging. If a person has more than 1 residence, or if a wife has a residence separate from that of the husband, that place at which the person resides the greater part of the time shall be his or her official residence for the purposes of this act. This section shall not be construed to affect existing judicial interpretation of the term residence.” MCL 28.722(g).



## C. Expungement of DNA Analyses

\*For Michigan's specific disposal requirements, see Section 11.4(G).

42 USC 14132(d)(1)(A) requires the FBI to “promptly expunge” the DNA analysis of a person included in the index on the basis of a qualifying federal offense, a qualifying District of Columbia offense, or a qualifying military offense if it receives, for each conviction of the qualifying offense, a certified copy of a final court order establishing that the conviction has been overturned. A court order is not “final” if time remains for an appeal or application for discretionary review with respect to the order. 42 USC 14132(d)(1)(C).\*

42 USC 14132(d)(2)(A) requires as a condition of access to the index that a state “promptly expunge” the DNA analysis of a person included in the index by that state if the responsible agency or official of that state receives, for each conviction of a qualifying offense, a certified copy of a final order establishing that such conviction has been overturned. A court order is not “final” if the time remains for an appeal or application for discretionary review with respect to the order. 42 USC 14132(d)(2)(B).

### 11.4 DNA Identification Profiling System

\*See Section 11.3 for more information on CODIS.

Michigan’s “DNA Identification Profiling System Act,” MCL 28.171 et seq., which took effect on June 17, 1994, is part of the national Combined DNA Index System (CODIS)\* that links together existing state DNA databases. Michigan’s Act requires the *collection* of blood, saliva, or tissue samples from selected criminal and juvenile offenders, along with the *retention* of the resultant “DNA identification profiles.” The Act works in conjunction with five other statutes, each requiring a certain class of criminal and juvenile offenders to provide DNA samples for a type of offense. The classes of offenders are as follows:

\*Including a juvenile convicted through “waiver” or “designation.”

- ◆ An individual arrested for a violent felony as defined in MCL 791.236, MCL 750.520m (penal code).
- ◆ A person found responsible for a violation or attempted violation of a specified offense, MCL 750.520m (penal code).
- ◆ A person\* convicted of any felony, attempted felony, or specified misdemeanor on or after January 1, 2002, MCL 750.520m (penal code).
- ◆ A juvenile found responsible for a specified offense on or after January 1, 2002, MCL 712A.18k(1) (juveniles).
- ◆ A person in custody
  - A person in prison on or after January 1, 2002, MCL 791.233d (prisoners under jurisdiction of DOC).



\*SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

\*SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

\*SCAO Form MC 283, available at <http://www.courts.michigan.gov/scao/courtforms/generalcriminal/mc283.pdf> (last visited July 25, 2002).

## 1. Persons Convicted On or After January 1, 2002

For a person convicted on or after January 1, 2002 of an offense listed in Section 11.4(A)(1), including a juvenile convicted through waiver, the court must order the county sheriff or investigating law enforcement agency to collect the blood, saliva, and tissue sample.\* MCL 750.520m(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). However, a sample taken under MCL 750.520m(1)(a) (individual arrested for a violent felony as defined in MCL 791.236) may be transmitted to the Department of State Police upon collection. MCL 750.520m(3). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the State Police. *Id.*

**Note:** Included within the above provisions are persons who are convicted of an offense for which a DNA sample is required, even though they happen to be in prison or supervised/committed to FIA/DCJ for another offense. Implementation of SCAO Administrative Memorandum 2001-10 Public Acts 84-91 - DNA Sampling and Assessment (July 16, 2002).

For a juvenile convicted in a designated proceeding on or after January 1, 2002 of an offense listed in Section 11.4(A)(1), the court must order only the investigating law enforcement agency to collect the blood, saliva, and tissue sample.\* MCL 712A.18k(3). The sample must be collected after conviction but before sentencing, and promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the State Police. *Id.*

## 2. Juveniles Found Responsible On or After January 1, 2002

For a juvenile found responsible on or after January 1, 2002 for an offense listed in Section 11.4(A)(2), the court must order only the investigating law enforcement agency to collect a blood, saliva, and tissue sample.\* MCL 712A.18k(3). The sample must be collected after a finding of responsibility but before disposition and promptly forwarded, along with any samples already in the agency's possession, to the State Police. MCL 28.176(4). The sample must be collected in a medically approved manner by qualified persons using supplies provided by the State Police. *Id.*

**Note:** Included within the above provisions are juveniles who are found responsible for an offense for which a DNA sample is required, even though they happen to be supervised/committed to FIA/DCJ for another offense. Implementation of SCAO Administrative Memorandum 2001-10 Public Acts 84-91 - DNA Sampling and Assessment (July 16, 2002).

