Controlled Substances Benchbook

September-December 2009 Updates

Updates have been issued for the Controlled Substances 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 4: Other Offenses in the Controlled Substances Act

4.10(B) Failure to Mark or Imprint Prescription Drug

Effective November 19, 2009, 2009 PA 150 amended MCL 333.17708(4)(b) to expand the definition of prescription drug to include a drug bearing the federal legend "Rx only."

Chapter 5: Licensee and Practitioner Violations in the Controlled Substances Act

5.5(A) Practitioner Dispensing a Prescription for a Controlled Substance From an Out-of-State Prescriber

Effective November 19, 2009, some statutory language concerning out-of-state prescribers of controlled substances was deleted from MCL 333.7405(e). 2009 PA 150. The benchbook text has been modified to reflect the changes.

Chapter 6: Controlled Substance Offenses Not Found in the Controlled Substances Act

6.4(B) Selling, Giving, or Furnishing a Prescription Drug or Controlled Substance to a Prisoner

Effective November 19, 2009, 2009 PA 150 amended MCL 333.17708(4)(b) to expand the definition of prescription drug to include a drug bearing the federal legend "Rx only."

Chapter 8: Sentencing

8.21(E) Fines, Costs, Assessments, and Restitution

The amount of court-ordered restitution may not be reduced by the amount of an unpaid civil judgment obtained by the victim against the defendant. *People v Dimoski*, ___ Mich App ___, ___ (2009).

12.6 Emergency Doctrine

The emergency aid exception to the search warrant requirement justified the warrantless entry of a defendant's home when, after responding to a complaint of a disturbance, the police saw in the driveway a vehicle with blood on the hood and its front end smashed, blood on clothes inside the vehicle, damaged fenceposts in the yard, three broken house windows, a locked back door, and a blockaded front door, where the defendant, who was inside the home screaming and throwing things, ignored the police officers' questions about whether he needed medical help for the cut on his hand and refused to respond to the officers' knock on the door. *Michigan v Fisher (Jeremy)*, ___ US ___, ___ (2009).

12.14(A) Exceptions to the Exclusionary Rule/Situations Where the Exclusionary Rule Does Not Apply

The inevitable discovery doctrine cannot be used as an exception to the warrant requirement merely because probable cause existed to obtain a search warrant even though one was not obtained before the search took place. *People v Hyde*, 285 Mich App 428, 445 (2009). Allowing the inevitable discovery doctrine to except the warrant requirement in such cases would create an exception "that engulfs the warrant requirement." *Hyde*, *supra* at 445.

Previous updates issued since the April 2009 CD was released:

May-August 2009 Updates

Chapter 8: Sentencing

8.7 Discretionary Sentence Enhancement—§7413(2)

"[MCL 333.]7413(2)'s authorization for a trial court to imprison a defendant for a 'term not more than twice the term otherwise authorized' signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the 'term otherwise authorized.'" *People v Lowe*, 484 Mich 718, 724 (2009).

Chapter 12: Search and Seizure

12.1(A) Protection Against Unreasonable Searches and Seizures

"Although a defendant's status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in [a] defendant's home . . . there is support for the proposition that status as a drug dealer plus observation of drug activity near [a] defendant's home is sufficient to establish probable cause to search the home." *United States v Berry*, 565 F3d 332, 339 (CA 6, 2009).

Chapter 13: Evidentiary Issues

13.3(A) Testimonial Evidence

The affidavits of state laboratory analysts, stating that material seized by police and connected to the defendant was a certain quantity of drugs, constituted testimonial hearsay and could not be admitted as evidence unless the analysts who authored the affidavits testify at trial or the defendant has had an opportunity to cross-examine them regarding the affidavits. *Melendez-Diaz v Massachusetts*, 557 US ___, ___ (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 inadmissible 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).

Controlled Substances Benchbook

2008–December 2009

Michigan Judicial Institute

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Controlled Substances Benchbook

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Michigan Supreme Court

- The Honorable Marilyn Kelly, Chief Justice
- The Honorable Michael F. Cavanagh, The Honorable Elizabeth A. Weaver, The Honorable Maura D. Corrigan, The Honorable Robert P. Young, Jr., The Honorable Stephen J. Markman, The Honorable Diane M. Hathaway, Justices
- Mr. Carl L. Gromek, JD, State Court Administrator/Chief of Staff

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The research contained in this benchbook is current through April 30, 2009. This benchbook is not intended to be an authoritative statement by the Justices of the Michigan Supreme Court regarding any of the substantive issues discussed.

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In this chapter...

This chapter defines the intended scope of the Controlled Substances benchbook and contains a brief description of each chapter in the benchbook. Chapter 1 also discusses the structure of the Controlled Substances Act, briefly summarizes the content of each part of the Act, and defines the term "major controlled substance offense." Finally, although specific terms are frequently defined where they appear throughout the benchbook, Chapter 1 provides a central location for all definitions relevant to the content of the Controlled Substances benchbook.

1.1 Summary of Contents

The Controlled Substances benchbook is intended to provide trial judges with the information necessary to manage a trial involving most controlled substance offenses. The benchbook focuses primarily on criminal drug offenses described in Article 7 of the Public Health Code—Michigan's Controlled Substances Act. MCL 333.7101 *et seq*.

Each chapter (described in more detail below) is designed to present the reader with the statutory law applicable to the topic or offense discussed, followed by relevant case law related to that topic or offense. To the extent possible, this format is followed throughout the benchbook. Often, the content of a particular chapter or section will cross-reference information found elsewhere in the benchbook or in other MJI publications. These cross-references are denoted with an asterisk in the primary text; the information corresponding to the asterisk appears in the margin next to the paragraph containing the asterisk.

> **Note:** When no relevant published opinions address issues discussed in this benchbook, unpublished opinions discussing those issues have been included to provide some guidance to users of this benchbook. An unpublished opinion of the Court of Appeals is not binding under the doctrine of stare decisis. MCR 7.215(C)(1).

A. Chapter Summaries

Chapters 2 through 4 discuss the majority of offenses found in the Controlled Substances Act. These offenses are categorized in Chapters 2 and 3 as manufacture and delivery offenses, and possession and use offenses, respectively. Offenses discussed in Chapter 4 are also described in the Controlled Substances Act, but those offenses do not fit within the parameters established in Chapters 2 and 3.

- **Chapter 2** focuses on manufacture and delivery offenses. The offenses discussed in Chapter 2 include all offenses prohibiting the "manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver" controlled substances. With the exception of offenses expressly applicable to licensees and practitioners, Chapter 2 also discusses offenses involving the distribution and sale of substances within the purview of the Controlled Substances Act. Offenses involving the ownership or possession of equipment used to manufacture controlled substances are also found in Chapter 2.

- **Chapter 3** focuses on possession and use offenses including possession of counterfeit prescription forms and use of controlled substance analogues and imitation controlled substances. Chapter 3 also discusses possession offenses occurring on or near school property and in public or private parks.

- **Chapter 4** discusses other offenses in the Controlled Substances Act not included among the offenses found in Chapters 2 and 3. The "miscellaneous" offenses discussed in Chapter 4 include indirect offenses, attempted offenses, and offenses involving drug paraphernalia, drug houses, and improperly marking, imprinting, advertising, or obtaining controlled substances.

Chapters 5 and 6 discuss offenses under the Controlled Substances Act involving licensees and practitioners, as well as offenses involving controlled substances that are not found in the Controlled Substances Act.

- **Chapter 5** includes offenses involving prescribing and dispensing prescription drugs, keeping records and inventories, and using a fictitious license number. The offenses discussed in Chapter 5 are limited to violations of the Controlled Substances Act by practitioners and licensees.

- **Chapter 6** discusses a variety of offenses, some of which involve typical controlled substances. Other offenses discussed in Chapter 6 involve nitrous oxide and other chemical agents or inhalants—substances not formally classified as controlled substances. Chapter 6 also discusses offenses involving the labeling and mixing of drugs, prescription violations, furnishing prisoners with controlled substances, and conspiracy.

Chapters 7 and 8 discuss the specific aspects of, or topics uniquely related to, a trial court's disposition of controlled substance offenses.

- **Chapter 7**'s content is limited to the various penalties applicable to each of the offenses discussed in the benchbook.
- **Chapter 8** is devoted to sentencing and includes a general overview of the statutory sentencing guidelines and the application of those guidelines to specific controlled substance offenses. Chapter 8 also discusses sentence enhancements for repeat and habitual offenders, sentence departures, consecutive and concurrent sentencing, delayed sentencing, deferred adjudication, and selected probation and parole provisions.

Chapters 9 through 11 discuss pretrial issues and other procedural issues common to the disposition of charged offenses involving controlled substances.

- **Chapter 9** details information concerning joinder and severance of multiple charges against a single defendant and cases involving multiple defendants.
- **Chapter 10** discusses the entrapment defense and several statutory exemptions or exceptions to prosecution under the Controlled Substances Act.
- **Chapter 11** contains a general discussion of the prohibition against double jeopardy, methods of determining whether a defendant's protection against double jeopardy has been violated, and circumstances under which double jeopardy principles are not implicated.

Chapters 12 and 13 are devoted to evidentiary issues that arise both before and during trials involving violations of the Controlled Substances Act. These chapters discuss relevant court rules, rules of evidence, statutory law, and constitutional law necessary to a court's resolution of the many evidentiary issues that commonly arise in violations involving controlled substances.

- **Chapter 12** discusses the broad topic of warrantless searches and seizures and the manner in which a court determines whether a defendant's constitutional protection against unreasonable searches and seizures has been violated. Chapter 12 also discusses investigatory stops, the proper scope of warrantless searches, exceptions to the warrant requirement, and the exclusionary rule.
- **Chapter 13** addresses evidentiary issues not included in Chapter 12's treatment of searches and seizures. These topics include expert testimony, issues involving informants and other witnesses, and the admissibility of testimonial evidence, expert testimony, confessions, and evidence of other crimes committed by a defendant.

Chapters 14 and 15 discuss an additional sentencing option for controlled substance offenders and other possible consequences of a controlled substance conviction.

- **Chapter 14** provides a comprehensive overview of drug treatment courts and their components. It discusses general admission requirements, pre-admission procedures, screening and assessment, post-admission procedures, and issues involving a defendant's successful or unsuccessful completion of drug treatment court.

- **Chapter 15**'s discussion of forfeiture includes information about due process requirements, jurisdiction, standing, and defenses. Chapter 15 also discusses administrative forfeitures, judicial forfeitures, and summary forfeitures, as well as the seizure of property subject to forfeiture and post-judgment proceedings related to forfeiture.

1.2 Scope of This Benchbook

The Controlled Substances benchbook is designed to assist trial judges in handling cases involving offenses governed by the Controlled Substances Act as well as offenses that involve controlled substances not governed by the Act. The following substances and related items are regulated by the Controlled Substances Act:

- **Controlled substances.** As defined in MCL 333.7104(2), a controlled substance is "a drug, substance, or immediate precursor" listed in any of the five schedules found in the Act. Those categories—schedules 1 through 5—are discussed in Section 1.3(B), below.

- **Imitation controlled substances.** An imitation controlled substance is not a controlled substance or a substance for which a prescription is required; an imitation controlled substance is a substance, "which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance." MCL 333.7341(1)(b).

- **Counterfeit controlled substances.** As defined in MCL 333.7104(5), a counterfeit controlled substance is a controlled substance (or its container or labeling) bearing an unauthorized "trademark, trade name or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser" other than the actual manufacturer, distributor, or dispenser of the substance.

- **Controlled substance analogues.** A controlled substance analogue is a substance whose chemical structure is substantially similar to a substance in schedule 1 or 2, and whose narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system is substantially similar to or greater than the effect had by a substance in

schedule 1 or 2. MCL 333.7104(3). Controlled substance analogues have sometimes been referred to as "designer drugs."

- **Drug paraphernalia.** Broadly defined, drug paraphernalia is any equipment, product, or material specifically designed for use in the production, distribution, or ingestion of a controlled substance. MCL 333.7451. The statute provides very specific processes for which drug paraphernalia is used, as well as detailed descriptions of items included in the definition of drug paraphernalia.

- **Prescription forms.** As defined in MCL 333.7109(5), a prescription form is a preprinted form bearing the information required by the statute and intended for use by an authorized practitioner to prescribe controlled substances or other prescription drugs.

Generally, the unauthorized manufacture, delivery, possession, use, or possession with the intent to manufacture or deliver any of the controlled substances or related items discussed above is a violation of the Controlled Substances Act. Authorized conduct involving the same substances or items does not violate the Act's provisions. The Board of Pharmacy issues licenses to authorize activity involving controlled substances and items related to controlled substances that are governed by the Controlled Substances Act. See MCL 333.7303(1) and MCL 333.7401(1). Specific licensee violations and exceptions to, or exemptions from, the licensure requirements are discussed in Chapters 5 and 10, respectively.

Additional matters regulated by the Controlled Substances Act include licensure proceedings, civil administrative actions involving licensure, and the Board of Pharmacy's substance classification procedures. A discussion of these matters is beyond the scope of this benchbook. Because the Controlled Substances Act does not apply to the regulation of alcoholic beverages or over-the-counter drugs, discussion of those topics is also beyond the scope of the benchbook. See MCL 333.7208 and MCL 333.7227. Finally, the benchbook does not address a drug dealer's civil liability under MCL 691.1601 *et seq*.

1.3 Article 7 of the Public Health Code: Michigan's Controlled Substances Act

The Controlled Substances Act has the dual purpose of regulating commerce involving legitimate controlled substances and penalizing commerce involving illegal drugs. The Act prohibits specific conduct with regard to each controlled substance regulated by the Act, and the Act provides the penalties corresponding to each violation. The Controlled Substances Act is divided into five parts:

- General Provisions (including definitions) (Part 71);
- Standards and Schedules (Part 72);

- Manufacture, Distribution, and Dispensing (Part 73);
- Offenses and Penalties (Part 74); and
- Enforcement and Administration (Part 75).

Each of the Act's five parts are discussed in the subsections below.

The controlled substances regulated by the Act are divided into five categories—Schedules 1 through 5—and the content of the five schedules is determined by the Board of Pharmacy. MCL 333.7201. The schedules divide controlled substances into five groups based on a substance's potential for harm and abuse. Substances are ranked according to their harmful potential and the schedules are numbered to reflect the dangerous potential of the substances in each schedule. The most dangerous substances are assigned to schedule 1, while the least harmful substances are assigned to schedule 5.

Penalties prescribed for controlled substance violations are derived from a combination of factors—the nature of the conduct involved, and the classification and amount of the substance involved. *People v Turmon*, 417 Mich 638, 645 (1983).

A. Part 71—Definitions and General Provisions

*See **Section 1.5**, below, for a complete list of definitions.

Part 71 of the Controlled Substances Act contains definitions for terms appearing in the Act* and guidelines for construction and application of the Act. Part 71 also provides structural information about the members and duties of the controlled substances advisory commission.

B. Part 72—Standards and Controlled Substance Schedules

Part 72 contains information regarding the administration of article 7 by the Michigan Board of Pharmacy and an explanation of the factors to be considered when determining a substance's harmful potential. The Administrative Procedures Act of 1969, MCL 24.201 *et seq*., governs the Board's rulemaking procedures. Lists of controlled substances comprising each of the five schedules are found in Part 72. Part 72 also provides information regarding substances that are excluded from the formal lists of controlled substances regulated by the Controlled Substances Act.

For purposes of the Act, a controlled substance is "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." MCL 333.7104(2). The Board of Pharmacy determines which drugs, substances, and immediate precursors are assigned to each of the schedules. As set forth in MCL 333.7202(a)–(h), the following factors are to be used by the Board of Pharmacy in determining a controlled substance's placement on one of the five schedules:

- The drug's actual or relative potential for abuse.

- If known, the scientific evidence of the drug's pharmacological effect.
- The state of current scientific knowledge about the drug.
- The historical and contemporary patterns of the drug's abuse.
- The scope, duration, and significance of the drug's abuse.
- The public health risk related to the drug.
- The drug's potential for producing psychic or physiological dependence liability.
- Whether the drug is an immediate precursor of another drug already regulated under the Act.

1. Schedule 1

As defined in MCL 333.7211, a controlled substance in schedule 1 has a high potential for abuse and either (1) has no accepted medical use in treatment in the United States, or (2) lacks accepted safety for use in treatment under medical supervision.

The pharmacological descriptions of all schedule 1 substances are listed in MCL 333.7212(1)(a)–(g). Schedule 1 drugs include marijuana, opiates and opium derivatives (e.g., heroin), hallucinogenics (e.g., LSD, peyote, mescaline, and psilocybin), synthetic equivalents of the substance found in marijuana, and MDMA (ecstasy).

> **Note:** Marijuana and its synthetic equivalents and derivatives are regulated as schedule 2 substances when they are properly dispensed as part of a therapeutic research program. MCL 333.7212(2). MCL 333.7335 and MCL 333.7336 outline the requirements for the use and administration of marijuana as part of a therapeutic research program.

Statutory language describing offenses involving schedule 1 or 2 substances sometimes limits the substances included to narcotic drugs found in schedule 1 or 2. See MCL 333.7401(2)(a). In general, opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate is classified as a narcotic drug,* whether the drug is produced by natural extraction, chemical synthesis, or a combination of extraction and synthesis. MCL 333.7107(a)–(b). Narcotic drugs in schedule 1 are listed in MCL 333.7212(1)(a) and (b).

*See **Section 1.5**(Q).

2. Schedule 2

As defined in MCL 333.7213(a)–(c), a controlled substance in schedule 2 meets all of the following requirements:

- its potential for abuse is high,

- it has currently accepted medical use in treatment in the United States or it has currently accepted medical use with severe restrictions, and
- its abuse could lead to severe psychic or physical dependence.

Controlled substances in schedule 2 are listed in their entirety in MCL 333.7214(a)–(e). Schedule 2 drugs include opium and opiate and their derivatives (e.g., codeine, morphine, methadone, hydrocodone, and oxycodone), coca leaves and derivatives (cocaine and cocaine-related substances), amphetamines, any substance containing methamphetamine, and central nervous system depressants (e.g., methaqualone and secobarbital).

As with substances in schedule 1, some statutes describing controlled substance offenses expressly limit the substances included to the narcotic drugs found in schedule 2. See MCL 333.7401(2)(a). Narcotic drugs in schedule 2 are found in MCL 333.7214(a)(*i*), (*ii*), and (b).

3. Schedule 3

As defined in MCL 333.7215(a)–(c), a controlled substance in schedule 3 meets all of the following requirements:

- it has less potential for abuse than the substances in schedules 1 and 2,
- it has currently accepted medical use in treatment in the United States, and
- its abuse could lead to moderate or low physical dependence or high psychological dependence.

Controlled substances classified in schedule 3 are listed in their entirety in MCL 333.7216(1)(a)–(h). Schedule 3 drugs include certain stimulants and depressants, and materials, compounds, mixtures, or preparations containing limited quantities of certain listed narcotic drugs. Precise amounts for the specific substances are described in MCL 333.7216(1)(g)(*i*)–(*viii*).

4. Schedule 4

As defined in MCL 333.7217(a)–(c), a controlled substance in schedule 4 meets all of the following requirements:

- relative to the substances in schedule 3, its potential for abuse is low,
- it has currently accepted medical use in treatment in the United States, and
- relative to the substances in schedule 3, its abuse could lead to limited physical dependence or psychological dependence.

Controlled substances found in schedule 4 are listed in their entirety in MCL 333.7218(1)(a)–(c). Schedule 4 drugs include anti-anxiety medications (e.g., valium) and certain substances having a stimulant effect on the central nervous system.

5. Schedule 5

As defined in MCL 333.7219(a)–(c), a controlled substance in schedule 5 meets all of the following requirements:

- relative to the substances in schedule 4, its potential for abuse is low,
- it has currently accepted medical use in treatment in the United States, and
- relative to the substances in schedule 4, it has limited physical or psychological dependence liability, or the incidence of abuse indicates that it should be dispensed by a practitioner.

Substances classified in schedule 5 are listed in their entirety in MCL 333.7220(1)(a)–(c). Schedule 5 drugs include substances containing limited quantities of a narcotic drug and at least one non-narcotic drug with medicinal value so that the combination of the narcotic and non-narcotic drug results in a substance having valuable medicinal qualities other than the qualities of the narcotic drug itself. Specific forms of ephedrine and ephedrine-related substances are also classified as schedule 5 drugs.

C. Part 73—Licensed Manufacture and Distribution of Controlled Substances

The Controlled Substances Act prohibits unauthorized conduct involving controlled substances. Part 73 details the methods by which an individual may obtain authorization to handle controlled substances and the civil or administrative sanctions possible for licensure violations. Part 73 describes specific requirements for licensure and the recordkeeping associated with licensure. Sections of Part 73 define the scope of conduct authorized under specific types of licenses and detail the factors for which license revocation or denial is appropriate. Also found in Part 73 are the circumstances in which an individual may be exempt from licensure requirements or such requirements may be waived. In addition, Part 73 describes the limited situations in which no license is required for the possession of controlled substances or prescription forms.

D. Part 74—Criminal Offenses and Penalties

*See also relevant sections in Parts III and IV in *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009).

Penalties imposed for criminal violations of the Controlled Substances Act are in addition to any civil or administrative penalty or other authorized sanction. MCL 333.7408. With the exception of the offenses found in Part 73, all criminal offenses and corresponding penalties are contained in Part 74. In many cases, the penalties prescribed for controlled substance offenses are directly related to the amount or quantity of the drugs involved. Chapters 2, 3, and 4 discuss in detail the elements of criminal offenses appearing in the Controlled Substances Act. Licensee and practitioner violations, many of which are punishable by imprisonment, are discussed in Chapter 5. Chapter 7 contains the penalties applicable to controlled substance offenses, and Chapter 8 discusses sentencing.*

E. Part 75—Provisions for Enforcement and Administration

*See **Section 12.2** for more information on warrantless arrests.

Part 75 governs the execution of administrative inspections under the Controlled Substances Act and describes the procedure for obtaining an administrative inspection warrant, the scope of administrative inspections, and the authority of agents conducting inspections. Part 75 authorizes warrantless arrests in cases where a law enforcement officer has probable cause to believe an individual has violated the Controlled Substances Act, if the violation is punishable by more than one year of imprisonment.* Part 75 also addresses the seizure, storage, and disposition of property subject to forfeiture. Chapter 15 discusses forfeiture in detail.

1.4 Major Controlled Substance Offenses

Controlled substance offenses identified in the Code of Criminal Procedure as "major controlled substance offenses" may be subject to procedural limitations not applicable to cases involving "ordinary" controlled substance offenses. In addition, major controlled substance offenses may be subject to sentencing standards different from the sentencing considerations present in "ordinary" controlled substance offenses. Sentencing issues unique to major controlled substance offenses are discussed in Chapter 8.

A. Definition

*MCL 761.2 defines major controlled substance offenses for the purposes of the Code of Criminal Procedure.

A "major controlled substance offense" is limited to convictions for the commission of one of nine crimes described in MCL 761.2(a)–(c):*

- a violation of MCL 333.7401(2)(a)(*i*)–(*iv*).
- a violation of MCL 333.7403(2)(a)(*i*)–(*iv*).
- conspiracy to commit an offense under MCL 333.7401(2)(a)(*i*)–(*iv*) or 333.7403(2)(a)(*i*)–(*iv*).

1. MCL 333.7401(2)(a) Violations

The offenses described in MCL 333.7401(2)(a) prohibit an individual from manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a controlled substance listed in the statute, a prescription form, or a counterfeit prescription form.* The violations defined as major controlled substance offenses are found within MCL 333.7401(2)(a)—designated as (*i*), (*ii*), (*iii*), and (*iv*)—and differ from each other by the quantity of the controlled substance involved in the offense.

*See **Section 2.1** for more information.

- A violation of MCL 333.7401(2)(a)(*i*) involves 1,000 grams or more of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.
- A violation of MCL 333.7401(2)(a)(*ii*) involves 450 grams or more, but less than 1,000 grams, of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.
- A violation of MCL 333.7401(2)(a)(*iii*) involves 50 grams or more, but less than 450 grams, of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.
- A violation of MCL 333.7401(2)(a)(*iv*) involves less than 50 grams of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.

2. MCL 333.7403(2)(a) Violations

The offenses described in MCL 333.7403(2)(a) prohibit an individual from knowingly or intentionally possessing a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, analogue, or prescription form was obtained directly from a valid prescription or order of a practitioner acting in the course of his or her professional practice.* The violations defined as major controlled substance offenses are found within MCL 333.7403(2)(a)—designated as (*i*), (*ii*), (*iii*), and (*iv*)—and differ from each other by the quantity of the controlled substance involved in the offense.

*See **Section 3.1** for more information.

- A violation of MCL 333.7403(2)(a)(*i*) involves 1,000 grams or more of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.
- A violation of MCL 333.7403(2)(a)(*ii*) involves 450 grams or more, but less than 1,000 grams, of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.
- A violation of MCL 333.7403(2)(a)(*iii*) involves 50 grams or more, but less than 450 grams, of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.

- A violation of MCL 333.7403(2)(a)(*iv*) involves 25 grams or more, but less than 50 grams, of a mixture containing cocaine or a narcotic drug listed in schedule 1 or 2.

B. "Lesser" Major Controlled Substance Offenses

A defendant indicted for violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*) may be found guilty of the offense charged in the indictment or an inferior degree of those offenses as long as the inferior offense is a major controlled substance offense. MCL 768.32(2). In other words, a defendant charged with violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*) may be convicted on the basis of that charge or on the lesser offenses of MCL 333.7401(2)(a)(*iii*) or (*iv*) or MCL 333.7403(2)(a)(*iii*) or (*iv*).

With reference to a charge of violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*), the applicable statutory language states:

> "[T]he jury, or judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment but may find the accused guilty of a degree of that offense inferior to that charged in the indictment only if the lesser included offense is a major controlled substance offense. A jury shall not be instructed as to other lesser included offenses involving the same controlled substance nor as to an attempt to commit either a major controlled substance offense or a lesser included offense involving the same controlled substance." MCL 768.32(2).

C. Procedural Issues Involving Major Controlled Substance Offenses

Although the Controlled Substances Act does not refer to "major controlled substance offenses" as does the Code of Criminal Procedure, the following sub-subsections address several procedural issues within the Controlled Substances Act involving the offenses defined by the Code of Criminal Procedure as major controlled substance offenses.

1. Charging Discretion

For defendants arraigned on a warrant. If a magistrate determines after a preliminary examination that there is probable cause for charging a defendant with violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*), the prosecutor shall not be permitted to reduce the charge against the defendant. MCL 333.7415(1).

2. Dismissal of Charge

For defendants arraigned on a warrant. After a defendant is arraigned on a warrant for violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*), the magistrate must not dismiss the case on the prosecutor's motion unless the dismissal is with prejudice. MCL 333.7415(1).

For defendants arraigned on an indictment or information. As with defendants arraigned on warrants, after a defendant is arraigned on an indictment or information for violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*), the magistrate must not dismiss the case on the prosecutor's motion unless the dismissal is with prejudice. MCL 333.7415(2).

3. Pleas

For defendants arraigned on an indictment or information. After a defendant is arraigned on an indictment or information for violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*), statutory law prescribes the limited options available to a defendant who wishes to enter a plea to the charge or charges. Provided that the prosecutor consents on the record, a court may accept a plea from a defendant charged with one of the above offenses as long as the following requirements are met:

- the defendant must plead guilty, guilty but mentally ill, or nolo contendere; and
- the defendant must plead to no less than one of the felonies enumerated in MCL 333.7415(2)—violating or conspiring to violate MCL 333.7401(2)(a)(*i*), (*ii*), (*iii*), or (*iv*) or MCL 333.7403(2)(a)(*i*), (*ii*), (*iii*), or (*iv*).* MCL 333.7415(2)(a)–(c).

*These are the same offenses classified as "major controlled substance offenses" in the Code of Criminal Procedure.

1.5 Definitions

A. Administer

"'Administer' means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or other means, to the body of a patient or research subject by a practitioner, or in the practitioner's presence by his or her authorized agent, or the patient or research subject at the direction and in the presence of the practitioner." MCL 333.7103(1).

B. Controlled Substance

"'Controlled substance' means a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." MCL 333.7104(2).

C. Controlled Substance Analogue

"'Controlled substance analogue' means a substance the chemical structure of which is substantially similar to that of a controlled substance in schedule 1 or 2 and that has a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2 or, with respect to a particular individual, that the individual represents or intends to have a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2. Controlled substance analogue does not include 1 or more of the following:

> "(a) A controlled substance.
>
> "(b) A substance for which there is an approved new drug application.
>
> "(c) A substance with respect to which an exemption is in effect for investigational use by a particular person under . . . the federal food, drug and cosmetic act . . . to the extent conduct with respect to the substance is pursuant to the exemption.
>
> "(d) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance." MCL 333.7104(3).

D. Counterfeit Prescription Form

"'Counterfeit prescription form' means a printed form that is the same or similar to a prescription form and that was manufactured, printed, duplicated, forged, electronically transmitted, or altered without the knowledge or permission of a prescriber." MCL 333.7104(4).

E. Counterfeit Substance

"'Counterfeit substance' means a controlled substance that, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance." MCL 333.7104(5).

F. Deleterious Drug

"'Deleterious drug' means a drug, other than a proprietary medicine, likely to be destructive to adult human life in quantities of 3.88 grams or less." MCL 333.7104(6).

G. Electronic Signature

"'Electronic signature' means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." MCL 333.7104(7).

H. Deliver/Delivery

"'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1).

I. Dispense

"'Dispense' means to deliver or issue a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, or compounding necessary to prepare the substance for the delivery or issuance." MCL 333.7105(3).

A "dispenser" is a practitioner who dispenses. MCL 333.7105(4).

J. Distribute

"'Distribute' means to deliver other than by administering or dispensing a controlled substance." MCL 333.7105(5).

A "distributor" is a person who distributes. MCL 333.7105(6).

For offenses involving imitation controlled substances, "'[d]istribute' means the actual, constructive, or attempted transfer, sale, delivery, or dispensing from one person to another of an imitation controlled substance." MCL 333.7341(1)(a).

K. Drug

"'Drug' means a substance recognized as a drug in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, or any supplement to any of them; a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals; a substance other than food intended to affect the structure or any function of the body of human beings or animals; or, a substance intended for use as a component of any article specified in this subsection. It does not include a device or its components, parts, or accessories." MCL 333.7105(7).

L. Human Consumption

"'Human consumption' means application, injection, inhalation, or ingestion by a human being." MCL 333.7105(8).

M. Imitation Controlled Substance

"'Imitation controlled substance' means a substance that is not a controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. However, this subsection does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles." MCL 333.7341(1)(b).

*See **Sections 1.5**(J) and (O), respectively.

MCL 333.7341 contains definitions for "distribute" and "manufacture" as those terms are used with regard to imitation controlled substances.* MCL 333.7341(1)(a) and (c).

N. Immediate Precursor

"'Immediate precursor' means a substance which the administrator has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture." MCL 333.7106(1).

O. Manufacture

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that it does not include:

"(a) The preparation or compounding of a controlled substance by an individual for his or her own use.

"(b) The preparation, compounding packaging, or labeling of a controlled substance:

"(*i*) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.

"(*ii*) By a practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." MCL 333.7106(2).

For offenses involving imitation controlled substances, "'[m]anufacture' means the production, preparation, compounding, conversion, encapsulating, packaging, repackaging, labeling, relabeling, or processing of an imitation controlled substance, directly or indirectly." MCL 333.7341(1)(c).

P. Marijuana*

*The terms "marijuana" and "marihuana" refer to the same substance.

"Marihuana" means all parts of the plant Canabis sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination." MCL 333.7106(3).

Q. Narcotic Drug

"'Narcotic drug' means 1 or more of the following, whether produced directly or indirectly by extraction from substances of

vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

> "(a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.
>
> "(b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subdivision (a), but not including the isoquinoline alkaloids of opium." MCL 333.7107.

R. Opiate

*Dextro-methorphan is a cough suppressant.

"'Opiate' means a substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include [dextromethorphan],* unless specifically designated as controlled under section 7212 . . . . It does include its racemic and levorotatory forms." MCL 333.7108(1).

S. Paraphernalia

"As used in sections 7453 to 7461 and section 7521, 'drug paraphernalia' means any equipment, product, material, or combination of equipment, products, or materials, which is specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance[.]" MCL 333.7451.

T. Practitioner

"'Practitioner' means:

"(a) A prescriber or pharmacist, a scientific investigator as defined by rule of the administrator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state, including an individual in charge of a dog pound or animal shelter licensed or registered by the department of agriculture . . . or a class B dealer licensed by the United States department of agriculture . . . for the limited purpose of buying, possessing, and administering a

commercially prepared, premixed solution of sodium pentobarbital to practice euthanasia on animals.

"(b) A pharmacy, hospital, or other institution or place of professional practice licensed, registered, or otherwise permitted to distribute, prescribe, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state." MCL 333.7109(3).

U. Prescriber

According to MCL 333.7109(4), "prescriber" means that term as it is defined in MCL 333.17708:

"'Prescriber' means a licensed dentist, a licensed doctor of medicine, a licensed doctor of osteopathic medicine and surgery, a licensed doctor of podiatric medicine and surgery, a licensed optometrist certified under part 174 to administer and prescribe therapeutic pharmaceutical agents, a licensed veterinarian, or another licensed health professional acting under the delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery." MCL 333.17708(2).

V. Prescription Form

"'Prescription form' means a printed form, that is authorized and intended for use by a prescribing practitioner to prescribe controlled substances or other prescription drugs and that meets the requirements of rules promulgated by the administrator, and all of the following requirements:

"(a) Bears the preprinted, stamped, typed, or manually printed name, address, and telephone number or pager number of the prescribing practitioner.

"(b) Includes the manually printed name of the patient, the address of the patient, the prescribing practitioner's signature, and the prescribing practitioner's drug enforcement administration registration number.

"(c) The quantity of the prescription drug prescribed, in both written and numerical terms.

"(d) Includes the date the prescription drug was prescribed.

"(e) Any rules promulgated by the department pursuant to section 7333a(7)." MCL 333.7109(5).

W. Production

"'Production' means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." MCL 333.7109(6).

X. Sign

"'Sign' means to affix one's signature manually to a document or to use an electronic signature." MCL 333.7109(7).

Y. Ultimate User

"'Ultimate user' means an individual who lawfully possesses a controlled substance for personal use or for the use of a member of the individual's household, or for administering to an animal owned by the individual or by a member of the individual's household." MCL 333.7109(8).

Chapter 2: Manufacture and Delivery Offenses in the Controlled Substances Act

2

2.1 Manufacture, Creation, Delivery, or Possession with Intent to Manufacture, Create, or Deliver a Controlled Substance 2-2

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In this chapter...

This chapter discusses manufacture and delivery crimes under the Controlled Substances Act. Specifically, this chapter will discuss the following statutes: MCL 333.7339, MCL 333.7340, MCL 333.7341, MCL 333.7401, MCL 333.7401a, MCL 333.7401b, MCL 333.7401c, MCL 333.7402, MCL 333.7410, and MCL 333.7410a.

Penalties for violations of these statutes are discussed in Chapter 7.

2.1 Manufacture, Creation, Delivery, or Possession with Intent to Manufacture, Create, or Deliver a Controlled Substance

A. Statute

MCL 333.7401(1) provides:

> "Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant."

B. Definitions

1. Manufacture/Create

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that it does not include:

> "(a) The preparation or compounding of a controlled substance by an individual for his or her own use.
>
> "(b) The preparation, compounding[,] packaging, or labeling of a controlled substance:
>
> > "(*i*) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.
> >
> > "(*ii*) By a practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." MCL 333.7106(2).

"Production," as that term is used in the above definition, means "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." MCL 333.7109(6).

2. Delivery

"'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1).

3. Possession

The term "possession"* has not been defined by statute. However, the Court of Appeals has held that possession "connotes dominion or the right of control over [a] drug with knowledge of its presence and character." *People v Mumford*, 60 Mich App 279, 282 (1975). Further, "[t]he term 'possession' is to be construed in its commonly understood sense . . . ." *Id*. at 282–283.

*See **Chapter 3** for a detailed discussion of the possession offenses under MCL 333.7403.

CJI2d 12.7, which defines possession for purposes of controlled substances offenses, provides as follows:

> "Possession does not necessarily mean ownership. Possession means that either:
>
> > "(1) the person has actual physical control of the [controlled substance] . . . or
> >
> > "(2) the person has the right to control the [controlled substance], even though it is in a different room or place.
>
> "Possession may be sole, where one person alone possesses the [controlled substance].
>
> "Possession may be joint, where two or more people each share possession.
>
> "It is not enough if the defendant merely knew about the [controlled substance]; the defendant possessed the [controlled substance] only if [he/she] had control of it or the right to control it, either alone or together with someone else."

4. Controlled Substance

"'Controlled substance' means a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." MCL 333.7104(2).*

*See **Section 1.3**(B) for a description of the schedules.

5. Prescription Form

"'Prescription form' means a printed form, that is authorized and intended for use by a prescribing practitioner to prescribe controlled substances or other prescription drugs and that meets the requirements of rules promulgated by the administrator, and all of the following requirements:

"(a) Bears the preprinted, stamped, typed, or manually printed name, address, and telephone number or pager number of the prescribing practitioner.

"(b) Includes the manually printed name of the patient, the address of the patient, the prescribing practitioner's signature, and the prescribing practitioner's drug enforcement administration registration number.

"(c) The quantity of the prescription drug prescribed, in both written and numerical terms.

"(d) Includes the date the prescription drug was prescribed.

"(e) Any rules promulgated by the department pursuant to [MCL 333.7333a(7)]." MCL 333.7109(5).

C. Elements of the Crimes

1. Manufacturing or Creating a Controlled Substance or a Prescription Form

The elements of the manufacturing or creating offense under MCL 333.7401(1) are as follows:

1) the defendant manufactured or created one of the following:

   - a controlled substance,
   - a prescription form, or
   - a counterfeit prescription form;

2) the defendant knew he or she was manufacturing or creating the substance or item listed above; and

3) if the substance manufactured or created was a narcotic drug classified in schedule 1 or 2, a cocaine-related substance as found in MCL 333.7214(a)(*iv*), or marijuana, the substance was in a mixture within one of the weight categories listed in MCL 333.7401(2)(a) or MCL 333.7401(2)(d).*

*The weight categories are discussed in **Chapter 7**.

See MCL 333.7401; CJI2d 12.1.

In *People v Meshell*, 265 Mich App 616, 619-621 (2005), the Court of Appeals held that sufficient evidence existed to support defendant's conviction of manufacturing methamphetamine, where police officers found everything needed for manufacturing methamphetamine inside a garage, and defendant was the only person in the garage.

The statutory definition of "manufacture," as that term is used in MCL 333.7401, "does not include . . . [t]he preparation or compounding of a controlled substance by an individual for his or her own use." MCL 333.7106(2)(a). Thus, the statutory definition creates a personal use exception or defense. The Court of Appeals has held, however, that this defense applies only to the preparation and compounding of a controlled substance already in existence; it does not apply to the production, including the growing, of a controlled substance for one's own use. *People v Pearson*, 157 Mich App 68, 72 (1987). As the *Pearson* Court explained, "the plain intent of the statutory personal use exception is to avoid imposing felony liability on individuals who, already in possession of a controlled substance, make it ready for their own use or combine it with other ingredients for use. *Id*. at 71.

In *People v Hunter*, 201 Mich App 671, 676 (1993), the Court of Appeals held that the conversion of powder cocaine into crack cocaine by heating it with water and other chemicals fit the statutory definition of "manufacture," which includes the conversion or processing of a controlled substance by chemical synthesis.

2. Delivering/Attempting to Deliver a Controlled Substance or a Prescription Form

The elements of the delivery offense under MCL 333.7401(1) are as follows:

1) the defendant delivered one of the following:
   - a controlled substance,
   - a prescription form, or
   - a counterfeit prescription form;
2) the defendant knew he or she was delivering the substance or item listed above; and
3) if the substance delivered was a narcotic drug classified in schedule 1 or 2, a cocaine-related substance as found in MCL 333.7214(a)(*iv*), or marijuana, the substance was in a mixture within one of the weight categories listed in MCL 333.7401(2)(a) or MCL 333.7401(2)(d).*

*The weight categories are discussed in **Chapter 7**.

See MCL 333.7401; CJI2d 12.2.

Because the statutory definition of "deliver" or "delivery" as used in the Controlled Substances Act includes "actual, constructive, or attempted transfer . . . of a controlled substance . . . ," a person may be prosecuted under MCL 333.7401(1) for attempted delivery as if it were the completed offense.* The elements of the attempted delivery offense under MCL 333.7401 are as follows:

*See also MCL 333.7407a, discussed in **Section 4.1**, for further discussion of attempts.

1) The defendant intended to deliver the substance or item to someone else.

2) The defendant took some action toward delivering the substance but failed to complete the delivery.

See CJI2d 12.2(7), which explains:

> "It is not enough to prove that the defendant made preparations for delivering the substance. Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it hadn't been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime the defendant is charged with attempting and not some other goal."

Delivery is a general intent crime. *People v Maleski*, 220 Mich App 518, 522 (1997). Attempted delivery, however, is a specific intent crime. *People v Joeseype Johnson*, 407 Mich 196, 239 (1979).

What constitutes delivery.

"Constructive delivery" of a controlled substance occurs "when the defendant directs another person to convey the controlled substance under the defendant's direct or indirect control to a third person or entity." *People v Plunkett*, 281 Mich App 721, 728 (2008) (even where the defendant provided transportation and money to obtain the drugs, he did not constructively deliver the drugs to a third party because the drugs were not under the defendant's control and the defendant did not direct the drug dealer to transfer the drugs to the third party).

Injection of a substance into another person constitutes delivery of a controlled substance for purposes of conviction under MCL 333.7401. *People v Schultz*, 246 Mich App 695, 708–709 (2001). The sharing of a controlled substance in a social setting also constitutes delivery. *People v Brown*, 163 Mich App 273, 296–297 (1987). Moreover, such transfer need not necessarily involve an exchange of drugs for money, or any remuneration at all. *Id*. In *Brown*, the defendant shared marijuana and cocaine in his apartment in exchange for sex with a prostitute. The Court of Appeals held that evidence of such sharing was sufficient evidence of delivery to support defendant's bindover for trial under MCL 333.7401. The Court further held that mere social sharing with no remuneration at all was likewise sufficient to constitute delivery. *Id.*

The use of cocaine by a pregnant woman 13 hours before giving birth to a child does not constitute delivery, even though the mother's use may result in the postpartum transfer of cocaine through the umbilical cord to the infant.

People v Hardy, 188 Mich App 305, 310 (1991). This is so because a pregnant woman's use of cocaine, which might result in the postpartum transfer of cocaine metabolites to her infant through the umbilical cord, is not "the type of conduct that the Legislature intended to be prosecuted" under the delivery statute. *Id*.

The definition of "deliver" or "delivery" as used in the Controlled Substances Act is broad enough to impose criminal liability on an agent who procures drugs for a principal from a third party. MCL 333.7105(1). Thus, the procuring-agent defense, formerly available to a defendant who acted merely as a procuring agent on another's behalf, is no longer a valid defense. *People v Potra*, 191 Mich App 503, 511 (1992).

Where the controlled substance at issue in a case has been ingested, a prosecution for delivery may nonetheless proceed without physical evidence of the substance. The trier of fact must be convinced beyond a reasonable doubt that the defendant delivered a controlled substance to the person who ingested it. Identification of the controlled substance in such instances may be made by expert testimony from the person who ingested it if that person is knowledgeable as to its effects. *People v Boyd*, 65 Mich App 11, 13 (1975). In *Boyd*, the complaining witness was a former addict who testified that she had used heroin or cocaine hundreds of times during the past 2-1/2 years. The witness explained the effects that heroin had on her and testified that after she purchased the substance from defendant she experienced similar effects. The *Boyd* Court found that the trial court properly permitted the witness to testify as an expert and to express her opinion that the substance she purchased from defendant was heroin. *Boyd*, *supra* at 12–13.

Delivery by a licensed physician or other practitioner. The Controlled Substances Act only imposes sanctions on unauthorized drug delivery. Certain drug deliveries are authorized under the Act or are exempt from criminal punishment. Authorized deliveries include prescription of a controlled substance by a licensed practitioner acting within the scope of his or her license. MCL 333.7401(1). Authorized deliveries do not include conduct that is not in conformity with the license. Thus, a physician's or other practitioner's prescribing or dispensing a controlled substance constitutes delivery for purposes of MCL 333.7401(1) if the physician or practitioner is not carrying out a legitimate, professionally recognized therapeutic or scientific purpose within the scope of his or her practice. *People v Alford*, 405 Mich 570, 589 (1979).

However, the Court of Appeals has held that a physician's or other practitioner's prescribing of a controlled substance without first conducting the necessary examination and procedures does not constitute delivery for purposes of MCL 333.7401(1). *People v Orzame*, 224 Mich App 551, 565–567 (1997).

Scienter as an element of delivery offenses. A trial court is not required to deliver a jury instruction that knowledge is an essential element of the crime

of delivery. However, the Michigan Supreme Court has held that it is the better practice to give such an instruction in delivery cases to guarantee that the jury understands the *mens rea* requirement. *People v Delgado*, 404 Mich 76, 86 (1978). A knowledge instruction is essential where there is a question as to whether the defendant knew the nature of the substance he or she was delivering. *Id*.

Precise knowledge of the nature of a substance is not required for conviction as long as the defendant was aware that he or she was delivering a controlled substance. *People v Zion*, 93 Mich App 576, 578 (1980). In *Zion*, the defendant was properly convicted of delivery where although he did not know what kind of controlled substance was in the balloon he was delivering, he did know that the balloon contained some kind of controlled substance. *Id*. The Court of Appeals found that this was sufficient for purposes of conviction of delivery under MCL 333.7401(1). *Id*. Similarly, precise knowledge of the amount of a substance being delivered is not required for conviction because knowledge of the amount is not an element of the crime. *People v Mass*, 464 Mich 615, 618 (2001).

3. Possessing a Controlled Substance with Intent to Manufacture, Create, or Deliver

The elements of possession with intent to manufacture, create, or deliver under MCL 333.7401(1) are as follows:

1) the defendant possessed one of the following:
   - a controlled substance,
   - a prescription form, or
   - a counterfeit prescription form;
2) the defendant intended to manufacture, create, or deliver the substance or form to someone else;
3) the defendant knew the nature of the substance or form in his or her possession; and
4) if the substance possessed was a narcotic drug classified in schedule 1 or 2, a cocaine-related substance as found in MCL 333.7214(a)(*iv*), or marijuana, the substance was in a mixture within one of the weight categories listed in MCL 333.7401(2)(a) or MCL 333.7401(2)(d).*

*The weight categories are discussed in **Chapter 7**.

See MCL 333.7401; CJI2d 12.3.

Possession with intent to manufacture, create, or deliver is a specific intent crime. *People v Crawford*, 458 Mich 376, 389 (1998).

Nature of "possession." Actual physical possession of a controlled substance is not necessary for purposes of conviction of possession with intent under MCL 333.7401(1). Rather, possession may be either actual or constructive. *People v Wolfe*, 440 Mich 508, 519–520 (1992), modified on other grounds 441 Mich 1201 (1992). Similarly, possession may be found even when the defendant is not the owner of recovered narcotics. *Id*. at 520. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. *Id*.

Constructive possession exists where the defendant has the right to exercise control over a controlled substance and knows that the substance is present. *Id.* Constructive possession may be found where a defendant has paid for drugs that are being delivered to him by a person acting as his agent. *People v Konrad*, 449 Mich 263, 273 (1995). However, "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe*, *supra* at 520. "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id*. at 521.

See *People v Catanzarite*, 211 Mich App 573, 577–578 (1995) (actual possession was found where defendant was arrested holding a bag containing cocaine, and constructive possession was found where substantial additional amounts of controlled substances and money were found in the vehicle defendant was driving at the time of his arrest); *People v Head*, 211 Mich App 205, 210 (1995) (constructive possession was found where defendant lived with several people in a house and controlled substances were found sitting in plain view in a room containing defendant's belongings); *People v Richardson*, 139 Mich App 622, 625–626 (1985) (constructive possession was found where police found cocaine, receipts, and personal papers with defendant's name on them in a drawer in an apartment to which defendant and others had access); and *People v McGhee*, 268 Mich App 600, 612 (2006) (constructive possession was found where defendant had exclusive control or dominion over property on which controlled substances were found).

But see *People v Genoa*, 188 Mich App 461, 463 (1991) (constructive possession was not found where defendant's only connection with the controlled substances in question was to help finance the purchase of the drugs by another, and defendant was to receive only a monetary return on his investment but no drugs).

To establish joint possession, something more than mere association must be shown. The prosecution must show an additional independent factor linking the defendant with the drugs. *People v Williams*, 188 Mich App 54, 57 (1991) (joint possession was found where defendant was attempting to destroy cocaine in 34 packets, and codefendant dropped a similar packet to the floor when police entered the house). See also *People v DeLeon*, 110 Mich App 320, 325 (1981), rev'd on other grounds 414 Mich 851 (1982) (joint possession was found where defendant, during a traffic stop of a vehicle in

which he was a passenger, tossed his hat onto the front seat, covering up plastic bags containing heroin).

But see *People v Simpson*, 104 Mich App 731, 733–734 (1981) (joint possession was not found where the only connections between defendant and the controlled substances in question were fingerprints on tin foil and a mirror seized from the room where the controlled substances were found and the presence of her hat in the room).

Scienter as an element of possession with intent offenses. "Possession of a controlled substance requires that the alleged possessor was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it." *People v Delongchamps*, 103 Mich App 151, 159 (1981). More specifically, "[i]t is black letter law that [it] is essential to the defendant's guilt that he knew he possessed . . . narcotics." *People v Harrington*, 396 Mich 33, 43 (1976) (citation omitted). Thus, precise knowledge of the nature of a substance is not required for conviction under MCL 333.7401(1) as long as the defendant was aware that he or she possessed a controlled substance.

Knowing possession has been inferred from the following circumstances:

- The purity and, therefore, the value of controlled substances in a defendant's possession; e.g., where the defendant had in his possession heroin worth $11,000, the Court of Appeals reasoned that a person "is not likely to possess an $11,000 asset without knowing what it is." *DeLeon, supra* at 326–327.
- Furtive gestures or attempts to hide the controlled substances. *People v Nash*, 61 Mich App 708, 716 (1975).
- Presence in very close proximity to the location of controlled substances in a vehicle and leaning toward that location. *People v Cardenas*, 21 Mich App 636, 638–639 (1970).

Where an amount of a controlled substance is visible to the naked eye, regardless of whether there is enough of the substance present to make it usable, there is a sufficient amount present from which a jury may infer knowing possession. *People v Harrington*, 396 Mich 33, 49 (1976). However, where the controlled substance present is not visible to the naked eye, the presence of the substance alone is insufficient to support an inference of knowing possession. *People v Hunten*, 115 Mich App 167, 171 (1982).

Precise knowledge of the amount of a controlled substance possessed is not required for conviction of possession with intent under MCL 333.7401. *People v Hamp*, 170 Mich App 24, 35 (1988), vacated in part on other grounds 437 Mich 865 (1990).

Establishing intent to deliver. Proof of actual delivery of controlled substances is not required to prove intent to deliver for purposes of conviction under MCL 333.7401. *Wolfe*, *supra* at 524.

Intent to deliver has been inferred from the following circumstances:

- The quantity of narcotics in a defendant's possession. *People v Ray*, 191 Mich App 706, 708 (1992).
- The manner in which drugs are packaged. *People v Gay*, 149 Mich App 468, 472 (1986) (cocaine packaged in a single packet suggests personal use); *People v Williams*, 268 Mich App 416, 422–423 (2005) (intent to deliver inferred from the fact that marijuana was divided into more parcels than the number of defendant's roommates with whom defendant purchased marijuana, and the presence of additional packaging material); *People v Kirchoff*, 74 Mich App 641, 649 (1977) (intent to deliver inferred from the fact that defendant was arrested with 39 separate plastic bags containing marijuana); *People v Potter*, 115 Mich App 125, 130 (1982) (intent to deliver inferred where defendant was arrested with 80 marijuana cigarettes, and testimony was given that marijuana is often sold by individual cigarettes).
- The presence of packaging material or paraphernalia commonly used for packaging drugs. *People v Tolbert*, 77 Mich App 162, 166 (1977); *People v Mumford*, 60 Mich App 279, 283 (1975).
- Observation of an apparent drug transfer. *People v Metzler*, 193 Mich App 541, 548 (1992).
- The absence of drug paraphernalia commonly associated with the use of drugs. *People v Delongchamps*, 103 Mich App 151, 159–160 (1981).

Intent to deliver may not be inferred from the fact that a defendant matches a drug dealer profile. *People v Hubbard*, 209 Mich App 234, 238, 241–243 (1995). But see also *People v Murray*, 234 Mich App 46, 53–56 (1999) (drug profile evidence admissible as modus operandi evidence).*

*For a more detailed discussion of the admissibility of drug profile evidence, see **Section 13.6**(D).

2.2 Manufacture, Creation, Delivery, or Possession with Intent to Deliver a Counterfeit Substance or a Controlled Substance Analogue

A. Statute

MCL 333.7402(1) provides in part:

> "Except as authorized by this article, a person shall not create, manufacture, deliver, or possess with intent to deliver a counterfeit

substance or a controlled substance analogue intended for human consumption."

B. Definitions

1. Counterfeit Substance

"'Counterfeit substance' means a controlled substance that, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance." MCL 333.7104(5).

A "counterfeit substance" must be distinguished from an "imitation controlled substance," which is a substance, such as flour or soap, that resembles but is not a controlled substance. See MCL 333.7341(1)(b) and MCL 333.7341(2).

2. Controlled Substance Analogue

"Controlled substance analogues" are drugs that produce effects similar to controlled substances but are chemically distinct enough to fall outside the categories of substances included in the schedules. They are commonly referred to as "designer drugs."

MCL 333.7104(3) states:

> "(3) 'Controlled substance analogue' means a substance the chemical structure of which is substantially similar to that of a controlled substance in schedule 1 or 2 and that has a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2 or, with respect to a particular individual, that the individual represents or intends to have a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2. Controlled substance analogue does not include 1 or more of the following:
>
> > "(a) A controlled substance.
> >
> > "(b) A substance for which there is an approved new drug application.
> >
> > "(c) A substance with respect to which an exemption is in effect for investigational use by a particular person under section 505 of the federal food, drug and cosmetic act,

> chapter 675, 52 Stat. 1052, 21 U.S.C. 355, to the extent conduct with respect to the substance is pursuant to the exemption.
>
> "(d) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance."

For definitions of the terms "manufacture," "create," "delivery," and "possession," see Section 2.1(B), above.

C. Elements of the Crimes

1. Manufacturing or Creating a Counterfeit Substance or a Controlled Substance Analogue

The elements of the manufacturing or creating offense under MCL 333.7402(1) are as follows:

1) the defendant manufactured or created one of the following:
   - a counterfeit substance, or
   - a controlled substance analogue; and
2) the defendant knew he or she was manufacturing or creating the counterfeit substance or controlled substance analogue.

See MCL 333.7402; CJI2d 12.1.

2. Delivering/Attempting to Deliver a Counterfeit Substance or a Controlled Substance Analogue

The elements of the delivery offense under MCL 333.7402(1) are as follows:

1) the defendant delivered or attempted to deliver* one of the following:
   - a counterfeit substance, or
   - a controlled substance analogue; and
2) the defendant knew he or she was delivering the counterfeit substance or controlled substance analogue.

See MCL 333.7402; CJI2d 12.2.

*For case law regarding "delivery" and the scienter element in delivery offenses, see **Section 2.1**(C)(2), above.

3. Possessing a Counterfeit Substance or a Controlled Substance Analogue with Intent to Deliver

The elements of possession with intent to deliver under MCL 333.7402(1) are as follows:

*For discussion of "possession" and scienter, see **Section 2.1**(C)(3).

*For case law regarding intent to deliver, see **Section 2.1**(C)(3).

1) the defendant possessed* one of the following:

   - a counterfeit substance, or
   - a controlled substance analogue;

2) the defendant intended to deliver* the counterfeit substance or controlled substance analogue to someone else; and

3) the defendant knew the nature of the counterfeit substance or controlled substance analogue in his or her possession.

See MCL 333.7402; CJI2d 12.3.

2.3 Manufacture, Distribution, or Possession with Intent to Distribute an Imitation Controlled Substance

A. Statute

MCL 333.7341(3) provides:

> "Except as provided in [MCL 333.7341(7)], a person shall not manufacture, distribute, or possess with intent to distribute, an imitation controlled substance."

MCL 333.7341(7) states that a person "who is authorized by the administrator or the federal food and drug administration to manufacture, distribute, prescribe, or possess an imitation controlled substance for use as a placebo for legitimate medical, therapeutic, or research purposes" is exempt from the prohibition set forth in MCL 333.7341(3).

B. Definitions

1. Manufacture

"'Manufacture' means the production, preparation, compounding, conversion, encapsulating, packaging, repackaging, labeling, relabeling, or processing of an imitation controlled substance, directly or indirectly." MCL 333.7341(1)(c).

2. Distribute

"'Distribute' means the actual, constructive, or attempted transfer, sale, delivery, or dispensing from one person to another of an imitation controlled substance." MCL 333.7341(1)(a).

3. Imitation Controlled Substance

"'Imitation controlled substance" means a substance that is not a controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. However, this subsection does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles." MCL 333.7341(1)(b).

C. Elements of the Crimes

1. Manufacturing an Imitation Controlled Substance

The elements of the offense under MCL 333.7341(3) are as follows:

1) the defendant manufactured an imitation substance; and

2) the defendant knew he or she was manufacturing the imitation controlled substance.

See MCL 333.7341(3); CJI2d 12.1.

2. Distribution of an Imitation Controlled Substance

The elements of the offense under MCL 333.7341(3) are as follows:

1) the defendant distributed or attempted to distribute;

2) an imitation controlled substance.

See MCL 333.7341(3).

Because the statutory definition of "distribute," as used in MCL 333.7341(3), includes "actual, constructive, or attempted transfer . . . of an imitation controlled substance . . . ," a person may be prosecuted under MCL 333.7341(3) for attempted distribution as if it were the completed offense.* The elements of the attempted distribution offense under MCL 333.7341(3) are as follows:

*See also MCL 333.7407a, discussed in **Section 4.1**, for further discussion of attempts.

1) the defendant intended to distribute the substance or item to someone else; and

2) the defendant took some action toward distributing the substance but failed to complete the distribution.

See CJI2d 12.2(7), which explains:

> "It is not enough to prove that the defendant made preparations for delivering the substance. Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it hadn't been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime the defendant is charged with attempting and not some other goal."

3. Possession with Intent to Distribute an Imitation Controlled Substance

The elements of the offense under MCL 333.7341(3) are as follows:

*For case law regarding "possession" and the scienter element in possession offenses, see **Section 2.1**(C)(3), above.

1) the defendant possessed* an imitation controlled substance;

2) the defendant intended to distribute the imitation controlled substance; and

3) the defendant knew the nature of the imitation controlled substance.

See MCL 333.7341(3); CJI2d 12.3.

2.4 Delivery of a Controlled Substance or GBL to Commit or Attempt to Commit Criminal Sexual Conduct

A. Statute

MCL 333.7401a(1) provides:

> "A person who, without an individual's consent, delivers a controlled substance or a substance described in section 7401b or causes a controlled substance or a substance described in section 7401b to be delivered to that individual to commit or attempt to commit a violation of . . . MCL 750.520b, 750.520c, 750.520d, 750.520e, and 750.520g, against that individual is guilty of a felony punishable by imprisonment for not more than 20 years."

The substances described in section 7401b are "gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone." MCL 333.7401b(1)(a).

Note: Gamma-butyrolactone (GBL) turns into gamma-hydroxybutyrate or gamma-hydroxybutyric acid (GHB) when it is ingested. *People v Holtschlag*, unpublished opinion per curiam of the Court of Appeals, decided March 27, 2003 (Docket No. 226715); House Legislative Analysis, HB 5556, and House Legislative Analysis, HB 5557, October 9, 2000. GHB is listed in MCL 333.7212(1)(f) as a schedule 1 controlled substance. Both GBL and GHB have the same effect on the human body and are used in the same manner. House Legislative Analysis, HB 5556 and 5557, October 9, 2000. The statute discussed in this section, MCL 333.7401a, prohibits the delivery of either substance with the intent to commit criminal sexual conduct.

B. Definition

The term "mixture" has not been defined by statute. However, the Court of Appeals has held that this term is to be construed according to its common and approved usage. *People v Barajas*, 198 Mich App 551, 555 (1993). The *Barajas* Court concluded that a "[mixture] must be reasonably homogeneous or uniform. That is, the [controlled substance] and the filler . . . must be 'mixed' together to form a 'mixture' that is reasonably uniform. A sample from anywhere in the mixture should reasonably approximate in purity a sample taken elsewhere in the mixture." *Id*. at 556.

See *Barajas*, *supra* at 556–557 (the contents of a box did not constitute a mixture where a 26-gram rock of cocaine was taped to the inside of the box containing baking soda, and where the baking soda could be poured out in its entirety with the rock of cocaine still remaining in the box); and *People v Hunter*, 201 Mich App 671, 675 (1993) (the contents of a container did not constitute a mixture where cocaine and water were in the container, and the cocaine was an insoluble solid material easily separated from the water).

For definitions of the terms "deliver" and "controlled substance," see Section 2.1(B), above.

C. Elements of the Crime

Delivery of either a controlled substance or GBL to commit or attempt to commit criminal sexual conduct. The elements of this crime are as follows:

1) the delivery or causing the delivery;*

2) without the recipient's consent;

3) of one of the following:

- a controlled substance (including GHB),
- gamma-butyrolactone (GBL), or
- any material, compound, mixture, or preparation containing GBL;

*For case law regarding "delivery" and the scienter element in delivery offenses, see **Section 2.1**(C)(2), above.

4) in order to commit or attempt to commit criminal sexual conduct.

See MCL 333.7401a; MCL 333.7401b.

A conviction or sentence under MCL 333.7401a does not prohibit a conviction or sentence for any other crime arising out of the same transaction. MCL 333.7401a(2). Thus, a defendant may be convicted of and sentenced for both criminal sexual conduct and delivery of a controlled substance with intent to commit criminal sexual conduct. On the other hand, a defendant may be convicted and sentenced under MCL 333.7401a regardless of whether he or she is convicted of criminal sexual conduct or attempted criminal sexual conduct. MCL 333.7401a(3).

2.5 Manufacture, Delivery, or Possession with Intent to Manufacture or Deliver GBL

A. Statute

According to MCL 333.7401b(1)(a), a person shall not:

> "(a) Manufacture, deliver, or possess with intent to manufacture or deliver gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone.*"

*For a discussion of the crime of possession of GBL in a school zone, see **Section 3.3**.

> **Note:** Gamma-butyrolactone (GBL) turns into gamma-hydroxybutyrate or gamma-hydroxybutyric acid (GHB) when it is ingested. *People v Holtschlag*, unpublished opinion per curiam of the Court of Appeals, decided March 27, 2003 (Docket No. 226715); House Legislative Analysis, HB 5556 and House Legislative Analysis, HB 5557, October 9, 2000. GHB is listed in MCL 333.7212(1)(f) as a schedule 1 controlled substance. The statute discussed in this section, MCL 333.7401b(1)(a), makes it a crime to manufacture, deliver, or possess with intent to manufacture or deliver GBL. The manufacture, delivery, or possession with intent to manufacture or deliver GHB is prohibited under the general statute prohibiting the manufacture, delivery, or possession with intent to deliver a controlled substance, MCL 333.7401(1), discussed in Section 2.1, above.

B. Definitions

1. Manufacture

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of gamma-butyrolactone or any

material, compound, mixture, or preparation containing gamma-butyrolactone, directly or indirectly, by extraction from substances of natural origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container." MCL 333.7401b(3)(c).

2. Deliver

"'Deliver' means the actual, constructive, or attempted transfer from 1 person to another of gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone, whether or not there is an agency relationship." MCL 333.7401b(3)(b).

For definition of the term "possession," see Section 2.1(B), above. For definition of the term "mixture," see Section 2.4(B), above.

C. Elements of the Crimes

1. Manufacturing GBL or Any Material, Compound, Mixture, or Preparation Containing GBL

The elements of the offense under MCL 333.7401b(1)(a) are as follows:

1) the defendant manufactured one of the following:

   - GBL, or
   - any material, compound, mixture, or preparation containing GBL; and

2) the defendant knew he or she was manufacturing GBL or a material, compound, mixture, or preparation containing GBL.

See MCL 333.7401b; CJI2d 12.1.

2. Delivering/Attempting to Deliver GBL or Any Material, Compound, Mixture, or Preparation Containing GBL

The elements of the offense under MCL 333.7401b(1)(a) are as follows:

1) the defendant delivered* one of the following:

   - GBL, or
   - any material, compound, mixture, or preparation containing GBL; and

2) the defendant knew he or she was delivering GBL or a material, compound, mixture, or preparation containing GBL.

*For case law regarding "delivery" and the scienter element in delivery offenses, see **Section 2.1**(C)(2), above.

See MCL 333.7401b; CJI2d 12.2.

3. Possessing GBL or Any Material, Compound, Mixture, or Preparation Containing GBL with Intent to Manufacture or Deliver

The elements of the offense under MCL 333.7401b(1)(a) are as follows:

*For discussion of "possession" and scienter, see **Section 2.1**(C)(3), above.

*For case law regarding intent to deliver, see **Section 2.1**(C)(3).

1) the defendant possessed* one of the following:

   - GBL, or
   - any material, compound, mixture, or preparation containing GBL;

2) the defendant intended to manufacture or deliver* the GBL or the material, compound, mixture, or preparation containing GBL to someone else; and

3) the defendant knew the nature of the substance in his or her possession.

See MCL 333.7401b; CJI2d 12.3.

MCL 333.7401b(1) does not prohibit manufacturing, delivering, or possessing with intent to manufacture or deliver GBL or any material, compound, mixture, or preparation containing GBL for use in a commercial application and not for human consumption. It is an affirmative defense to a prosecution under MCL 333.7401b(1)(a) that the person manufactured, delivered, or possessed with intent to manufacture or deliver GBL or any material, compound, mixture, or preparation containing GBL for use in a commercial application. MCL 333.7401b(2).

2.6 Delivery or Distribution of a Controlled Substance to a Minor

A. Statute

MCL 333.7410(1) provides:

> "Except as otherwise provided in subsections (2) and (3), an individual 18 years of age or over who violates [MCL 333.7401(2)(a)(*iv*)] by delivering or distributing a controlled substance listed in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(*iv*)] to an individual under 18 years of age who is at least 3 years the deliverer's or distributor's junior may be punished by the fine authorized by [MCL 333.7401(2)(a)(*iv*)] or by a term of imprisonment of not less than 1 year nor more than twice that authorized by [MCL 333.7401(2)(a)(*iv*)], or both. An individual 18 years of age or over

who violates [MCL 333.7401 or MCL 333.7401b] by delivering or distributing any other controlled substance listed in schedules 1 to 5 or gamma-butyrolactone to an individual under 18 years of age who is at least 3 years the distributor's junior may be punished by the fine authorized by [MCL 333.7401(2)(b), MCL 333.7401(2)(c), or MCL 333.7401(2)(d) or MCL 333.7401b], or by a term of imprisonment not more than twice that authorized by [MCL 333.7401(2)(b), MCL 333.7401(2)(c), or MCL 333.7401(2)(d) or MCL 333.7401b], or both."

B. Definitions

"'Distribute' means to deliver other than by administering or dispensing a controlled substance." MCL 333.7105(5). "Dispensing," as that term is used in the above definition, "means to deliver or issue a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, or compounding necessary to prepare the substance for the delivery or issuance." MCL 333.7105(3).

For definitions of the terms "delivery" and "controlled substance," see Section 2.1(B), above. For definition of the term "mixture," see Section 2.4(B), above.

C. Elements of the Crime

Delivery or distribution of a controlled substance to a minor. The elements of the crime are as follows:

1) the delivery* or distribution;

2) by an individual 18 years of age or older;

3) of one of the following:

   - less than 50 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*),

   - any amount of a controlled substance (including GHB) other than schedule 1 or 2 narcotic drugs or cocaine-related substances, or

   - any amount of gamma-butyrolactone (GBL);

4) to an individual under 18 years of age who is at least three years younger than the deliverer or distributor.

See MCL 333.7410(1); MCL 333.7401(2)(a)(*iv*).

*For case law regarding "delivery" and the scienter element in delivery offenses, see **Section 2.1**(C)(2), above.

2.7 Delivery or Possession with Intent to Deliver in a School Zone

A. Statute

MCL 333.7410 provides:

*MCL 333.7410(5) allows a court to depart from the mandatory minimum sentence for substantial and compelling reasons. See **Section 8.2**(C) for further discussion.

> "(2) An individual 18 years of age or over who violates [MCL 333.7401(2)(a)(*iv*)] by delivering a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(*iv*)] to another person on or within 1,000 feet of school property shall be punished, subject to subsection (5),* by a term of imprisonment of not less than 2 years or more than 3 times that authorized by [MCL 333.7401(2)(a)(*iv*)] and, in addition, may be punished by a fine of not more than 3 times that authorized by [MCL 333.7401(2)(a)(*iv*)].
>
> "(3) An individual 18 years of age or over who violates [MCL 333.7401(2)(a)(*iv*)] by possessing with intent to deliver to another person on or within 1,000 feet of school property a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in [MCL 333.7214(a)(*iv*)] shall be punished, subject to subsection (5), by a term of imprisonment of not less than 2 years or more than twice that authorized by [MCL 333.7401(2)(a)(*iv*)] and, in addition, may be punished by a fine of not more than 3 times that authorized by [MCL 333.7401(2)(a)(*iv*)]."

B. Definitions

"'[S]chool property' means a building, playing field, or property used for school purposes to impart instruction to children in grades kindergarten through 12, when provided by a public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses." MCL 333.7410(6).

In *People v McCrady*, 213 Mich App 474, 485 (1995), the Court of Appeals held that a school parking lot constitutes "school property" for purposes of conviction under MCL 333.7410(2).

For definitions of the terms "possession," "delivery," and "controlled substance," see Section 2.1(B), above. For definition of the term "mixture," see Section 2.4(B), above.

C. Elements of the Crimes

1. Delivery of a Controlled Substance in a School Zone

The elements of this crime are as follows:

1) the delivery;*

2) by an individual 18 years of age or older;

3) of less than 50 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*);

4) to another person;

5) on or within 1,000 feet of school property.

See MCL 333.7410(2); MCL 333.7401(2)(a)(*iv*).

A defendant's knowledge that he or she is on school property is not required for purposes of conviction under MCL 333.7410(2). *McCrady*, *supra* at 485.

*For case law regarding "delivery" and the scienter element in delivery offenses, see **Section 2.1**(C)(2), above.

2. Possession with Intent to Deliver a Controlled Substance in a School Zone

The elements of this crime are as follows:

1) the possession;*

2) by an individual 18 years of age or older;

3) of less than 50 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*);

4) with the intent to deliver* the substance to another person;

5) on or within 1,000 feet of school property.

See MCL 333.7410(3); MCL 333.7401(2)(a)(*iv*).

A defendant's knowledge that he or she is on school property is not required for purposes of conviction under MCL 333.7410(3). *McCrady*, *supra* at 485.

*For discussion of "possession" and the element of scienter in possession offenses, see **Section 2.1**(C)(3).

*For case law regarding intent to deliver, see **Section 2.1**(C)(3), above.

2.8 Delivery or Possession with Intent to Deliver a Controlled Substance, GBL, MDMA, or Methamphetamine to a Minor in a Park

A. Statute

MCL 333.7410a(1) provides:

> "(1) An individual 18 years of age or over who does any of the following may be punished by a term of imprisonment of not more than 2 years:
>
> > "(a) Violates section 7401(2)(a)(*iv*) or (2)(b)(*i*) or section 7401b by delivering a controlled substance or gamma-butyrolactone to a minor who is in a public park or private park or within 1,000 feet of a public park or private park.
> >
> > "(b) Violates section 7401(2)(a)(*iv*) or (2)(b)(*i*) or section 7401b by possessing with intent to deliver a controlled substance or gamma-butyrolactone to a minor who is in a public park or private park or within 1,000 feet of a public park or private park."

*Often referred to as "ecstasy."

Section 7401(2)(a)(*iv*) deals with quantities of less than 50 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*). Section 7401(2)(b)(*i*) deals with 3,4-methylenedioxymethamphetamine (MDMA),* as found in MCL 333.7212(1)(g), and any substance that contains methamphetamine, including its salts, stereoisomers, and salts of stereoisomers, as found in MCL 333.7214(c)(*ii*). Section 7401b deals with gamma-butyrolactone (GBL), or any material, compound, mixture, or preparation containing GBL.

B. Definitions

1. Public Park

"'Public park' means real property owned or maintained by this state or a political subdivision of this state that is designated by this state or by that political subdivision as a public park." MCL 333.7410a(3)(b).

2. Private Park

"'Private park' means real property owned or maintained by a private individual or entity and that is open to the general public or local residents for recreation or amusement." MCL 333.7410a(3)(a).

For definitions of the terms "possession," "delivery," and "controlled substance," see Section 2.1(B), above. For definition of the term "mixture," see Section 2.4(B), above.

C. Elements of the Crimes

Delivery of, or possession with the intent to deliver, a controlled substance, GBL, MDMA, or methamphetamine to a minor in a park. The elements of these crimes are as follows:

1) an individual 18 years of age or older;

2) delivers or possesses with the intent to deliver;*

3) one of the following:

   - less than 50 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*),
   - any amount of GBL,
   - any amount of any material, compound, mixture, or preparation containing GBL,
   - any amount of MDMA, or
   - any amount of any substance that contains methamphetamine, including its salts, stereoisomers, and salts of stereoisomers;

4) to a minor;

5) in or within 1,000 feet of a public or private park.

See MCL 333.7410a(1)(a); MCL 333.7401(2)(a)(*iv*); MCL 333.7401(2)(b)(*i*); MCL 333.7401b.

*For case law regarding "delivery" and the scienter element in delivery offenses, see **Section 2.1**(C)(2), above.

2.9 Ownership, Possession, or Use of a Vehicle, Building, Structure, Place, or Area to Manufacture a Controlled Substance, Counterfeit Substance, or Controlled Substance Analogue

A. Statute

According to MCL 333.7401c(1)(a), a person shall not:

> "(a) Own, possess, or use a vehicle, building, structure, place, or area that he or she knows or has reason to know is to be used as a location to manufacture a controlled substance in violation of

section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402."

B. Definitions

1. Manufacture

"(c) 'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Manufacture does not include any of the following:

"(*i*) The packaging or repackaging of the substance or labeling or relabeling of its container.

"(*ii*) The preparation or compounding of a controlled substance by any of the following:

"(A) A practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.

"(B) A practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." MCL 333.7401c(7)(c).

2. Vehicle

"'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks and except, only for the purpose of titling and registration under this act, a mobile home as defined in section 2 of the mobile home commission act, Act No. 96 of the Public Acts of 1987, being section 125.2302 of the Michigan Compiled Laws." MCL 333.7401c(7)(g); MCL 257.79.

For definitions of the terms "possession" and "controlled substance," see Section 2.1(B), above. For definitions of the terms "counterfeit substance" and "controlled substance analogue," see Section 2.2(B), above.

C. Elements of the Crime

Ownership, possession, or use of a vehicle, building, structure, place, or area used to manufacture a controlled substance, counterfeit substance, or controlled substance analogue. The elements of this crime are as follows:

1) the ownership, possession, or use;

2) of one of the following:

- a vehicle,
- a building,
- a structure,
- a place, or
- an area;

3) that the defendant knows or has reason to know;

4) is being used as a location to manufacture one of the following:

- a controlled substance,
- a counterfeit substance, or
- a controlled substance analogue.

See MCL 333.7401c(1)(a).

In *People v Meshell*, 265 Mich App 616, 624–625 (2005), the Court of Appeals held that sufficient evidence to support defendant's conviction of operating or maintaining a methamphetamine laboratory existed, where the police observed defendant walking out of a garage inside which methamphetamine was cooking or "off-gassing" and giving off steam or smoke visible from outside the garage as well as a strong chemical odor detectable near the garage, where the methamphetamine had not been cooking long at the time police observed defendant leaving the garage, and where defendant was the only person in the area of the garage at the time.

MCL 333.7401c does not apply to violations involving only a cocaine-related substance as found in MCL 333.7214(a)(*iv*), or marijuana, or both. MCL 333.7401c(3).

MCL 333.7401c does not prohibit a defendant from being charged with, convicted of, or punished for any other violation of law committed by him or her while violating or attempting to violate this statute. MCL 333.7401c(4).

2.10 Ownership or Possession of Chemical or Lab Equipment Used to Manufacture a Controlled Substance, Counterfeit Substance, or Controlled Substance Analogue

A. Statute

According to MCL 333.7401c(1)(b), a person shall not:

"(b) Own or possess any chemical or any laboratory equipment that he or she knows or has reason to know is to be used for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402."

B. Definitions

"'Laboratory equipment' means any equipment, device, or container used or intended to be used in the process of manufacturing a controlled substance, counterfeit substance, or controlled substance analogue." MCL 333.7401c(7)(b).

For definitions of the terms "possession" and "controlled substance," see Section 2.1(B), above. For definitions of the terms "counterfeit substance" and "controlled substance analogue," see Section 2.2(B), above. For definition of the term "manufacture," as used in MCL 333.7401c, see Section 2.9(B)(1), above.

C. Elements of the Crime

Ownership or possession of chemical or lab equipment used to manufacture a controlled substance, counterfeit substance, or controlled substance analogue. The elements of this crime are as follows:

1) the ownership or possession;

2) of one of the following:

   - chemicals, or

   - laboratory equipment;

3) that the defendant knows or has reason to know;

4) is to be used for the purpose of manufacturing one of the following:

   - a controlled substance,

   - a counterfeit substance, or

   - a controlled substance analogue.

See MCL 333.7401c(1)(b).

In *People v Meshell*, 265 Mich App 616, 626–627 (2005), the Court of Appeals held that sufficient evidence to support defendant's conviction of possession of chemical or laboratory equipment used to manufacture methamphetamine existed, where police found chemicals and laboratory equipment used to manufacture methamphetamine in a garage that police

observed defendant leaving, where methamphetamine was actively being manufactured in the garage at the time and had not been cooking long, and where defendant was the only person in the area of the garage.

This statute does not require that every chemical component necessary to manufacture a controlled substance be present in order to sustain a conviction. Rather, it requires only that the defendant own or possess a chemical or laboratory equipment that he or she knows or has reason to know is to be used to manufacture a controlled substance, a counterfeit substance, or a controlled substance analogue. *People v Vallance*, unpublished opinion per curiam of the Court of Appeals, decided October 16, 2003 (Docket No. 242163).

MCL 333.7401c does not apply to violations involving only a cocaine-related substance as found in MCL 333.7214(a)(*iv*), or marijuana, or both. MCL 333.7401c(3).

MCL 333.7401c does not prohibit a defendant from being charged with, convicted of, or punished for any other violation of law committed by him or her while violating or attempting to violate this statute. MCL 333.7401c(4).

2.11 Providing Chemical or Lab Equipment to Another Knowing the Person Intends to Use It to Manufacture a Controlled Substance, Counterfeit Substance, or Controlled Substance Analogue

A. Statute

According to MCL 333.7401c(1)(c), a person shall not:

> "(c) Provide any chemical or laboratory equipment to another person knowing or having reason to know that the other person intends to use that chemical or laboratory equipment for the purpose of manufacturing a controlled substance in violation of section 7401 or a counterfeit substance or a controlled substance analogue in violation of section 7402."

B. Definitions

For definition of the term "controlled substance," see Section 2.1(B), above. For definitions of the terms "counterfeit substance" and "controlled substance analogue," see Section 2.2(B), above. For definition of the term "manufacture," as used in MCL 333.7401c, see Section 2.9(B)(1), above. For definition of the term "laboratory equipment," see Section 2.10(B), above.

C. Elements of the Crime

Providing chemical or lab equipment to another knowing the person intends to use it to manufacture a controlled substance, counterfeit substance, or controlled substance analogue. The elements of this crime are as follows:

1) providing to another person;

2) one of the following:

   - chemicals, or
   - laboratory equipment;

3) knowing or having reason to know;

4) that the other person intends to use the item(s) provided for the purpose of manufacturing one of the following:

   - a controlled substance,
   - a counterfeit substance, or
   - a controlled substance analogue.

See MCL 333.7401c(1)(c).

MCL 333.7401c does not apply to violations involving only a cocaine-related substance as found in MCL 333.7214(a)(*iv*), or marijuana, or both. MCL 333.7401c(3).

MCL 333.7401c does not prohibit a defendant from being charged with, convicted of, or punished for any other violation of law committed by him or her while violating or attempting to violate this statute. MCL 333.7401c(4).

2.12 Distribution of Marijuana Without Remuneration

A. Statute

MCL 333.7410(7) provides:

> "A person who distributes [marijuana] without remuneration and not to further commercial distribution and who does not violate subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both, unless the distribution is in accordance with the federal law or the law of this state."

A person violates subsection (1) by "delivering or distributing [marijuana] to an individual under 18 years of age who is at least 3 years the deliverer's or distributor's junior . . . ." MCL 333.7410(1).

B. Definitions

"'[Marijuana]' means all parts of the plant Canabis sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination." MCL 333.7106(3).

For definition of the term "distribute," see Section 2.6(B), above.

C. Elements of the Crime

Distribution of marijuana without remuneration. The elements of this crime are as follows:

1) the distribution of marijuana;

2) to a person who, if younger than 18 years old, is not three or more years younger than the defendant;

3) without remuneration; and

4) in a noncommercial context.

See MCL 333.7410(1) and (7).

2.13 Sale, Distribution or Delivery of a Product Containing Ephedrine or Pseudoephedrine by Mail, Internet, Telephone, or Other Electronic Means

A. Statute

MCL 333.7340(1) provides:

> "A person shall not sell, distribute, deliver, or otherwise furnish a product that contains any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer of ephedrine or

pseudoephedrine to an individual if the sale is transacted through use of the mail, internet, telephone, or other electronic means."

B. Definitions

For definition of the term "distribute," see Section 2.6(B), above. For definition of the term "deliver," see Section 2.1(B), above. For definition of the term "mixture," see Section 2.4(B), above.

C. Elements of the Crime

Sale, distribution, or delivery of a product containing ephedrine or pseudoephedrine by mail, internet, telephone, or other electronic means. The elements of this crime are as follows:

*For case law regarding "delivery" and the scienter element in delivery offenses, see **Section 2.1**(C)(2), above.

1) the sale, distribution, or delivery;*

2) of a product that contains any compound, mixture, or preparation containing any detectable quantity of any of the following:

   - ephedrine or pseudoephedrine,
   - a salt or optical isomer of ephedrine or pseudoephedrine, or
   - a salt of an optical isomer of ephedrine or pseudoephedrine;

3) if the sale is transacted through use of one of the following:

   - the mail,
   - the internet,
   - the telephone, or
   - other electronic means.

See MCL 333.7340.

MCL 333.7340(2) provides a number of exceptions to the general rule set forth in MCL 333.7340(1). MCL 333.7340(2) provides:

> "(2) [MCL 333.7340(1)] does not apply to any of the following:
>
> > "(a) A pediatric product primarily intended for administration to children under 12 years of age according to label instructions.
> >
> > "(b) A product containing pseudoephedrine that is in a liquid form if pseudoephedrine is not the only active ingredient.

"(c) A product that the state board of pharmacy, upon application of the manufacturer or certification by the United States drug enforcement administration as inconvertible, exempts from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine.

"(d) A person who dispenses a product described in subsection (1) pursuant to a prescription.

"(e) A person who, in the course of his or her business, sells or distributes products described in subsection (1) to either of the following:

> "(*i*) A person licensed by this state to manufacture, deliver, dispense, or possess with intent to manufacture or deliver a controlled substance, prescription drug, or other drug.
>
> "(*ii*) A person who orders those products described in subsection (1) for retail sale pursuant to a license issued under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78.

"(f) A manufacturer or distributor who donates product samples to a nonprofit charitable organization that has tax-exempt status pursuant to section 501(c)(3) of the internal revenue code of 1986, a licensed practitioner, or a governmental entity."

2.14 Dispensing, Selling, or Giving to a Minor a Food Product or Dietary Supplement Containing Ephedrine

A. Statute

MCL 333.7339(1) provides in part:

> "A person shall not dispense, sell, or otherwise give a product described in [MCL 333.7220(1)(c)(*ii*)] to an individual less than 18 years of age. This section does not apply to a physician or pharmacist who prescribes, dispenses, administers, or delivers a product described in section 7220(1)(c)(*ii*) to an individual less than 18 years of age, to a parent or guardian of an individual less than 18 years of age who delivers the product to the individual, or to a person authorized by the individual's parent or legal guardian who dispenses or delivers the product to the individual."

MCL 333.7220(1)(c)(*ii*) describes the prohibited substance as follows:

> "(*ii*) A food product or a dietary supplement containing ephedrine, if the food product or dietary supplement meets all of the following criteria:
>
> > "(A) It contains, per dosage unit or serving, not more than the lesser of 25 milligrams of ephedrine alkaloids or the maximum amount of ephedrine alkaloids provided in applicable regulations adopted by the United States food and drug administration and contains no other controlled substance.
> >
> > "(B) It contains no hydrochloride or sulfate salts of ephedrine alkaloids.
> >
> > "(C) It is packaged with a prominent label securely affixed to each package that states the amount in milligrams of ephedrine in a serving or dosage unit; the amount of the food product or dietary supplement that constitutes a serving or dosage unit; that the maximum recommended dosage of ephedrine for a healthy adult human is the lesser of 100 milligrams in a 24-hour period or the maximum recommended dosage or period of use provided in applicable regulations adopted by the United States food and drug administration; and that improper use of the product may be hazardous to a person's health."

B. Definitions

For definition of the term "dispense," see Section 2.6(B), above. For definition of the term "deliver," see Section 2.1(B), above.

C. Elements of the Crime

Dispensing, selling, or giving a minor a food product or dietary supplement containing ephedrine. The elements of this crime are as follows:

1) the dispensing, selling, or giving;

2) to an individual under 18 years of age;

3) of a food product or a dietary supplement containing ephedrine, as described in MCL 333.7220(1)(c)(*ii*);*

4) by someone other than one of the following:

   - a physician,

*See **Section 2.14**(A), above.

- a pharmacist,
- a parent or guardian of the individual under 18 years of age, or
- a person authorized by the parent or legal guardian of the individual under 18 years of age.

See MCL 333.7339(1).

Chapter 3: Possession and Use Offenses in the Controlled Substances Act

3

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In this chapter...

This chapter discusses possession and use crimes under the Controlled Substances Act. Specifically, this chapter will discuss the following statutes: MCL 333.7341, MCL 333.7401b, MCL 333.7403, MCL 333.7404, MCL 333.7407, MCL 333.7410, and MCL 333.7410a.

Penalties for violations of these statutes are discussed in Chapter 7.

3.1 Possession of a Controlled Substance or Controlled Substance Analogue

A. Statute

MCL 333.7403(1) provides:

> "A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, controlled substance analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article."

B. Definitions

1. Possession

*For information regarding authorization as a defense to possession crimes, see **Section 10.1**.

MCL 333.7403 punishes only the *unauthorized* possession of a controlled substance, controlled substance analogue, or prescription form.*

The term "possession" has not been defined by statute. However, the Court of Appeals has held that possession "connotes dominion or the right of control over [a] drug with knowledge of its presence and character." *People v Mumford*, 60 Mich App 279, 282 (1975). Further, "[t]he term 'possession' is to be construed in its commonly understood sense . . . ." *Id*. at 282–283.

CJI2d 12.7 defines possession for purposes of controlled substances offenses:

> "Possession does not necessarily mean ownership. Possession means that either:
>
> > "(1) the person has actual physical control of the [controlled substance] . . . or
> >
> > "(2) the person has the right to control the [controlled substance], even though it is in a different room or place.
>
> "Possession may be sole, where one person alone possesses the [controlled substance].
>
> "Possession may be joint, where two or more people each share possession.
>
> "It is not enough if the defendant merely knew about the [controlled substance]; the defendant possessed the [controlled substance] only if [he/she] had control of it or the right to control it, either alone or together with someone else."

2. Controlled Substance

*See **Section 1.3**(B) for a description of the schedules.

"'Controlled substance' means a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." MCL 333.7104(2).*

3. Controlled Substance Analogue

"Controlled substance analogues" are drugs that produce effects similar to controlled substances but are chemically distinct enough to fall outside the categories of substances included in the schedules. They are commonly referred to as "designer drugs."

MCL 333.7104(3) states:

"(3) 'Controlled substance analogue' means a substance the chemical structure of which is substantially similar to that of a controlled substance in schedule 1 or 2 and that has a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2 or, with respect to a particular individual, that the individual represents or intends to have a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2. Controlled substance analogue does not include 1 or more of the following:

"(a) A controlled substance.

"(b) A substance for which there is an approved new drug application.

"(c) A substance with respect to which an exemption is in effect for investigational use by a particular person under section 505 of the federal food, drug and cosmetic act, chapter 675, 52 Stat. 1052, 21 U.S.C. 355, to the extent conduct with respect to the substance is pursuant to the exemption.

"(d) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance."

4. Mixture

The term "mixture" has not been defined by statute. However, the Court of Appeals has held that this term is to be construed according to its common and approved usage. *People v Barajas*, 198 Mich App 551, 555 (1993). The *Barajas* Court concluded that a "[mixture] must be reasonably homogeneous or uniform. That is, the [controlled substance] and the filler . . . must be 'mixed' together to form a 'mixture' that is reasonably uniform. A sample from anywhere in the mixture should reasonably approximate in purity a sample taken elsewhere in the mixture." *Id*. at 556.

See *Barajas*, *supra* at 556–557 (the contents of a box did not constitute a mixture where a 26-gram rock of cocaine was taped to the inside of the box containing baking soda, and where the baking soda could be poured out in its entirety with the rock of cocaine still remaining in the box); and *People v Hunter*, 201 Mich App 671, 675 (1993) (the contents of a container did not constitute a mixture where cocaine and water were in the container, and the cocaine was an insoluble solid material easily separated from the water).

5. Prescription Form

"'Prescription form' means a printed form, that is authorized and intended for use by a prescribing practitioner to prescribe controlled substances or other prescription drugs and that meets the requirements of rules promulgated by the administrator, and all of the following requirements:

> "(a) Bears the preprinted, stamped, typed, or manually printed name, address, and telephone number or pager number of the prescribing practitioner.
>
> "(b) Includes the manually printed name of the patient, the address of the patient, the prescribing practitioner's signature, and the prescribing practitioner's drug enforcement administration registration number.
>
> "(c) The quantity of the prescription drug prescribed, in both written and numerical terms.
>
> "(d) Includes the date the prescription drug was prescribed.
>
> "(e) Any rules promulgated by the department pursuant to section 7333a(7)." MCL 333.7109(5).

C. Elements of the Crime

The elements of the possession offense under MCL 333.7403(1) are as follows:

1) the defendant possessed one of the following:
   - a controlled substance,
   - a controlled substance analogue, or
   - a prescription form;
2) the defendant knew that he or she possessed one of the foregoing substances or items; and
3) if the substance possessed was a narcotic drug classified in schedule 1 or 2 or a cocaine-related substance as found in MCL 333.7214(a)(*iv*), the substance was in a mixture within one of the weight categories listed in MCL 333.7403(2)(a).*

*The weight categories are discussed in **Chapter 7**.

See MCL 333.7403(1); CJI2d 12.5.

No constitutional right of privacy exists that encompasses the right to possess and use marijuana. *People v Williams*, 135 Mich App 537, 538 (1984). Therefore, MCL 333.7403 does not violate a defendant's constitutional right to privacy.

Nature of "possession." Actual physical possession of a controlled substance is not necessary; rather, possession may be either actual or constructive. *People v Wolfe*, 440 Mich 508, 519–520 (1992), modified on other grounds 441 Mich 1201 (1992). Similarly, possession may be found even when the defendant is not the owner of recovered narcotics. *Id*. at 520. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance. *Id*.

Constructive possession exists where the defendant has the right to exercise control over a controlled substance and knows that the substance is present. *Id*. Constructive possession may be found where a defendant has paid for drugs that are being delivered to him by a person acting as his agent. *People v Konrad*, 449 Mich 263, 273 (1995). However, "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe*, *supra* at 520. "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id*. at 521.

See *People v Catanzarite*, 211 Mich App 573, 577–578 (1995) (actual possession was found where defendant was arrested holding a bag containing cocaine, and constructive possession was found where substantial additional amounts of controlled substances and money were found in the vehicle defendant was driving at the time of his arrest); *People v Head*, 211 Mich App 205, 210 (1995) (constructive possession was found where defendant lived with several people in a house, and controlled substances were found sitting in plain view in a room containing defendant's belongings); *People v Richardson*, 139 Mich App 622, 625–626 (1985) (constructive possession was found where police found cocaine, receipts, and personal papers with defendant's name on them in a drawer in an apartment to which defendant and others had access); and *People v McGhee*, 268 Mich App 600, 612 (2006) (constructive possession was found where defendant had exclusive control or dominion over property on which controlled substances were found).

But see *People v Genoa*, 188 Mich App 461, 463 (1991) (constructive possession was not found where defendant's only connection with the controlled substances in question was to help finance the purchase of the drugs by another person, and defendant was to receive only a monetary return on his investment but no drugs).

To establish joint possession, something more than mere association must be shown. The prosecution must show an additional independent factor linking the defendant with the drugs. *People v Williams*, 188 Mich App 54, 57 (1991) (joint possession was found where defendant was attempting to destroy 34 packets of cocaine, and codefendant dropped a similar packet to the floor when police entered the house). See also *People v DeLeon*, 110 Mich App 320, 325 (1981), rev'd on other grounds 414 Mich 851 (1982) (joint possession was found where defendant, during a traffic stop of a vehicle in

which he was a passenger, tossed his hat onto the front seat, covering up plastic bags containing heroin).

But see *People v Simpson*, 104 Mich App 731, 733–734 (1981) (joint possession was not found where the only connections between defendant and the controlled substances in question were fingerprints on tin foil and a mirror seized from the room where the controlled substances were found and the presence of her hat in the room).

Scienter as an element of possession offenses. "Possession of a controlled substance requires that the alleged possessor was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it." *People v Delongchamps*, 103 Mich App 151, 159 (1981). More specifically, "[i]t is black letter law that [it] is essential to the defendant's guilt that he knew he possessed . . . narcotics." *People v Harrington*, 396 Mich 33, 43 (1976). Thus, precise knowledge of the nature of a substance is not required for conviction of possession with intent to deliver under MCL 333.7401(1) as long as the defendant is aware that he or she possesses a controlled substance.

Knowing possession has been inferred from the following circumstances:

- The purity, and therefore, the value of controlled substances in a defendant's possession; e.g., where the defendant had in his possession heroin worth $11,000, the Court of Appeals reasoned that a person "is not likely to possess an $11,000 asset without knowing what it is." *DeLeon, supra* at 326–327.
- Furtive gestures or attempts to hide the controlled substances. *People v Nash*, 61 Mich App 708, 716 (1975).
- Presence in very close proximity to the location of controlled substances in a vehicle and leaning toward that location. *People v Cardenas*, 21 Mich App 636, 638–639 (1970).

A jury may infer knowing possession where a controlled substance is visible to the naked eye, regardless of whether there is enough of the substance present to make it usable. *People v Harrington*, 396 Mich 33, 49 (1976). However, where the controlled substance present is not visible to the naked eye, the presence of the substance alone is insufficient to support an inference of knowing possession. *People v Hunten*, 115 Mich App 167, 171 (1982).

Precise knowledge of the amount of a controlled substance possessed is not required for conviction under MCL 333.7403(1). *People v Hamp*, 170 Mich App 24, 35 (1988), vacated in part on other grounds 437 Mich 865 (1990).

Where the controlled substance at issue in a case has been ingested, a prosecution for possession may nonetheless proceed without physical evidence. Identification of the controlled substance in such instances may be made by expert testimony from a person who ingested it if that person is

knowledgeable as to its effects. *People v Belleville*, 56 Mich App 275, 277 (1974). In *Belleville*, *supra* at 276–277, where the prosecution's main witness testified that he was "quite familiar with marijuana" and had smoked some with the defendants, the Court of Appeals found that such testimony was sufficient to support a conviction of possession of marijuana.

3.2 Possession of GBL

A. Statute

According to MCL 333.7401b(1)(b), a person shall not:

> "(b) Knowingly or intentionally possess gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone."

> **Note:** Gamma-butyrolactone (GBL) turns into gamma-hydroxybutyrate or gamma-hydroxybutyric acid (GHB) when it is ingested. *People v Holtschlag*, unpublished opinion per curiam of the Court of Appeals, decided March 27, 2003 (Docket No. 226715); House Legislative Analysis, HB 5556 and 5557, October 9, 2000. GHB is listed in MCL 333.7212(1)(f) as a schedule 1 controlled substance. Both GBL and GHB have the same effect on the human body and are used in the same manner. House Legislative Analysis, HB 5556 and 5557, October 9, 2000. The statute discussed in this section, MCL 333.7401b(1)(b), makes it a criminal activity to possess GBL. Possession of GHB is prohibited under the general statute prohibiting possession of a controlled substance, MCL 333.7403(1), discussed in Section 3.1, above.

B. Definitions

For definitions of the terms "possession" and "mixture," see Section 3.1(B), above.

C. Elements of the Crime

Possession of GBL. The elements of this crime are as follows:

1) the defendant possessed* GBL, or any material, compound, mixture, or preparation containing GBL, and

2) the defendant knew that he or she possessed GBL or a material, compound, mixture, or preparation containing GBL.

*For discussion of "possession" and scienter in possession offenses, see **Section 3.1**(C), above.

See MCL 333.7401b; CJI2d 12.5.

MCL 333.7401b(1) does not prohibit the possession of GBL, or any material, compound, mixture, or preparation containing GBL, for use in a commercial application and not for human consumption. It is an affirmative defense to a prosecution under MCL 333.7401b(1)(b) that the person possessed GBL, or any material, compound, mixture, or preparation containing GBL, for use in a commercial application. MCL 333.7401b(2).

3.3 Possession of GBL or a Controlled Substance on School Property

A. Statute

MCL 333.7410(4) provides:

> "An individual 18 years of age or over who violates section 7401b or 7403(2)(a)(*v*), (b), (c), or (d) by possessing gamma-butyrolactone or a controlled substance on or within 1,000 feet of school property shall be punished by a term of imprisonment or a fine, or both, of not more than twice that authorized by section 7401b or 7403(2)(a)(*v*), (b), (c), or (d)."

The subject matter of the specific statutory sections mentioned in MCL 333.7410(4), above, are as follows:

- Section 7401b deals with gamma-butyrolactone (GBL), or any material, compound, mixture, or preparation containing GBL.
- Section 7403(2)(a)(*v*) deals with quantities of less than 25 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*).
- Section 7403(2)(b) deals with 3,4-methylenedioxy-methamphetamine (MDMA, often referred to as "ecstasy"), as found in MCL 333.7212(1)(g), any substance that contains methamphetamine, including its salts, stereoisomers, and salts of stereoisomers, as found in MCL 333.7214(c)(*ii*), any controlled substance classified in schedule 1, 2, 3, or 4 for which a penalty is not elsewhere prescribed in section 7403 (including GHB), and controlled substance analogues.
- Section 7403(2)(c), deals with LSD, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, and controlled substances classified in schedule 5.
- Section 7403(2)(d) deals with marijuana.

Note: Gamma-butyrolactone (GBL) turns into gamma-hydroxybutyrate or gamma-hydroxybutyric acid (GHB) when it is ingested. *People v Holtschlag*, unpublished opinion per curiam of the Court of Appeals, decided March 27, 2003 (Docket No. 226715); House Legislative Analysis, HB 5556 and 5557, October 9, 2000. GHB is listed in MCL 333.7212(1)(f) as a schedule 1 controlled substance. Both GBL and GHB have the same effect on the human body and are used in the same manner. House Legislative Analysis, HB 5556 and 5557, October 9, 2000. The statute discussed in this section, MCL 333.7410(4), prohibits the possession of either substance by a person at least 18 years of age on school property.

B. Definitions

"'[S]chool property' means a building, playing field, or property used for school purposes to impart instruction to children in grades kindergarten through 12, when provided by a public, private, denominational, or parochial school, except those buildings used primarily for adult education or college extension courses." MCL 333.7410(6).

In *People v McCrady*, 213 Mich App 474, 485 (1995), the Court of Appeals held that a school parking lot constitutes "school property" for purposes of conviction under MCL 333.7410(4).

For definitions of the terms "possession," "controlled substance," "controlled substance analogue," and "mixture," see Section 3.1(B), above.

C. Elements of the Crime

Possession of GBL or a controlled substance on school property. The elements of this crime are as follows:

1) the defendant is 18 years of age or older and possessed* one of the following:

   - any amount of GBL,
   - any amount of any material, compound, mixture, or preparation containing GBL,
   - less than 25 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*),
   - any amount of any controlled substance classified in schedule 1, 2, 3, or 4, except those for which a penalty is prescribed in MCL 333.7403(2)(a), (b)(*i*), (c), or (d) (including GHB),
   - any amount of a controlled substance analogue,

*For case law regarding "possession" and the element of scienter in possession offenses, see **Section 3.1**(C), above.

- any amount of LSD,
- any amount of peyote,
- any amount of mescaline,
- any amount of dimethyltryptamine,
- any amount of psilocyn,
- any amount of psilocybin,
- any amount of any controlled substance classified in schedule 5, or
- any amount of marijuana,

2) on or within 1,000 feet of school property.

See MCL 333.7410(4); MCL 333.7401b; MCL 333.7403(2)(a)(*v*), (b), (c), and (d).

A defendant's actual knowledge that he or she is on or within 1,000 feet of school property is not required for purposes of conviction under MCL 333.7410(4). *McCrady, supra* at 485.

3.4 Possession of a Controlled Substance, GBL, MDMA, or Methamphetamine in a Park

A. Statute

MCL 333.7410a(1)(c) provides:

> "(1) An individual 18 years of age or over who does any of the following may be punished by a term of imprisonment of not more than 2 years:
>
> ***
>
> > "(c) Violates section 7403(2)(a)(*v*), (b), (c), or (d) or section 7401b by possessing a controlled substance or gamma-butyrolactone in a public park or private park."

The subject matter of the statutory sections referred to in MCL 333.7410a(1)(c), above, are as follows:

- Section 7403(2)(a)(*v*) deals with quantities of less than 25 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*).

- Section 7403(2)(b) deals with 3,4-methylenedioxy-methamphetamine (MDMA, often referred to as "ecstasy"), as found in MCL 333.7212(1)(g), any substance that contains methamphetamine, including its salts, stereoisomers, and salts of stereoisomers, as found in MCL 333.7214(c)(*ii*), any controlled substance classified in schedule 1, 2, 3, or 4 for which a penalty is not elsewhere prescribed in section 7403 (including GHB), and controlled substance analogues.

- Section 7403(2)(c) deals with LSD, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, and controlled substances classified in schedule 5.

- Section 7403(2)(d) deals with marijuana.

- Section 7401b deals with gamma-butyrolactone (GBL) or any material, compound, mixture, or preparation containing GBL.

Note: Gamma-butyrolactone (GBL) turns into gamma-hydroxybutyrate or gamma-hydroxybutyric acid (GHB) when it is ingested. *People v Holtschlag*, unpublished opinion per curiam of the Court of Appeals, decided March 27, 2003 (Docket No. 226715); House Legislative Analysis, HB 5556 and 5557, October 9, 2000. GHB is listed in MCL 333.7212(1)(f) as a schedule 1 controlled substance. Both GBL and GHB have the same effect on the human body and are used in the same manner. House Legislative Analysis, HB 5556 and 5557, October 9, 2000. The statute discussed in this section, MCL 333.7410a(1)(c), prohibits the possession of either substance by a person at least 18 years of age in a public or private park.

B. Definitions

1. Public Park

"'Public park' means real property owned or maintained by this state or a political subdivision of this state that is designated by this state or by that political subdivision as a public park." MCL 333.7410a(3)(b).

2. Private Park

"'Private park' means real property owned or maintained by a private individual or entity and that is open to the general public or local residents for recreation or amusement." MCL 333.7410a(3)(a).

For definitions of the terms "possession," "controlled substance," "controlled substance analogue," and "mixture," see Section 3.1(B), above.

C. Elements of the Crime

*For case law regarding "possession" and the element of scienter in possession offenses, see **Section 3.1**(C), above

Possession of a controlled substance, GBL, MDMA, or methamphetamine in a park. The elements of this crime are as follows:

1) the defendant is 18 years of age or older and possessed* one of the following:

   - any amount of GBL,
   - any amount of any material, compound, mixture, or preparation containing GBL,
   - less than 25 grams of a mixture containing a schedule 1 or 2 narcotic drug or cocaine-related substance as found in MCL 333.7214(a)(*iv*),
   - any amount of any controlled substance classified in schedule 1, 2, 3, or 4 (including GHB), except those for which a penalty is prescribed in MCL 333.7403(2)(a), (b)(*i*), (c), or (d),
   - any amount of a controlled substance analogue,
   - any amount of LSD,
   - any amount of peyote,
   - any amount of mescaline,
   - any amount of dimethyltryptamine,
   - any amount of psilocyn,
   - any amount of psilocybin,
   - any amount of any controlled substance classified in schedule 5, or
   - any amount of marijuana,

2) in a public or private park.

See MCL 333.7410a(1)(c); MCL 333.7401b; MCL 333.7403(2)(a)(*v*), (b), (c), and (d).

3.5 Possession of Counterfeit Prescription Forms

A. Statute

MCL 333.7407(1)(f) provides:

> "A person shall not knowingly or intentionally . . . [p]ossess counterfeit prescription forms, except as an agent of government while engaged in the enforcement of this part."

B. Definitions

"'Counterfeit prescription form' means a printed form that is the same or similar to a prescription form and that was manufactured, printed, duplicated, forged, electronically transmitted, or altered without the knowledge or permission of a prescriber." MCL 333.7104(4).

C. Elements of the Crime

Possession of counterfeit prescription forms. The elements of this crime are as follows:

1) the defendant possessed a counterfeit prescription form, and

2) the defendant knew he or she possessed a counterfeit prescription form.

See MCL 333.7407(1)(f); CJI2d 12.5.

3.6 Use of a Controlled Substance or Controlled Substance Analogue

A. Statute

MCL 333.7404(1) provides:

> "A person shall not use a controlled substance or controlled substance analogue unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article."

B. Definition

MCL 333.7109(3) defines "practitioner" as follows:

> "(a) A prescriber or pharmacist, a scientific investigator as defined by rule of the administrator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state, including an individual in charge of a dog pound or animal shelter licensed or registered by the department of agriculture pursuant to 1969 PA 287, MCL 287.331 to 287.340, or a class B dealer licensed by the United States department of agriculture pursuant to the animal welfare act, Public Law 89-544, 7 U.S.C. 2131 to 2147, 2149, and 2151 to 2159 and the department of agriculture pursuant to 1969 PA 224, MCL 287.381 to 287.395, for the limited purpose of buying, possessing, and administering a commercially prepared, premixed solution of sodium pentobarbital to practice euthanasia on animals.
>
> "(b) A pharmacy, hospital, or other institution or place of professional practice licensed, registered, or otherwise permitted to distribute, prescribe, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state."

For definitions of the terms "controlled substance," "controlled substance analogue," and "prescription form," see Section 3.1(B), above.

C. Elements of the Crime

Use of a controlled substance or controlled substance analogue. The elements of the crime are as follows:

1) the defendant used one of the following:
   - a controlled substance, or
   - a controlled substance analogue, and
2) the defendant knew at the time he or she used it that the substance was a controlled substance or a controlled substance analogue.

See MCL 333.7404; CJI2d 12.6.

MCL 333.7404 prohibits only the *unauthorized* use of controlled substances or controlled substance analogues.* Use is authorized if the substance was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice.

*For a more detailed analysis of authorization as a defense to use crimes, see **Section 10.3**.

Where a defendant argues that he or she was authorized to use the controlled substance or controlled substance analogue, he or she bears the burden of proving that his or her use was authorized. MCL 333.7531(1). In the absence of proof, there is a rebuttable presumption that the defendant was not

authorized to use the controlled substance or controlled substance analogue. MCL 333.7531(2).

MCL 333.5129 contains several provisions regarding individuals convicted under MCL 333.7404 for intravenous use of a controlled substance. Upon conviction, the court must order the defendant to be examined or tested for hepatitis B and C infection and the presence of HIV or an antibody to HIV. MCL 333.5129(4). The court must send the examination and test results to the Department of Corrections (DOC) if the defendant is placed in DOC's custody. MCL 333.5129(7).

3.7 Use or Possession with Intent to Use an Imitation Controlled Substance

A. Statute

MCL 333.7341(4) provides in part:

> "A person shall not use, or possess with intent to use, an imitation controlled substance, except under the direction of a person authorized pursuant to subsection (7)."

MCL 333.7341(7) provides that a person "who is authorized by the administrator or the federal food and drug administration to manufacture, distribute, prescribe, or possess an imitation controlled substance for use as a placebo for legitimate medical, therapeutic, or research purposes" is exempt from the prohibition set forth in MCL 333.7341(3).

B. Definitions

"'Imitation controlled substance' means a substance that is not a controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. However, this subsection does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles." MCL 333.7341(1)(b).

For definition of the term "possession," see Section 3.1(B), above.

C. Elements of the Crimes

1. Use of an Imitation Controlled Substance

The elements of this crime are as follows:

1) the defendant used an imitation controlled substance, and

2) the defendant knew at the time he or she used it that the substance was an imitation controlled substance.

See MCL 333.7341(4); CJI2d 12.6.

2. Possession with Intent to Use an Imitation Controlled Substance

The elements of this crime are as follows:

*For case law regarding "possession" and the element of scienter in possession offenses, see **Section 3.1**(C), above.

1) the defendant possessed* an imitation controlled substance;

2) the defendant intended to use the imitation controlled substance; and

3) the defendant knew that the substance was an imitation controlled substance.

See MCL 333.7341(4).

Chapter 4: Other Offenses in the Controlled Substances Act

4

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In this chapter...

This chapter discusses crimes under the Controlled Substances Act other than manufacture, delivery, possession, use, and licensee and practitioner offenses. Specifically, this chapter will discuss the following statutes: MCL 333.7302a, MCL 333.7339, MCL 333.7341, MCL 333.7405, MCL 333.7407, MCL 333.7407a, MCL 333.7416, MCL 333.7453, and MCL 333.7455.

Penalties for violations of these statutes are discussed in Chapter 7.

4.1 Attempts

A. Statute

MCL 333.7407a(1) provides that "[a] person shall not attempt to violate this part."

The "part" referred to is Part 74 of the Controlled Substances Act, MCL 333.7401–MCL 333.7461.

B. Elements of the Crime

The elements of attempted controlled substance offenses are as follows:

1) the defendant intended to commit an offense under the Controlled Substances Act, and

2) the defendant took some overt action beyond mere preparation toward committing the alleged crime but failed to complete the crime.

*For further discussion of attempted offenses, see **Section 2.1**(C)(2).

See MCL 333.7407a(1); CJI2d 9.1. See also *People v Grim*, unpublished opinion per curiam of the Court of Appeals, decided March 14, 2006 (Docket No. 258201).*

CJI2d 9.1(3) explains what actions qualify as an attempt:

> "It is not enough to prove that the defendant made preparations for committing the crime. Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it had not been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime that the defendant is charged with attempting and not some other objective."

An attempt is a specific intent crime. *People v Langworthy*, 416 Mich 630, 644–645 (1982).

It is not a defense to an attempt charge that a defendant fails to complete the attempted crime due to the intervention of outside forces, circumstances different than expected, or unexpected resistance. *People v Cross*, 187 Mich App 204, 206 (1991). Thus, abandonment is not a defense to attempt when the abandonment is not voluntary but results from the victim's resistance or from the defendant's fear of being caught. *Id*. at 206–207. However, voluntary abandonment of the crime is an affirmative defense to attempt. The burden is on the defendant to establish by a preponderance of the evidence that he or she voluntarily and completely abandoned his or her criminal purpose. *Id*. at 206.

4.2 Soliciting, Inducing, or Intimidating Another to Violate the Controlled Substances Act

A. Statute

MCL 333.7407a(2) provides:

> "A person shall not knowingly or intentionally solicit, induce, or intimidate another person to violate this part."

The "part" referred to is Part 74 of the Controlled Substances Act, MCL 333.7401–MCL 333.7461.

B. Definitions

1. Solicitation

The Controlled Substances Act contains no definition of the term "solicitation," and Michigan courts have not construed the term in the context of MCL 333.7407a. However, where a term has developed a peculiar meaning in the law, it should be construed in accordance with that peculiar meaning. MCL 8.3a. Moreover, the Legislature is presumed to enact legislation in harmony with existing statutes. *Rochester Community Schools Bd of Ed v State Bd of Ed*, 104 Mich App 569, 578 (1981). Accordingly, it seems likely that the definition of solicitation as used in the context of the statute considered here, MCL 333.7407a(2), would mirror that found in the general solicitation statute, MCL 750.157b(1):

> "'[S]olicit' means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation."

2. Induce

The Controlled Substances Act contains no definition of the term "induce," and Michigan courts have not construed the term in the context of MCL 333.7407a. However, where a term has developed a peculiar meaning in the law, it should be construed in accordance with that peculiar meaning. MCL 8.3a.

In *People v Rehkopf*, 422 Mich 198, 206 (1985), the Supreme Court construed the term "induce" in the context of MCL 750.157b as that statute then existed. The Court construed the term to refer to an utterance that actually moves the listener to act. *Rehkopf*, *supra* at 206. Furthermore, CJI2d 8.4, which defines the term "induce" in the context of the aiding and abetting statute, includes commission of the target offense as an element. Therefore, it seems likely that "induce," as that term is used in MCL 333.7407a, would have a similar definition.

3. Intimidate

The Controlled Substances Act contains no definition of the term "intimidate," and Michigan courts have not construed the term in the context of MCL 333.7407a. Where a word is not defined in a statute and has not developed a peculiar meaning in the law, it should be given its plain and ordinary meaning. *People v Gregg*, 206 Mich App 208, 211 (1994); MCL 8.3a. A court may consult dictionary definitions to ascertain the meaning of a word in a criminal statute. *Gregg*, *supra* at 212.

Black's Law Dictionary (7th ed) defines "intimidation" as "[u]nlawful coercion; extortion." *Black's* further quotes *Salmond on the Law of Torts*, 364 (17th ed) as follows:

> "The wrong of intimidation includes all those cases in which harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with. This wrong is of two distinct kinds, for the liberty of action so interfered with may be either that of the plaintiff himself, or that of other persons with resulting damage to the plaintiff."

C. Elements of the Crimes

1. Soliciting Another Person to Violate the Controlled Substances Act

The elements of the solicitation offense under MCL 333.7407a(2) are as follows:

1) the defendant, through words or actions, offered, promised, or gave money, services, or anything of value to another person, or forgave or promised to forgive a debt or obligation; and

2) the defendant intended that what he or she said or did would cause the other person to commit a violation of the Controlled Substances Act.

See MCL 333.7407a(2); CJI2d 10.6.

The following principles apply to the general solicitation statute, MCL 750.157b, and may also apply to solicitation under MCL 333.7407a(2) as well.

- The prosecutor does not have to prove that the person the defendant solicited actually committed, attempted to commit, or intended to commit a violation of the Controlled Substances Act. CJI2d 10.6(4).

- Solicitation is a specific intent crime, requiring proof that the defendant intended that the solicited crime be committed. *People v Vandelinder*, 192 Mich App 447, 450 (1992).

The general solicitation statute, MCL 750.15b, provides a renunciation affirmative defense, stating as follows:

> "It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall

establish by a preponderance of the evidence the affirmative defense under this subsection." MCL 750.157b(4).

MCL 333.7407a makes no mention of such a defense, and Michigan courts have not considered the question of whether the renunciation defense is applicable to MCL 333.7407a. Therefore, it is uncertain at this time whether such a defense exists in connection with this statute.

Solicitation differs from inducement in two ways. First, inducement requires the commission or attempted commission of the target offense, while solicitation does not. Second, inducement requires no offer of consideration in exchange for commission of the target offense, while solicitation does require consideration.

Solicitation differs from aiding and abetting* in that aiding and abetting requires that the target crime be completed, whereas the crime of solicitation is committed as soon as the solicitation is complete. See *People v Genoa*, 188 Mich App 461, 464 (1991).

*For a discussion of aiding and abetting, see **Section 6.2**.

2. Inducing Another Person to Violate the Controlled Substances Act

The elements of the inducement offense under MCL 333.7407a(2) are as follows:

1) the defendant made an utterance, and

2) this utterance caused the listener to violate or attempt to violate the Controlled Substances Act.

See *People v Rehkopf*, 422 Mich 198, 206 (1985).

Inducement differs from solicitation in two ways. First, inducement requires the commission or attempted commission of the target offense, while solicitation does not. Second, inducement requires no offer of consideration in exchange for commission of the target offense, while solicitation does require consideration.

To the extent that "inducement" under MCL 333.7407a includes commission of the target offense as one of its elements, it may overlap with aiding and abetting* offenses under MCL 767.39. Punishing a defendant for both offenses may raise double jeopardy concerns. Michigan courts have not yet addressed double jeopardy issues in this context. See **Chapter 11** for a discussion of double jeopardy.

*For a discussion of aiding and abetting, see **Section 6.2**.

3. Intimidating Another Person to Violate the Controlled Substances Act

The elements of the intimidation offense under MCL 333.7407a(2) are as follows:

1) the defendant threatened another person, and

2) the defendant intended that the threat would cause the other person to violate the Controlled Substances Act.

See MCL 333.7407a(2).

Intimidation under MCL 333.7407a(2) differs from extortion, MCL 750.213, in that extortion requires that the threat be communicated orally or in writing, while MCL 333.7407a(2) does not limit the ways by which the threat may be communicated. MCL 750.213; MCL 333.7407a(2).

4.3 Comparison Chart for Indirect Offenses

The following chart compares key elements of the indirect controlled substances offenses. Attempts, solicitation, inducement, and intimidation are discussed in this chapter. Aiding and abetting and conspiracy are discussed in Chapter 6.

	Attempts	Solicitation	Inducement	Intimidation	Aiding and Abetting	Conspiracy
Elements of the Offense	Defendant must intend to violate the Controlled Substances Act, and must take some overt action beyond mere preparation. See Section 4.1.	Defendant must give or promise some consideration, and must intend that his or her words or actions will cause the other person to violate the Controlled Substances Act. See Section 4.2.	Defendant must make an utterance, and this utterance must cause the listener to violate or attempt to violate the Controlled Substances Act. See Section 4.2.	Defendant must threaten another person, and must intend that the threat will cause the other person to violate the Controlled Substances Act. See Section 4.2.	Defendant must assist before or during a crime with intent to commit the crime or with knowledge that another intends its commission. See Section 6.2.	Defendant must agree with another to commit a crime, intending that the crime be committed. See Section 6.3.
Is An Act Beyond Mere Words Required by Defendant?	Yes. See Section 4.1.	No. See Section 4.2.	No. See Section 4.2.	No. See Section 4.2.	No. See Section 6.2.	No. See Section 6.3.
Is An Overt Act By Another Required?	No. See Section 4.1.	No. See Section 4.2.	The target offense must be completed or attempted. See Section 4.2.	No. See Section 4.2.	Yes. The target crime must be completed. See Section 6.2.	No overt act beyond that needed to form an agreement. See Section 6.3.

	Attempts	Solicitation	Inducement	Intimidation	Aiding and Abetting	Conspiracy
Must Target Crime Be Committed?	No. See Section 4.1.	No. See Section 4.2.	Yes. The target offense must be completed or attempted. See Section 4.2.	No. See Section 4.2.	Yes. The target crime must be completed. See Section 6.2.	No. See Section 6.3.
Can Defendant Withdraw Before Crime is Committed?	Yes. Voluntary abandonment of the crime is an affirmative defense to attempt. See Section 4.1.	Uncertain. Renunciation is permitted under general solicitation statute, MCL 750.157b(4). See Section 4.2.	Not decided. See Section 4.2.	No. See Section 4.2.	This defense is not applicable because aiding and abetting requires completion of the target crime. See Section 6.2.	No. See Section 6.3.

4.4 Recruiting or Inducing a Minor to Commit a Felony Under the Controlled Substances Act

A. Statute

MCL 333.7416(1) provides in part:

> "A person 17 years of age or over who recruits, induces, solicits, or coerces a minor less than 17 years of age to commit or attempt to commit any act that would be a felony under this part if committed by an adult is guilty of a felony . . . ."

B. Definitions

For definitions of the terms "solicitation" and "induce," see Section 4.2(B), above.

C. Elements of the Crime

Recruiting or inducing a minor to commit a felony under the Controlled Substances Act. The elements of this crime are as follows:

1) a person at least 17 years of age;

2) recruits, induces, solicits, or coerces a person younger than 17 years of age;

3) to commit or attempt to commit any act that would be a felony under the Controlled Substances Act if committed by an adult.

See MCL 333.7416(1).

Criminal liability attaches under this statute regardless of whether the adult knew or had reason to know that the person he or she was recruiting was under the age of 17. MCL 333.7416(4).

4.5 Keeping or Maintaining a Drug House

A. Statute

MCL 333.7405(1)(d) provides:

> "A person . . . shall not knowingly keep or maintain a store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article."

B. Definitions

1. Keep or Maintain

**Thompson* overruled the *Griffin* Court's determination that the defendant's exercise of authority or control must occur "continuously for an appreciable period of time."

The phrase "keep or maintain" has not been defined by statute. However, the Court of Appeals has held that in order "to keep or maintain" a drug house "it is not necessary for the defendant to own or reside at the property." *People v Griffin*, 235 Mich App 27, 32 (1999). "To keep or maintain" a drug house requires that a defendant "exercise authority or control over the property for purposes of making it available for keeping or selling proscribed drugs" and that during the defendant's exercise of authority over the property, the prohibited conduct occurred on more than one occasion. *People v Thompson*, 477 Mich 146, 152-153 (2007) (case involving a drug vehicle).* According to the *Thompson* Court,

> "'[K]eep or maintain' is not synonymous with 'use.' Hence, if the evidence only shows that defendant used a vehicle to keep or deliver drugs on one occasion, and there is no other evidence of continuity, the evidence is insufficient to establish that defendant kept or maintained a drug vehicle in violation of MCL 333.7405(1)(d)." *Thompson, supra* at 157-158.

Payment of rent for a building is indicative of "control" over the building. *People v Bartlett*, 231 Mich App 139, 156 (1998).

2. Vehicle

Although the above-cited statute does not define the term "vehicle," MCL 333.7401c* defines "vehicle" as follows:

*MCL 333.7401c is discussed in Sections 2.9, 2.10, and 2.11.

> "'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks and except, only for the purpose of titling and registration under this act, a mobile home as defined in section 2 of the mobile home commission act, Act No. 96 of the Public Acts of 1987, being section 125.2302 of the Michigan Compiled Laws." MCL 333.7401c(7)(g); MCL 257.79.

3. Controlled Substance

"'Controlled substance' means a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." MCL 333.7104(2).*

*See Section 1.3(B), above, for a description of the schedules.

C. Elements of the Crime

Keeping or maintaining a drug house. The elements of this crime are as follows:

1) knowingly;

2) keeping or maintaining one of the following:

   - a store,
   - a shop,
   - a warehouse,
   - a dwelling,
   - a building,
   - a vehicle,
   - a boat,
   - an aircraft, or
   - any other structure or place;

3) that is frequented by persons using controlled substances in violation of the Controlled Substances Act for the purpose of using controlled substances;

4) or that is used for keeping or selling controlled substances in violation of the Controlled Substances Act.

See MCL 333.7405(1)(d); *People v Duron*, unpublished opinion per curiam of the Court of Appeals, decided June 14, 2002 (Docket No. 229924).

MCL 333.7405(1)(d) does not require that a specified amount of drugs be found in the location in order to establish a violation of the statute. Thus, even a minimal amount of a controlled substance is adequate for purposes of conviction under MCL 333.7405(1)(d). *People v Mason*, unpublished opinion per curiam of the Court of Appeals, decided February 15, 2005 (Docket No. 251513).

4.6 Obtaining a Controlled Substance by Misrepresentation, Fraud, Deception, or Forgery

A. Statute

MCL 333.7407(1)(c) provides:

> "A person shall not knowingly or intentionally . . . [a]cquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge."

B. Definitions

*See Chapters 2 and 3 for a detailed discussion of the possession offenses under MCL 333.7401 and MCL 333.7403.

The term "possession"* has not been defined by statute. However, the Court of Appeals has held that possession "connotes dominion or the right of control over [a] drug with knowledge of its presence and character." *People v Mumford*, 60 Mich App 279, 282 (1975). Further, "[t]he term 'possession' is to be construed in its commonly understood sense . . . ." *Id*. at 282–283.

> CJI2d 12.7, which defines possession for purposes of controlled substances offenses, provides as follows:
>
> "Possession does not necessarily mean ownership. Possession means that either:
>
> > "(1) the person has actual physical control of the [controlled substance] . . . or
> >
> > "(2) the person has the right to control the [controlled substance], even though it is in a different room or place.
>
> "Possession may be sole, where one person alone possesses the [controlled substance].
>
> "Possession may be joint, where two or more people each share possession.

> "It is not enough if the defendant merely knew about the [controlled substance]; the defendant possessed the [controlled substance] only if [he/she] had control of it or the right to control it, either alone or together with someone else."

For definition of the term "controlled substances," see Section 4.5(B), above.

D. Elements of the Crime

Obtaining a controlled substance by misrepresentation, fraud, deception, or forgery. The elements of this crime are as follows:

1) the defendant knowingly or intentionally;

2) acquired or obtained possession of a controlled substance;

3) by one of the following means:

- misrepresentation,
- fraud,
- forgery,
- deception, or
- subterfuge.

See MCL 333.7407(1)(c).

The act of intentional forgery alone is sufficient to complete this offense. Therefore, it is no defense to a charge under this statute that the pharmacist to whom a forged prescription was presented knew or had reason to know that the prescription was forged and nonetheless filled it. There is no requirement under this statute that the supplier of the proscribed substance be deceived by the forged prescription. *People v Davis*, 109 Mich App 521, 523–524 (1981).

In *Davis*, the Court of Appeals further held that the defendant took constructive possession* of a controlled substance by means of forgery where he gave a forged prescription to a coworker, who agreed to take it to a pharmacist, pick it up, and deliver it to the defendant. The Court found that the defendant took constructive possession through the acts of his agent. *Id*. at 526–527.

*For a discussion of constructive possession in the context of possession offenses under MCL 333.7401 and MCL 333.7403, see **Sections 2.1**(C)(3) and **3.1**(C).

4.7 Possession of a Punch, Die, Plate, Stone, or Other Thing Designed to Imprint Trademark on a Drug, Label, or Container to Make Counterfeit Drugs

A. Statute

MCL 333.7407(1)(e) provides:

> "(1) A person shall not knowingly or intentionally:
>
> ***
>
> > "(e) Make, distribute, or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon a drug or container or labeling thereof so as to render the drug a counterfeit substance."

B. Definitions

1. Distribute

"'Distribute' means to deliver other than by administering or dispensing a controlled substance." MCL 333.7105(5).

2. Counterfeit Substance

"'Counterfeit substance' means a controlled substance that, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance." MCL 333.7104(5).

A "counterfeit substance" must be distinguished from an "imitation controlled substance," which is a substance, such as flour or soap, that resembles but is not a controlled substance. See MCL 333.7341(1)(b) and (2).

For definition of the term "possession," see Section 4.6(B), above.

C. Elements of the Crime

Possession of a punch, die, plate, stone, or other thing designed to imprint trademark on a drug, label, or container to make counterfeit drugs. The elements of this crime are as follows:

1) the defendant knowingly or intentionally;

2) made, distributed, or possessed one of the following:

- a punch,
- a die,
- a plate,
- a stone, or
- any other thing;

3) that was designed to print, imprint, or reproduce one of the following upon a drug, container, or label:

- the trademark of another,
- the trade name of another,
- any other identifying mark, imprint, or device of another;

4) so as to render the drug a counterfeit substance.

See MCL 333.7407(1)(e).

4.8 Sale of Drug Paraphernalia

A. Statute

MCL 333.7453(1) provides in part:

> "[A] person shall not sell or offer for sale drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance."

B. Definitions

"'[D]rug paraphernalia' means any equipment, product, material, or combination of equipment, products, or materials, which is specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance; including, but not limited to, all of the following:

"(a) An isomerization device specifically designed for use in increasing the potency of any species of plant which plant is a controlled substance.

"(b) Testing equipment specifically designed for use in identifying or in analyzing the strength, effectiveness, or purity of a controlled substance.

"(c) A weight scale or balance specifically designed for use in weighing or measuring a controlled substance.

"(d) A diluent or adulterant, including, but not limited to, quinine hydrochloride, mannitol, mannite, dextrose, and lactose, specifically designed for use with a controlled substance.

"(e) A separation gin or sifter specifically designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marihuana.

"(f) An object specifically designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish, or hashish oil into the human body.

"(g) A kit specifically designed for use in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived.

"(h) A kit specifically designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances.

"(i) A device, commonly known as a cocaine kit, that is specifically designed for use in ingesting, inhaling, or otherwise introducing controlled substances into the human body, and which consists of at least a razor blade and a mirror.

"(j) A device, commonly known as a bullet, that is specifically designed to deliver a measured amount of controlled substances to the user.

"(k) A device, commonly known as a snorter, that is specifically designed to carry a small amount of controlled substances to the user's nose.

"(l) A device, commonly known as an automotive safe, that is specifically designed to carry and conceal a controlled substance in an automobile, including, but not limited to, a can used for brake fluid, oil, or carburetor cleaner which contains a compartment for carrying and concealing controlled substances.

"(m) A spoon, with or without a chain attached, that has a small diameter bowl and that is specifically designed for use in ingesting, inhaling, or otherwise introducing controlled substances into the human body." MCL 333.7451.

MCL 333.7451 expressly states that the above list is not exhaustive.

According to MCL 333.7457, the following items are not considered "drug paraphernalia" for purposes of conviction under MCL 333.7453:*

*Effective March 20, 2007, 2006 PA 458 eliminated the exemption for products, materials, or equipment used to prepare or smoke tobacco.

"(a) An object sold or offered for sale to a person licensed under article 15 or under the occupational code, 1980 PA 299, MCL 339.101 to 339.2721, or any intern, trainee, apprentice, or assistant in a profession licensed under article 15 or under the occupational code, 1980 PA 299, MCL 339.101 to 339.2721, for use in that profession.

"(b) An object sold or offered for sale to any hospital, sanitarium, clinical laboratory, or other health care institution including a penal, correctional, or juvenile detention facility for use in that institution.

"(c) An object sold or offered for sale to a dealer in medical, dental, surgical, or pharmaceutical supplies.

"(d) A blender, bowl, container, spoon, or mixing device not specifically designed for a use described in section 7451.

"(e) A hypodermic syringe or needle sold or offered for sale for the purpose of injecting or otherwise treating livestock or other animals.

"(f) An object sold, offered for sale, or given away by a state or local governmental agency or by a person specifically authorized by a state or local governmental agency to prevent the transmission of infectious agents." MCL 333.7457.

For definition of the term "controlled substances," see Section 4.5(B), above.

C. Elements of the Crime

Sale of drug paraphernalia. The elements of this crime are as follows:

1) a person sells or offers to sell;

2) drug paraphernalia;

3) with the knowledge that it will be used in connection with the production, packaging, storage, concealment, or ingestion of a controlled substance.

See MCL 333.7453(1).

MCL 333.7453(1) prohibits only the sale or offer for sale of drug paraphernalia. It does not prohibit the possession of drug paraphernalia. *People v Stiff*, 190 Mich App 111, 113 (1991).

Notice requirement. Before a person can be arrested for a violation of MCL 333.7453(1), the prosecutor or attorney general must serve written notice, at least two business days before the person is to be arrested, of the following:

1) that the person possesses specific, defined material determined to be drug paraphernalia,

2) requesting the person to refrain from selling or offering for sale the material, and

3) informing the person that he or she will not be arrested if he or she complies with the notice. MCL 333.7453(2).

Compliance with the notice from the prosecutor or attorney general is a complete defense against prosecution under MCL 333.7453(1) as long as compliance continues. MCL 333.7453(3).

Declaratory relief available. A person who has received notice under MCL 333.7453(2) may commence a declaratory action against the attorney general or prosecuting attorney who sent the notice to obtain an adjudication of the legality of the intended sale or offer for sale. MCL 333.7459.

A declaratory judgment issued pursuant to an action brought under MCL 333.7459 and stating that the sale or the offer for sale of specified material does not violate MCL 333.7453(1) is a complete defense against prosecution under MCL 333.7453(1). MCL 333.7461.

4.9 Sale of Drug Paraphernalia to a Minor

A. Statute

MCL 333.7455(2) provides:

> "A person 18 years of age or older who violates section 7453 by selling or offering to sell drug paraphernalia to a person less than 18 years of age is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or a fine of not more than $7,500.00, or both."

B. Definitions

For definition of the term "drug paraphernalia," see Section 4.8(B), above.

C. Elements of the Crime

Sale of drug paraphernalia to a minor. The elements of this crime are as follows:

1) a person 18 years of age or older;

2) sells or offers to sell drug paraphernalia;

3) to a person less than 18 years of age.

See MCL 333.7455(2).

The notice requirements and availability of declaratory relief discussed in Section 4.8(C), above, are equally applicable to this statute.

4.10 Failure to Mark or Imprint Prescription Drug

A. Statute

MCL 333.7302a(1) provides:

> "A prescription drug that is in finished solid oral dosage form shall not be manufactured or distributed in this state after June 1, 1985 unless the drug is clearly and prominently marked or imprinted with an individual symbol, number, company name, words, letters, marking, national drug code, or a combination of any of the foregoing that identifies the prescription drug and the manufacturer or distributor of the drug."

B. Definitions

1. Manufacture

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that it does not include:

> "(a) The preparation or compounding of a controlled substance by an individual for his or her own use.
>
> "(b) The preparation, compounding[,] packaging, or labeling of a controlled substance:

"(*i*) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.

"(*ii*) By a practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." MCL 333.7106(2).

"Production," as that term is used in the above definition, means "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." MCL 333.7109(6).

2. Prescription Drug

*2009 PA 150, effective November 19, 2009, expanded the definition of prescription drug in MCL 333.17708(4)(b) to include a drug bearing the federal legend "Rx only."

"'[P]rescription drug' means 1 or more of the following:

"(a) A drug dispensed pursuant to a prescription.

"(b) A drug bearing the federal legend 'CAUTION: federal law prohibits dispensing without prescription' or 'Rx only'.*

"(c) A drug designated by the board as a drug that may only be dispensed pursuant to a prescription." MCL 333.7302a(7); MCL 333.17708(4).

For definition of the term "distribute," see Section 4.7(B), above.

C. Elements of the Crime

Failure to mark or imprint prescription drug. The elements of this crime are as follows:

1) the defendant knowingly or intentionally;

2) manufactured or distributed in Michigan;

3) a prescription drug that was in finished solid oral dosage form; and

4) the drug was not clearly and prominently marked or imprinted with one of the following to identify the drug and the manufacturer or distributor of the drug:

- symbol,
- number,
- company name,
- words,
- letters,

- marking,
- national drug code, or
- a combination of any of the above.

See MCL 333.7302a(1).

There are two statutory exceptions to this crime:

MCL 333.7302a(4) provides that upon application of a person who distributes or manufactures a prescription drug, the Department of Commerce will exempt a particular prescription drug from the requirements of MCL 333.7302a if the Department determines "that marking or imprinting the prescription drug is not feasible because of the drug's size, texture, or other unique characteristic."

MCL 333.7302a(5) provides that MCL 333.7302a does not apply to a prescription drug that is compounded by a pharmacist licensed under article 15.

4.11 Improperly Advertising or Describing a Food Product or Dietary Supplement Containing Ephedrine

A. Statute

MCL 333.7339(2) provides:

> "In the course of selling, offering for sale, or otherwise distributing a product described in [MCL 333.7220(1)(c)(*ii*)], a person shall not advertise or represent in any manner that the product causes euphoria, ecstasy, a 'buzz' or 'high', or an altered mental state, heightens sexual performance, or, because it contains ephedrine alkaloids, increases muscle mass."

MCL 333.7220(1)(c)(*ii*) describes the substance as follows:

> "(*ii*) A food product or a dietary supplement containing ephedrine, if the food product or dietary supplement meets all of the following criteria:
>
> > "(A) It contains, per dosage unit or serving, not more than the lesser of 25 milligrams of ephedrine alkaloids or the maximum amount of ephedrine alkaloids provided in applicable regulations adopted by the United States food and drug administration and contains no other controlled substance.

"(B) It contains no hydrochloride or sulfate salts of ephedrine alkaloids.

"(C) It is packaged with a prominent label securely affixed to each package that states the amount in milligrams of ephedrine in a serving or dosage unit; the amount of the food product or dietary supplement that constitutes a serving or dosage unit; that the maximum recommended dosage of ephedrine for a healthy adult human is the lesser of 100 milligrams in a 24-hour period or the maximum recommended dosage or period of use provided in applicable regulations adopted by the United States food and drug administration; and that improper use of the product may be hazardous to a person's health."

B. Definitions

For definition of the term "distribute," see Section 4.7(B), above.

C. Elements of the Crime

Improperly advertising or describing a food product or dietary supplement containing ephedrine. The elements of this crime are as follows:

1) advertising or representing;

2) with regard to the sale or distribution of a food product or dietary supplement containing ephedrine, as described in MCL 333.7220(1)(c)(*ii*);*

*See **Section 4.11**(A), above.

3) that the product causes euphoria, ecstasy, a "buzz" or "high," or an altered mental state, heightens sexual performance, or increases muscle mass.

See MCL 333.7339(2).

4.12 Advertisement or Solicitation Promoting Distribution of an Imitation Controlled Substance

A. Statute

MCL 333.7341(6) provides in part:

"A person shall not place an advertisement or solicitation in this state to be distributed by any electronic media in this state, or place an advertisement or solicitation in this state in any newspaper,

magazine, handbill, or other publication; or post or distribute an advertisement or solicitation in any public place in this state, knowing or having reason to know that the purpose of the advertisement or solicitation is to promote the distribution of an imitation controlled substance."

B. Definitions

"'Imitation controlled substance' means a substance that is not a controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. However, this subsection does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles." MCL 333.7341(1)(b).

C. Elements of the Crime

Advertisement or solicitation for distribution of an imitation controlled substance. The elements of this crime are as follows:

1) the defendant did one of the following:

   - placed an advertisement or solicitation in Michigan to be distributed by any electronic media in Michigan,
   - placed an advertisement or solicitation in Michigan in any newspaper, magazine, handbill, or publication, or
   - posted or distributed an advertisement or solicitation in any public place in Michigan;

2) knowing or having reason to know that the purpose of the advertisement was to promote the distribution of an imitation controlled substance.

See MCL 333.7341(7).

Chapter 5: Licensee and Practitioner Violations in the Controlled Substances Act

5

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In this chapter...

This chapter discusses licensee and practitioner violations under the Controlled Substances Act. Specifically, this chapter will discuss the following statutes: MCL 333.7321, MCL 333.7405, and MCL 333.7407.

Penalties for violations of these statutes are discussed in Chapter 7. For discussion of authorization and licensure as a defense to a charged violation of the Controlled Substances Act, see Sections 10.1, 10.2, and 10.3.

5.1 Unauthorized Manufacture, Distribution, Prescribing, or Dispensing of a Controlled Substance

A. Statute

MCL 333.7405(1) provides:

> "(1) A person:
>
> > "(a) Who is licensed by the administrator under this article shall not distribute, prescribe, or dispense a controlled substance in violation of section 7333.
> >
> > "(b) Who is a licensee shall not manufacture a controlled substance not authorized by his or her license or distribute, prescribe, or dispense a controlled substance not authorized by his or her license to another licensee or other

> authorized person, except as authorized by rules promulgated by the administrator."

The "article" referred to is Article 7, the Controlled Substances Act.

Section 7333 (referred to in MCL 333.7405(1)(a), above) governs the use of prescription forms for substances in schedules 2 through 5. In general, a practitioner may in good faith dispense a controlled substance in schedule 2 or a controlled substance in schedules 3 to 5 that is a prescription drug upon receipt of a prescription. See MCL 333.7333(2) and (4). A controlled substance in schedule 5 must not be distributed or dispensed unless for a medical purpose or in accordance with applicable regulations. MCL 333.7333(5).

*See **Section 10.1**(D) for further discussion.

As applied to a physician or similar practitioner, "good faith" means "prescribing or dispensing of a controlled substance . . . in the regular course of professional treatment to or for an individual who is under treatment by the practitioner for a pathology or condition other than that individual's physical or psychological dependence upon or addiction to a controlled substance . . . ." MCL 333.7333(1). Construing the phrase "good faith" as used in the previous Uniform Narcotic Drug Act, the Michigan Supreme Court held that the phrase denotes a subjective standard. "'Good faith' consistently has been deemed a standard measuring the state of mind and perception of the defendant—a measure of honest belief and intention." *People v Downes*, 394 Mich 17, 26 (1975). Thus, the focus must be on defendant's state of mind and not on whether defendant's conduct failed to meet objective standards of medical practice.* *Id*. at 26–27.

As applied to a pharmacist, "good faith" means "dispensing of a controlled substance pursuant to a prescriber's order which, in the professional judgment of the pharmacist, is lawful." MCL 333.7333(1). A pharmacist must consider the following factors in exercising his or her judgment:

> "(a) Lack of consistency in the doctor-patient relationship.
>
> "(b) Frequency of prescriptions for the same drug by 1 prescriber for larger numbers of patients.
>
> "(c) Quantities beyond those normally prescribed for the same drug.
>
> "(d) Unusual dosages.
>
> "(e) Unusual geographic distances between patient, pharmacist, and prescriber." MCL 333.7333(1)(a)–(e).

B. Definitions

1. Distribute

"'Distribute' means to deliver other than by administering or dispensing a controlled substance." MCL 333.7105(5).

2. Dispense

"'Dispense' means to deliver or issue a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, or compounding necessary to prepare the substance for the delivery or issuance." MCL 333.7105(3).

3. Manufacture

"'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that it does not include:

> "(a) The preparation or compounding of a controlled substance by an individual for his or her own use.
>
> "(b) The preparation, compounding[,] packaging, or labeling of a controlled substance:
>
> > "(*i*) By a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of his or her professional practice.
> >
> > "(*ii*) By a practitioner, or by the practitioner's authorized agent under his or her supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." MCL 333.7106(2).

4. Controlled Substance

"'Controlled substance' means a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." MCL 333.7104(2).*

*See **Section 1.3**(B) for a description of the schedules.

5. Practitioner

"'Practitioner' means:

> "(a) A prescriber or pharmacist, a scientific investigator as defined by rule of the administrator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with

respect to, or administer a controlled substance in the course of professional practice or research in this state, including an individual in charge of a dog pound or animal shelter licensed or registered by the department of agriculture pursuant to 1969 PA 287, MCL 287.331 to 287.340, or a class B dealer licensed by the United States department of agriculture pursuant to the animal welfare act, Public Law 89-544, 7 U.S.C. 2131 to 2147, 2149, and 2151 to 2159 and the department of agriculture pursuant to 1969 PA 224, MCL 287.381 to 287.395, for the limited purpose of buying, possessing, and administering a commercially prepared, premixed solution of sodium pentobarbital to practice euthanasia on animals.

"(b) A pharmacy, hospital, or other institution or place of professional practice licensed, registered, or otherwise permitted to distribute, prescribe, dispense, conduct research with respect to, or administer a controlled substance in the course of professional practice or research in this state." MCL 333.7109(3).

*These terms are also defined within the Controlled Substances Act itself, at MCL 333.7109.

"Practitioner" and "prescriber"* are defined in the Administrative Code, 2004 AACS, R 338.3102(1)(g), as dentists, doctors, doctors of osteopathic medicine, podiatrists, veterinarians, and optometrists.

C. Elements of the Crimes

1. Unauthorized Distribution, Prescribing, or Dispensing of a Controlled Substance by a Licensee

The elements of the unauthorized distribution, prescribing, or dispensing offense are as follows:

1) a person licensed by the administrator under the Controlled Substances Act;

2) distributes, prescribes, or dispenses;

3) a controlled substance;

4) in violation of MCL 333.7333.

See MCL 333.7405(1)(a).

A person who violates this statute may face either a civil or a criminal penalty. MCL 333.7406. In order to be subject to criminal sanctions for a violation of MCL 333.7405, the indictment must allege, and the trier of fact must find, that the violation was committed knowingly or intentionally. MCL 333.7406.

MCL 333.7406, which sets forth the fines and penalties for a violation of MCL 333.7405, mentions only criminal proceedings prosecuted by indictment without reference to criminal proceedings where the defendant is

charged by information. The term "indictment" under the Code of Criminal Procedure includes an information or any other formal written accusation. MCL 761.1(d). Michigan courts have not considered the issue, and therefore, it is unclear whether the term "indictment," as used in MCL 333.7406, should be interpreted in the same manner. The Legislature is presumed to enact legislation in harmony with existing statutes. *Rochester Community Schools Bd of Ed v State Bd of Ed*, 104 Mich App 569, 578 (1981). Accordingly, it seems likely that the term "indictment," as used in the context of MCL 333.7406, would mirror that found in MCL 761.1(d).

2. Unauthorized Manufacture, Distribution, Prescribing, or Dispensing of a Controlled Substance by a Licensee

The elements of the manufacture, distribution, prescribing, or dispensing beyond the scope of the license offense are as follows:

1) a licensee;

2) manufactures, distributes, prescribes, or dispenses;

3) a controlled substance;

4) to another licensee or other authorized person;

5) under circumstances not authorized by his or her license.

See MCL 333.7405(1)(b).

5.2 Licensee Distribution of a Schedule 1 or 2 Controlled Substance

A. Statute

MCL 333.7407(1)(a) provides:

> "A person shall not knowingly or intentionally . . . [d]istribute as a licensee a controlled substance classified in schedule 1 or 2, except pursuant to an order form as required by section 7331."

Section 7331 provides:

> "(1) Only a practitioner who holds a license under this article to prescribe or dispense controlled substances may purchase from a licensed manufacturer or distributor a schedule 1 or 2 controlled substance. The authority granted under this subsection to purchase a schedule 1 or 2 controlled substance is not assignable or transferable.

> "(2) A purchase of a schedule 1 or 2 controlled substance under subsection (1) shall be made only pursuant to an order form which is in compliance with federal law." MCL 333.7331.

B. Definitions

For definitions of the terms "distribute" and "controlled substance," see Section 5.1(B), above.

C. Elements of the Crime

Licensee distribution of a schedule 1 or 2 controlled substance. The elements of this crime are as follows:

1) a licensee;

2) knowingly or intentionally;

3) distributed a schedule 1 or 2 controlled substance;

4) not obtained from a licensed manufacturer or distributor pursuant to an order form that is in compliance with federal law.

See MCL 333.7407(1)(a); MCL 333.7331.

5.3 Use of Fictitious License Number

A. Statute

MCL 333.7407(1)(b) provides:

> "A person shall not knowingly or intentionally . . . [u]se in the course of the manufacture or distribution of a controlled substance a license number that is fictitious, revoked, suspended, or issued to another person."

B. Definitions

For definitions of the terms "manufacture," "distribution," and "controlled substance," see Section 5.1(B), above.

C. Elements of the Crime

Use of fictitious license number. The elements of this crime are as follows:

1) knowingly or intentionally using one of the following:

- another person's license number,
- a fictitious license number,
- a revoked license number,
- a suspended license number;

2) in the course of manufacturing or distributing a controlled substance.

See MCL 333.7407(1)(b).

5.4 Licensee Refusing to Allow Entry for Inspection

A. Statute

MCL 333.7405(1)(c) provides:

> "A person . . . [s]hall not refuse an entry into any premises for an inspection authorized by this article."

The "article" referred to is Article 7, the Controlled Substances Act.

B. Elements of the Crime

Licensee refusing to allow entry for inspection. The elements of this crime are as follows:

1) refusing entry into any premises,

2) for the purpose of making an inspection authorized by the Controlled Substances Act.*

*MCL 333.7303(6) authorizes the administrator to "inspect the establishment of a licensee . . . in accordance with the administrator's rule."

See MCL 333.7405(1)(c).

5.5 Practitioner Dispensing a Prescription for a Controlled Substance From an Out–of–State Prescriber

A. Statute

MCL 333.7405(1)(e) provides:

*2009 PA 150, effective November 19, 2009, deleted from MCL 333.7405(e) some statutory language concerning out-of-state prescribers of controlled substances.

"[A] practitioner shall not dispense a prescription for a controlled substance written and signed or transmitted by facsimile, electronic transmission, or other means of communication by a physician prescriber licensed to practice in a state other than Michigan, unless the prescription is issued by a physician prescriber ~~who resides adjacent to the land border between this state and an adjoining state or resides in Illinois or Minnesota and~~ who is authorized under the laws of that state to practice medicine or osteopathic medicine and surgery and to prescribe controlled substances ~~and whose practice may extend into this state, but who does not maintain an office or designate a place to meet patients or receive calls in this state~~."*

B. Definitions

For definitions of the terms "dispense," "controlled substance," and "practitioner," see Section 5.1(B), above.

C. Elements of the Crime

Practitioner dispensing a prescription for a controlled substance from an out-of-state prescriber. The elements of this crime are as follows:

1) a practitioner dispenses a prescription for a controlled substance;

2) written and signed or transmitted by facsimile, electronic transmission, or other means of communication by a physician prescriber licensed to practice in a state other than Michigan; and

3) the physician prescriber is not either of the following:

   - a resident of land adjacent to the land border between Michigan and an adjoining state, or

   - a resident of Minnesota or Illinois who is authorized under the laws of that state to practice medicine or osteopathic medicine and surgery and to prescribe controlled substances, and whose practice may extend into this state, but who does not maintain an office or designate a place to meet patients or receive calls in this state.

See MCL 333.7405(1)(e).

5.6 Furnishing False or Fraudulent Information on Application, Report, or Official Prescription Form

A. Statute

MCL 333.7407(1)(d) provides:

> "A person shall not knowingly or intentionally . . . [f]urnish false or fraudulent material information in, or omit any material information from, an application, report, or other document required to be kept or filed under this article, or any record required to be kept by this article."

The "article" referred to is Article 7, the Controlled Substances Act.

B. Elements of the Crime

Furnishing false or fraudulent information required by the Controlled Substances Act on application, report, or official prescription form. The elements of this crime are as follows:

1) knowingly or intentionally;
   - furnishing false or fraudulent material information in, or
   - omitting any material information from;
2) one of the following:
   - an application, report, or any other document required to be kept or filed under the Controlled Substances Act, or
   - any record required to be kept by the Controlled Substances Act.

See MCL 333.7407(1)(e).

5.7 Refusal to Make, Keep, or Furnish Any Record, Notification, Order Form, Statement, Invoice, or Other Required Information

A. Statute

MCL 333.7407(2) provides:

> "A person shall not refuse or knowingly fail to make, keep, or furnish any record, notification, order form, statement, invoice, or other information required under this article."

The "article" referred to is Article 7, the Controlled Substances Act.

B. Elements of the Crime

Refusal to make, keep, or furnish any record, notification, order form, statement, invoice, or other required information. The elements of this crime are as follows:

1) refusing or knowingly failing to make, keep, or furnish any of the following:

   - any record,
   - any notification,
   - any order form,
   - any statement,
   - any invoice, or
   - any other information;

2) that is required to be made, kept, or furnished under the Controlled Substances Act.

See MCL 333.7407(2).

5.8 Failure to Keep Records and Maintain Inventories in Conformance with the Law

A. Statute

MCL 333.7321 provides:

> "(1) Subject to subsection (2), a person licensed to manufacture, distribute, prescribe, or dispense controlled substances under this article shall keep records and maintain inventories in conformance with the record-keeping and inventory requirements of federal law and with any additional rules the administrator promulgates, unless exempted by those rules.
>
> "(2) Beginning May 1, 1989, and annually thereafter, each person licensed under this article to manufacture, distribute, prescribe, or dispense controlled substances shall inventory and report to the administrator all schedule 2 to 5 controlled substances possessed by the person at the time of the inventory. The annual report required under this subsection may be conducted and submitted to the administrator not more than 30 days before May 1, but shall be conducted and submitted to the administrator not later than 60 days after May 1. A person who violates this subsection may be punished by a civil fine of not more than $25,000.00 in a proceeding in the circuit court."

B. Definitions

For definitions of the terms "manufacture," "distribute," "dispense," and "controlled substance," see Section 5.1(B), above.

C. Elements of the Crime

Failure to keep records and maintain inventories in conformance with the law. The elements of this crime are as follows:

1) a person licensed to manufacture, distribute, prescribe, or dispense controlled substances;

2) fails to inventory and report to the administrator all schedule 2, 3, 4, and 5 substances possessed by the person at the time of the inventory;

3) by the dates specified in the statute (not more than 30 days before May 1 and not later than 60 days after June 30th).

See MCL 333.7321.

Chapter 6: Controlled Substance Offenses Not Found in the Controlled Substances Act

6

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In this chapter...

This chapter discusses controlled substance crimes that are not found in the Controlled Substances Act itself. Specifically, this chapter discusses the following statutes: MCL 333.17764, MCL 333.17766, MCL 333.17766c, MCL 333.17766f, MCL 750.16, MCL 750.18, MCL 750.141a, MCL 750.157a, MCL 750.317a, MCL 752.272, MCL 752.272a, MCL 767.39, and MCL 800.281.

Penalties for violations of these statutes are discussed in Chapter 7.

6.1 Delivery of a Schedule 1 or 2 Controlled Substance Causing Death

A. Statute

MCL 750.317a provides:

> "A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code, 1978 PA 368, MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years."

B. Definitions

1. Delivery

"'Deliver' or 'delivery' means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." MCL 333.7105(1).

2. Controlled Substance

"'Controlled substance' means a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72." MCL 333.7104(2).*

*See **Section 1.3**(B) for a description of the schedules.

C. Elements of the Crime

Delivery of a schedule 1 or 2 controlled substance causing death. The elements of this crime are as follows:

1) the defendant delivered a schedule 1 or 2 controlled substance other than marijuana to another person;

2) the recipient or another person consumed the controlled substance; and

3) the person who consumed the controlled substance died as a result of this consumption.

See MCL 750.317a.

Delivery is a general intent crime. *People v Maleski*, 220 Mich App 518, 522 (1997).

What constitutes delivery.*

*The definition of "delivery" for purposes of the crime discussed here, MCL 750.317a, is likely similar to the definition under the Controlled Substances Act.

"Constructive delivery" of a controlled substance occurs "when the defendant directs another person to convey the controlled substance under the defendant's direct or indirect control to a third person or entity." *People v Plunkett*, 281 Mich App 721, 728 (2008) (even where the defendant provided transportation and money to obtain the drugs, he did not constructively deliver the drugs to a third party because the drugs were not under the defendant's control and the defendant did not direct the drug dealer to transfer the drugs to the third party).

Injection of a substance into another person constitutes delivery of a controlled substance for purposes of conviction under MCL 333.7401. *People v Schultz*, 246 Mich App 695, 708–709 (2001). The sharing of a controlled substance in a social setting also constitutes delivery. *People v Brown*, 163 Mich App 273, 296–297 (1987). Moreover, such transfer need not necessarily involve an exchange of drugs for money, or any remuneration at all. *Id*. In *Brown*, the defendant shared marijuana and cocaine in his apartment in exchange for sex with a prostitute. The Court of Appeals held that evidence of such sharing was sufficient evidence of delivery to support defendant's bindover for trial for violating MCL 333.7401. The Court further held that mere social sharing with no remuneration at all also constituted delivery. *Brown, supra* at 296–297. The use of cocaine by a pregnant woman 13 hours before giving birth to a child, however, does not constitute delivery, even though the mother's use may result in the postpartum transfer of cocaine through the umbilical cord to the infant. *People v Hardy*, 188 Mich App 305, 310 (1991). A pregnant woman's use of cocaine, which might result in the postpartum transfer of cocaine metabolites to her infant, is not "the type of conduct that the legislature intended to be prosecuted" under the delivery statute. *Id*.

The definition of "deliver" or "delivery" as used in the Controlled Substances Act is broad enough to impose criminal liability on an agent who procures drugs for a principal from a third party. MCL 333.7105(1). Thus, the procuring-agent defense, formerly available to a defendant who acted merely as a procuring agent on another's behalf is no longer a valid defense. *People v Potra*, 191 Mich App 503, 511 (1992).

Delivery by a licensed physician or other practitioner. The Controlled Substances Act only prohibits unauthorized drug delivery. Certain drug deliveries are authorized under the Act or are exempt from criminal punishment.* Authorized deliveries include prescription of a controlled substance by a licensed practitioner acting within the scope of his or her license. MCL 333.7401(1). Authorized deliveries do not include conduct that is not in conformity with the license. Thus, a physician's or other practitioner's prescribing or dispensing a controlled substance constitutes delivery for purposes of MCL 333.7401(1) if the physician or practitioner is not carrying out a legitimate, professionally recognized therapeutic or

*See **Chapter 10** for information on defenses based on licensure and authorization.

scientific purpose within the scope of his or her practice. *People v Alford*, 405 Mich 570, 589 (1979).

Scienter as an element of delivery offenses. The statute does not require a jury instruction that knowledge is an essential element of the crime of delivery. However, it is the better practice to give such an instruction in delivery cases to guarantee that the jury understands the *mens rea* requirement. *People v Delgado*, 404 Mich 76, 86 (1978). A knowledge instruction is essential where there is a question as to whether the defendant knew the general nature of the substance he or she was delivering.

With regard to what knowledge is required for conviction of a delivery offense, precise knowledge of the nature of a substance is not required for conviction as long as the defendant was aware that he or she was delivering a controlled substance. *People v Zion*, 93 Mich App 576, 578 (1980). In *Zion*, the defendant knew he was delivering a controlled substance inside a balloon, but he did not know which controlled substance it was. The Court of Appeals found that this was sufficient for purposes of conviction under MCL 333.7401(1). Similarly, precise knowledge of the amount of a substance being delivered is not required for conviction. *People v Mass*, 464 Mich 615, 618 (2001).

6.2 Aiding and Abetting

A. Statute

The Controlled Substances Act does not contain any provisions that specifically penalize aiding and abetting another person to commit a drug offense. However, aiding and abetting another person to commit a violation of the Controlled Substances Act may be prosecuted under the general aiding and abetting statute, MCL 767.39, which provides:

> "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

B. Elements of the Crime

Aiding and abetting. The elements of this crime are as follows:

1) the defendant or someone else committed a crime;

2) the defendant performed acts or gave encouragement that aided or assisted the commission of the crime; and

3) the defendant intended the commission of the crime or knew that the principal intended its commission at the time the defendant gave the aid or assistance.

See CJI2d 8.1; *People v Jones*, 201 Mich App 449, 451 (1993).

"'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime . . . ." *People v Carines*, 460 Mich 750, 757 (1999). MCL 333.7407a makes it a felony to solicit, induce, or intimidate another to commit a controlled substance offense.* Therefore, such crimes should be charged under MCL 333.7407a, rather than under MCL 767.39, the general aiding and abetting statute.

*For a discussion of soliciting, inducing, or intimidating another to commit a controlled substance offense, see **Section 4.2**.

A defendant cannot be convicted of aiding and abetting unless some underlying crime was committed. While conviction of the principal who committed the underlying crime is not necessary to convict an aider and abetter to that crime, the prosecution must prove beyond a reasonable doubt that the underlying crime was committed by someone, and that the defendant either committed the crime or aided and abetted the commission of that crime. *People v Mann*, 395 Mich 472, 478 (1975).

Evidence that the defendant provided a third party with transportation and funds to purchase heroin from a drug dealer did not support a finding that the defendant aided and abetted the drug dealer in *delivering* the heroin, but rather, that the defendant aided and abetted the third party in *receiving* the heroin. *People v Plunkett*, 281 Mich App 721, 730 (2008).

But see the following cases where a defendant was properly charged or convicted of aiding and abetting the delivery of drugs:

> "[*People v*] *Izarraras-Placante*, [246 Mich App 490 (2001)] (the defendant aided and abetted the delivery of the cocaine to an undercover police officer when he discussed the price of the cocaine with the drug dealer and drove the drug dealer to the site of the sale); *People v Lyons*, 70 Mich App 615, 618[] (1976) (the defendant who 'actively assisted' the drug dealer 'by acting as a doorman or a "lookout"' was guilty of aiding and abetting the delivery of the heroin); *People v Berry*, 101 Mich App 399, 402[] (1981) (the defendant was properly bound over on the theory of aiding and abetting the delivery of a controlled substance where the evidence established that the defendant arranged, assisted, and facilitated the delivery of cocaine)." *Plunkett*, *supra* at 730.

A person's mere presence at the scene of a controlled substance offense will not support a conviction on an aiding and abetting theory. *People v Wolfe*, 440 Mich 508, 520 (1992), amended 441 Mich 1201 (1992).

An aider and abetter differs from an accessory after the fact in that an aider and abetter knows about and intends to further the commission of the crime before it is completed. An aider and abetter must do some act or give some encouragement that helps in the commission of the crime, while an accessory after the fact helps the person who committed the crime *after* the crime was committed. CJI2d 8.7; *People v Usher*, 196 Mich App 228, 233 (1992). A defendant cannot properly be convicted as both an aider and abetter and as an accessory after the fact to the same offense. *People v Hartford*, 159 Mich App 295, 299–302 (1987).

In *People v Blume*, 443 Mich 476, 494 (1993), the Supreme Court held that Michigan courts have no jurisdiction to prosecute a resident of another state as an aider and abetter of a crime committed in Michigan without proof that the out-of-state defendant's acts were intended to have, and actually did have, a detrimental effect in Michigan. The out-of-state defendant's mere knowledge that the principal will return to Michigan to commit the crime is not sufficient to establish the requisite intent to aid and abet a crime in Michigan. In *Blume*, the defendant, a Florida resident, sold cocaine in Florida to a Michigan resident who returned to Michigan with the cocaine. Under these circumstances, the Michigan Supreme Court found that jurisdiction was not proper because the prosecution failed to demonstrate that the defendant acted with the intent to have a detrimental effect in Michigan. *Id*. at 487.

*For a more complete discussion of double jeopardy, see **Chapter 11**.

Double jeopardy considerations.* Although conspiracy and aiding and abetting have common elements, it is possible to accomplish each without the other. Thus, a person may be convicted of both crimes stemming from the same completed offense without violating the rule against double jeopardy. *People v Carter*, 415 Mich 558, 577–582 (1982), overruled in part on other grounds 419 Mich 458 (1984).

6.3 Conspiracy

A. Statute

The Controlled Substances Act does not contain any provisions that specifically penalize conspiracy to commit a drug offense. However, controlled substance conspiracies may be prosecuted under the general conspiracy statute, MCL 750.157a, which provides:

> "Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . ."

B. Elements of the Crime

Conspiracy. The elements of this crime are as follows:

1) the defendant and at least one other person knowingly agreed to commit a crime;*

2) the defendant specifically intended to commit or help commit the crime; and

3) the agreement took place or continued during a specific time period.

*The jury must be instructed on the elements of the underlying crime. See CJI2d 10.1.

See MCL 750.157a; CJI2d 10.1.

A "criminal conspiracy" is "a mutual agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means." *People v Carter*, 415 Mich 558, 567 (1982), overruled in part on other grounds 419 Mich 458 (1984).

The gravamen of conspiracy is an agreement with another to commit a crime. Therefore, the crime is complete upon formation of the agreement, and it is not necessary to establish any overt act in furtherance of the conspiracy. *Id*. at 568. Direct proof of the agreement is not required, nor is proof of a formal agreement. Rather, "[i]t is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact." *Id*. Because the crime of conspiracy is complete upon formation of the agreement, the guilt or innocence of a conspirator does not depend on the accomplishment of the goals of the conspiracy. *Id*. at 569.

Beginning and end of a conspiracy. A defendant may become a member of an already existing conspiracy by cooperating knowingly to further the object of the conspiracy. *People v Blume*, 443 Mich 476, 483–484 (1993). A person who joins a conspiracy after it has been formed is bound by all acts committed in furtherance of the conspiracy prior to his or her joining, even if he or she did not know all of the conspirators and did not participate in all objects of the conspiracy. *People v Iaconnelli*, 112 Mich App 725, 781 (1982), vacated in part on other grounds 116 Mich App 176 (1982).

Once formed, a conspiracy continues to exist until consummated, abandoned, or otherwise terminated by some affirmative act. *People v Hintz*, 69 Mich App 207, 221 (1976). A conspiracy may even continue after the substantive crime that was the primary object of the conspiracy is complete, or until financial or other arrangements among the conspirators are also complete. *People v Scotts*, 80 Mich App 1, 5–6 (1978). However, subsequent acts taken for the purpose of concealing the conspiracy's crime do not show a continuation of the conspiracy. See *Grunewald v United States*, 353 US 391, 401–402 (1957).

Withdrawal is not a defense to the crime of conspiracy. "[W]ithdrawal from the conspiracy is ineffective because the heart of the offense is the participation in the unlawful agreement." *People v Cotton*, 191 Mich App 377, 393 (1992). See also *People v Heard*, unpublished opinion per curiam of the Court of Appeals, decided June 28, 2002 (Docket No. 221827).

Intent. Conspiracy is a specific intent crime and requires a two-fold specific intent:

1) the defendant must intend to combine with others, and

2) the defendant must intend to accomplish the illegal objective.

See *Carter, supra* at 568.

Because there can be no conspiracy without a combination of two or more persons, the prosecution must show not only that the defendant had this specific two-fold intent, but also that at least one other person shared the defendant's two-fold specific intent. *People v Anderson*, 418 Mich 31, 35 (1983).

If conspiracy to deliver or conspiracy to possess with intent to deliver is charged, the prosecution must show that the defendant knew the amount of the controlled substance the parties agreed to deliver. *People v Justice (After Remand)*, 454 Mich 334, 349 (1997); *People v Mass*, 464 Mich 615, 629–630 (2001). The jury must be instructed that the defendant conspired to deliver the amount of the controlled substance alleged in the underlying offense; that the defendant conspired to deliver an unspecified amount of a controlled substance is not sufficient. *Mass, supra* at 638–639, relying on *Justice, supra*, and *Apprendi v New Jersey*, 530 US 466 (2000).

The element of scienter. To establish the requisite intent for conspiracy, the prosecution must show that:

1) the defendant knew of the conspiracy;

2) the defendant knew of the objective of the conspiracy; and

3) the defendant intended to participate cooperatively to further the objective of the conspiracy.

See *Blume, supra* at 485.

However, for conviction under MCL 750.157a, a defendant need not "know the full scope of the conspiracy or participate in carrying out each detail." Nor must the defendant be acquainted with each of his or her coconspirators or know the exact part played by each of the coconspirators to be convicted under MCL 750.157a. *People v Grant*, 455 Mich 221, 236 n 20 (1997).

The "no one-person conspiracy" rule. Because the gravamen of conspiracy is an agreement between two or more persons to commit an illegal act, where only one person can be shown to have had the *mens rea* to commit an illegal act, no conspiracy exists. See *People v Atley*, 392 Mich 298, 311–312 (1974), overruled on other grounds 466 Mich 417 (2002) (no conspiracy was found where a conspiracy charge was based solely on an agreement between the defendant and a police informant who feigned participation in the crime), and *People v Barajas*, 198 Mich App 551, 558–559 (1993) (no conspiracy was found where the defendant's coconspirator intended to defraud the defendant at the time the criminal agreement was made).*

*The Michigan Supreme Court affirmed *Barajas* but limited its holding to the specific facts of the case. See 444 Mich 556, 557 (1994).

The "no one-person conspiracy" rule is also more commonly used to prevent inconsistent verdicts where coconspirators are tried jointly by a single fact finder for a conspiracy in which no additional persons are implicated. Under the "no one-person conspiracy" rule, a verdict finding one coconspirator guilty but not the other requires a judgment of acquittal as to both coconspirators. *People v Williams*, 240 Mich App 316, 325 (2000).

There are a number of situations, however, where the "no one-person conspiracy" rule does not apply:

- Where the defendant and his coconspirator are tried separately, an acquittal in one case does not require acquittal in the other. *Anderson, supra* at 38.
- Where the defendant and his coconspirator are tried jointly, but with separate fact finders, an acquittal in one case does not require acquittal in the other. *People v Jemison*, 187 Mich App 90, 93–94 (1991).
- Where conspiracy charges against a coconspirator are dismissed in exchange for a guilty plea to a different offense, the defendant's conviction for conspiracy need not be set aside. *People v Turner*, 86 Mich App 177, 182–183 (1978), vacated on other grounds 407 Mich 890 (1979).
- Where a coconspirator is granted immunity from prosecution in exchange for his or her testimony against the defendant, the defendant's conviction need not be set aside. *People v Berry*, 84 Mich App 604, 607 (1978).

Admissibility of coconspirator's statements.* In general, a codefendant's extrajudicial statements implicating another defendant are inadmissible as evidence against the other defendant in a jury trial unless the declarant testifies and is available for cross-examination. *Bruton v United States*, 391 US 123 (1968). However, under MRE 801(d)(2)(E), out-of-court statements by a defendant's coconspirator made "during the course and in furtherance of the conspiracy" are admissible against all conspirators upon independent proof of the conspiracy. MRE 801(d)(2)(E); *People v Oaks*, 94 Mich App 745, 751 (1980).

*For additional discussion of the admissibility of a coconspirator's statements, see **Section 13.6**(B)(1).

Independent proof of the existence of a conspiracy must be shown by a preponderance of the evidence *before* such statements may be admitted. *People v Vega*, 413 Mich 773, 780–782 (1982); *People v Trapani*, unpublished opinion per curiam of the Court of Appeals, decided May 27, 2003 (Docket No. 232330).

To meet the "during the course" element, "the conspiracy must be extant at the time the statement is made. The phrase relates to the temporal dimension of the conspiracy, which continues until the common enterprise has been fully completed, abandoned, or terminated. An arrest generally terminates the conspiracy, as does the success or failure of its objectives." *People v Bushard*, 444 Mich 384, 394 (1993).

With regard to the "in furtherance" requirement, "mere 'idle chatter' does not satisfy Rule 801(d)(2)(E). Rather, the statements must be such as to prompt the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates the carrying out of a criminal activity . . . ." *Bushard, supra* at 395. Statements that are in furtherance of a conspiracy include "statements that provide reassurance, or seek to induce a coconspirator's assistance or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." *Id*. at 395–396.

Because a coconspirator's statement made to the police following arrest is not made in furtherance of the conspiracy or during the course of the conspiracy, it is not admissible under MRE 801(d)(2)(E). *People v Cadle*, 204 Mich App 646, 653 (1994), overruled on other grounds 460 Mich 55 (1999).

Use of evidence against a coconspirator. When proof of a conspiracy is shown, evidence against one conspirator becomes evidence against all of the conspirators. In *People v Bahoda*, 448 Mich 261, 291 n 62 (1995), a videotape showing defendant's coconspirator accepting a package of cocaine was introduced into evidence. Although defendant was not depicted in the video, it was admissible against him because he was charged with conspiracy.

*For a more complete discussion of double jeopardy, see **Chapter 11**.

Double jeopardy considerations and Wharton's Rule.* Conspiracy to commit an offense is a separate and distinct crime from its target offense, and as a general rule both crimes may be punished even though they arise out of the same criminal transaction. *Mass, supra* at 632, 644 n 34; *People v Denio*, 454 Mich 691, 695–696 (1997).

Similarly, although conspiracy and aiding and abetting have common elements, it is possible to accomplish each without the other. Thus, a person may be convicted of both crimes stemming from the same completed offense without violating the rule against double jeopardy. *Carter, supra* at 577–582.

Wharton's Rule operates as an exception to the general rule that conspiracy and its target offense are separately punishable. *People v White*, 147 Mich App 31, 36 (1986). Wharton's Rule states that "[a]n agreement to commit a particular crime cannot be prosecuted as a conspiracy where the number of

alleged conspirators do not exceed the minimum number of persons logically necessary to complete the substantive offense." *People v Blume*, 443 Mich 476, 482 n 11 (1993).

Wharton's Rule is inapplicable "where the number of alleged coconspirators exceeds the number necessary to commit the target crime." *People v Weathersby*, 204 Mich App 98, 107 (1994).

Simple delivery of a controlled substance to another person "does not necessarily require the cooperative acts of more than one person"; therefore, Wharton's Rule may not apply to a conspiracy to deliver offense involving only two persons. *People v Betancourt*, 120 Mich App 58, 65 (1983).

Jurisdiction and venue. Michigan courts have no jurisdiction to try a non-resident for conspiracy offenses without proof that the non-resident's acts were intended to have, and actually did have, a detrimental effect in Michigan. *Blume, supra* at 486, 493. Venue in a conspiracy case, however, properly lies in any county where an overt act was committed in furtherance of the conspiracy. *People v Meredith*, 209 Mich App 403, 409 (1995).

6.4 Selling, Giving, or Furnishing a Prescription Drug or Controlled Substance to a Prisoner

A. Statute

MCL 800.281(1)* provides:

> "Except as provided in section 2, a person shall not sell, give, or furnish, either directly or indirectly, any alcoholic liquor, prescription drug, poison, or controlled substance to a prisoner who is in or on a correctional facility or dispose of that liquor, drug, poison, or controlled substance in any manner that allows a prisoner or employee of the correctional facility who is in or on a correctional facility access to it."

*This statute applies to the Department of Corrections facilities. For provisions that apply to jails, see MCL 801.261 *et seq*.

"Section 2," referred to in the above-cited statute, is MCL 800.282. MCL 800.282 provides in relevant part:

> "(1) A person is not in violation of section 1 if all of the following occur:
>
> > "(a) A licensed physician certifies in writing that the alcoholic liquor, prescription drug, or controlled substance is necessary for the health of the prisoner or employee.
> >
> > "(b) The certificate contains the following information:

"(*i*) The quantity of the alcoholic liquor, prescription drug, or controlled substance which is to be furnished to the prisoner or employee.

"(*ii*) The name of the prisoner or employee.

"(*iii*) The time when the alcoholic liquor, prescription drug, or controlled substance is to be furnished.

"(*iv*) The reason why the alcoholic liquor, prescription drug, or controlled substance is needed.

"(c) The certificate has been delivered to the chief administrator of the correctional facility to which the prisoner is assigned or at which the employee works.

"(d) The chief administrator of the correctional facility or the designee of the chief administrator approves in advance the sale, giving, furnishing, bringing, or possession of the alcoholic liquor, prescription drug, or controlled substance.

"(e) The sale, giving, furnishing, bringing, or possession of the alcoholic liquor, prescription drug, or controlled substance is in compliance with the certificate.

"(2) Not more than 2 ounces of wine for the use of the clergy may be brought into or onto a correctional facility by a person of the clergy of any religious denomination for clergy purposes."

B. Definitions

1. Alcoholic Liquor

"'Alcoholic liquor' means any spirituous, vinous, malt, or fermented liquor, liquid, or compound whether or not medicated, containing 1/2 of 1% or more of alcohol by volume and which is or readily can be made suitable for beverage purposes." MCL 800.281a(a).

2. Controlled Substance

*See **Section 1.3**(B) for a description of the schedules.

"'Controlled substance' means a drug, substance, or immediate precursor in schedules 1 to 5 of part 72 of 1978 PA 368, MCL 333.7201 to 333.7231."* MCL 800.281a(c).

3. Correctional Facility

"'Correctional facility' means any of the following:

"(*i*) A state prison, reformatory, work camp, or community corrections center.

"(*ii*) A youth correctional facility operated by the department [of corrections] or a private vendor under section 20g of 1953 PA 232, MCL 791.232.

"(*iii*) A privately operated community corrections center or resident home which houses prisoners committed to the jurisdiction of the department.

"(*iv*) The land on which a facility described in subparagraph (*i*), (*ii*), or (*iii*) is located." MCL 800.281a(e).

4. Prescription Drug

"'Prescription drug' means 1 or more of the following:

"(a) A drug dispensed pursuant to a prescription.

"(b) A drug bearing the federal legend 'CAUTION: federal law prohibits dispensing without prescription' or 'Rx only'.*

"(c) A drug designated by the board as a drug that may only be dispensed pursuant to a prescription." MCL 800.281a(f); MCL 333.17708(4).

*2009 PA 150, effective November 19, 2009, expanded the definition of prescription drug in MCL 333.17708(4)(b) to include a drug bearing the federal legend "Rx only."

5. Prisoner

"'Prisoner' means a person committed to the jurisdiction of the department [of corrections] who has not been released on parole or discharged." MCL 800.281a(g).

C. Elements of the Crimes

1. Selling, Giving, or Furnishing Alcoholic Liquor, Prescription Drugs, Poison, or Controlled Substances to a Prisoner

The elements of this crime are as follows:

1) selling, giving, or furnishing, either directly or indirectly, one of the following:

- alcoholic liquor,
- prescription drugs,
- poison,
- controlled substances;

2) to a prisoner who is in a correctional facility or on correctional facility grounds.

See MCL 800.281(1).

2. Disposing of Alcohol, Prescription Drugs, Poison, or Controlled Substances in any Manner Allowing a Prisoner or Employee of a Correctional Facility Access to Them

The elements of this crime are as follows:

1) disposing of one of the following:
   - alcoholic liquor,
   - prescription drugs,
   - poison,
   - controlled substances;
2) in any manner that allows a prisoner or employee of a correctional facility;
3) who is in a correctional facility or on correctional facility grounds;
4) access to the alcoholic liquor, prescription drugs, poison, or controlled substances.

See MCL 800.281(1).

A prisoner can be convicted under MCL 800.281(1) without ever leaving the prison if he or she is responsible for bringing the contraband into the prison. In *People v Lewis*, 97 Mich App 650, 652 (1980), a defendant's conviction under MCL 800.281(1) was proper where the defendant, a prison inmate, employed agents to pick up whiskey and marijuana outside of the prison and smuggle it inside where others would unload it, repackage it and deliver it to the defendant, because the defendant was directly responsible for bringing the contraband into the prison.

6.5 Inhalation or Consumption of a Chemical Agent

A. Statute

MCL 752.272 provides:

> "No person shall, for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction or dulling of the senses or nervous system, intentionally smell or inhale* the fumes of any chemical agent or intentionally drink, eat

*Commonly known as "huffing."

> or otherwise introduce any chemical agent into his respiratory or circulatory system."

B. Definitions

"'[C]hemical agent' means any substance containing a toxic chemical or organic solvent or both, having the property of releasing toxic vapors. The term includes, but is not limited to, glue, acetone, toluene, carbon tetrachloride, hydrocarbons and hydrocarbon derivatives." MCL 752.271.

C. Elements of the Crime

Inhalation or consumption of a chemical agent. The elements of this crime are as follows:

1) intentionally smelling or inhaling the fumes of any chemical agent, or

2) intentionally drinking, eating, or otherwise introducing any chemical agent into the respiratory or circulatory system,

3) for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction or dulling of the senses or nervous system.

See MCL 752.272.

MCL 752.272 specifically excludes the inhalation of anesthesia for medical or dental purposes from the conduct prohibited by the statute. MCL 752.272.

6.6 Sale or Distribution of a Device Containing or Dispensing Nitrous Oxide

A. Statute

MCL 752.272a(1) provides as follows:

> "A person shall not sell or otherwise distribute to another person any device that contains any quantity of nitrous oxide or sell or otherwise distribute a device to dispense nitrous oxide for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system."

Note: Nitrous oxide is more commonly known as laughing gas. It is used as a general anesthetic by doctors and dentists, and as a propellent in many commercial products, such as whipped cream or cooking oil spray. It is also

used in household devices such as whipped cream makers and espresso machines, and is sold in high performance vehicle shops for use as an adrenalin for performance cars.

B. Elements of the Crime

Sale or distribution of a device containing or dispensing nitrous oxide. The elements of this crime are as follows:

1) selling or otherwise distributing one of the following to another person:

   - any device containing any quantity of nitrous oxide, or
   - any device to dispense nitrous oxide,

2) for the purpose of causing a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system.

See MCL 752.272a(1).

Statutory exceptions. MCL 752.272a(1) explicitly excludes "nitrous oxide that has been denatured or otherwise rendered unfit for human consumption." The statute does not apply to:

> "(a) A person licensed under the food processing act of 1977, 1978 PA 328, MCL 289.801 to 289.810, or chapter VII of the food law of 2000, 2000 PA 92, MCL 289.7101 to 289.7137, who sells or otherwise distributes the device as a grocery product.
>
> "(b) A person engaged in the business of selling or distributing catering supplies only or food processing equipment only, or selling or distributing compressed gases for industrial or medical use who sells or otherwise distributes the device in the course of that business.
>
> "(c) A pharmacist, pharmacist intern, or pharmacy as defined in section 17707 of the public health code, 1978 PA 368, MCL 333.17707, who dispenses the device in the course of his or her duties as a pharmacist or pharmacist intern or as a pharmacy.
>
> "(d) A health care professional." MCL 752.272a(1).

6.7 Providing False Name or Information to a Pharmacist

A. Statute

MCL 333.17766 provides as follows:

> "Except as provided in section 17766d, a person who does any of the following is guilty of a misdemeanor:
>
> > "(a) Obtains or attempts to obtain a prescription drug by giving a false name to a pharmacist or other authorized seller, prescriber, or dispenser.
> >
> > "(b) Obtains or attempts to obtain a prescription drug by falsely representing that he or she is a lawful prescriber, dispenser, or licensee, or acting on behalf of a lawful prescriber, dispenser, or licensee."

"Section 17766d," referenced above, is MCL 333.17766d. That statute governs the acceptance and resale or redistribution of prescription drugs by pharmacies operated by the Department of Corrections or under contract with a county jail.

B. Definitions

1. Prescription Drug

"'Prescription drug' means 1 or more of the following:

> "(a) A drug dispensed pursuant to a prescription.
>
> "(b) A drug bearing the federal legend 'CAUTION: federal law prohibits dispensing without prescription'.
>
> "(c) A drug designated by the board as a drug that may only be dispensed pursuant to a prescription." MCL 333.17709(4).

2. Pharmacist

"'Pharmacist' means an individual licensed under this article to engage in the practice of pharmacy." MCL 333.17707(2).

3. Prescriber

"'Prescriber' means a licensed dentist, a licensed doctor of medicine, a licensed doctor of osteopathic medicine and surgery, a licensed doctor of podiatric medicine and surgery, a licensed optometrist certified under part 174 to administer and prescribe therapeutic pharmaceutical agents, a licensed veterinarian, or another licensed health professional acting under the

delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery." MCL 333.17708(2).

C. Elements of the Crimes

1. Obtaining or Attempting to Obtain a Prescription Drug by Giving a False Name

The elements of this crime are as follows:

1) obtaining or attempting to obtain a prescription drug;

2) by giving a false name;

3) to a pharmacist or other authorized seller, prescriber, or dispenser.

See MCL 333.17766(a).

2. Obtaining or Attempting to Obtain a Prescription Drug by False Representation

The elements of this crime are as follows:

1) obtaining or attempting to obtain a prescription drug;

2) by representing oneself as one of the following:

- a lawful prescriber, dispenser, or licensee, or
- acting on behalf of a lawful prescriber, dispenser, or licensee.

See MCL 333.17766(b).

6.8 Misdemeanor Prescription Violations

A. Statute

MCL 333.17766 provides as follows:

> "Except as provided in section 17766d, a person who does any of the following is guilty of a misdemeanor:
>
> ***
>
> "(c) Falsely makes, utters, publishes, passes, alters, or forges a prescription.

> "(d) Knowingly possesses a false, forged, or altered prescription.
>
> "(e) Knowingly attempts to obtain, obtains, or possesses a drug by means of a prescription for other than a legitimate therapeutic purpose, or as a result of a false, forged, or altered prescription.
>
> "(f) Possesses or controls for the purpose of resale, or sells, offers to sell, dispenses, or gives away, a drug, pharmaceutical preparation, or chemical that has been dispensed on prescription and has left the control of a pharmacist.
>
> "(g) Possesses or controls for the purpose of resale, or sells, offers to sell, dispenses, or gives away, a drug, pharmaceutical preparation, or chemical that has been damaged by heat, smoke, fire, water, or other cause and is unfit for human or animal use.
>
> "(h) Prepares or permits the preparation of a prescription drug, except as delegated by a pharmacist.
>
> "(i) Sells a drug in bulk or in an open package at auction, unless the sale has been approved in accordance with rules of the board."

"Section 17766d," referenced above, is MCL 333.17766d. That statute governs the acceptance and resale or redistribution of prescription drugs by pharmacies operated by the Department of Corrections or under contract with a county jail.

B. Definitions

1. Dispense

"'Dispense' means to issue 1 or more doses of a drug for subsequent administration to, or use by, a patient." MCL 333.17703(2).

2. Drug

"'Drug' means any of the following:

> "(a) A substance recognized or for which the standards or specifications are prescribed in the official compendium.
>
> "(b) A substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or other animals.

"(c) A substance, other than food, intended to affect the structure or a function of the body of human beings or other animals.

"(d) A substance intended for use as a component of a substance specified in subdivision (a), (b), or (c), but not including a device or its components, parts, or accessories." MCL 333.17703(4).

3. Prescription

"'Prescription' means an order for a drug or device written and signed or transmitted by other means of communication by a prescriber to be filled, compounded, or dispensed. Prescribing is limited to a prescriber. An order transmitted in other than written form shall be recorded or written and immediately dated by the pharmacist, and that record constitutes the original prescription. In a health facility or agency licensed under article 17 or other medical institution, an order for a drug or device in the patient's chart constitutes for the purposes of this definition the original prescription. Subject to section 17751(2), prescription includes, but is not limited to, an order for a drug, not including a controlled substance as defined in section 7104 except under circumstances described in section 17763(e), written and signed or transmitted by other means of communication by a physician prescriber licensed to practice in a state other than Michigan." MCL 333.17708(3).

4. Possession

*See **Sections 3.1**(C) and **2.1**(B) for a detailed discussion of possession.

The term "possession"* has not been defined by statute. However, the Court of Appeals has held that possession, in the context of the Controlled Substances Act, "connotes dominion or the right of control over [a] drug with knowledge of its presence and character." *People v Mumford*, 60 Mich App 279, 282 (1975). Further, "[t]he term 'possession' is to be construed in its commonly understood sense . . . ." *Id*. at 282–283.

For definitions of the terms "prescription drug" and "pharmacist," see Section 6.7, above.

C. Elements of the Crimes

1. Falsely Making, Uttering, Publishing, Passing, Altering, or Forging a Prescription

The elements of this crime are as follows:

1) falsely;

2) making, uttering, publishing, passing, altering, or forging a prescription.

See MCL 333.17766(c).

2. Knowingly Possessing a False, Forged, or Altered Prescription

The elements of this crime are as follows:

1) the defendant possessed one of the following:

   - a false prescription,
   - a forged prescription, or
   - an altered prescription; and

2) the defendant knew he or she possessed one of the above items.

See MCL 333.17766(d); CJI2d 12.5.

3. Knowingly Obtaining, Attempting to Obtain, or Possessing a Drug by Means of a Prescription for Other Than a Legitimate Therapeutic Purpose, or as a Result of a False, Forged, or Altered Prescription

The elements of this crime are as follows:

1) the defendant knowingly obtained, attempted to obtain, or possessed a drug,

2) by means of a prescription for other than a legitimate therapeutic purpose, or as a result of a false, forged, or altered prescription.

See MCL 333.17766(e); CJI2d 12.5.

Where a defendant obtains a controlled substance by means of a false, forged, or altered prescription, the prosecutor has discretion to charge the defendant under the felony statute for acquiring a controlled substance by any form of misrepresentation or deception, MCL 333.7407(1)(c),* or under the misdemeanor statute for obtaining a prescription drug as a result of a false, forged, or altered prescription, MCL 333.17766(e). *People v Joseph*, 127 Mich App 78, 82–83 (1983).

*See **Section 4.6**.

4. Possessing for Purpose of Resale, or Selling, Offering to Sell, Dispensing, or Giving Away a Drug, Pharmaceutical Preparation, or Chemical Dispensed by Prescription and No Longer Under a Pharmacist's Control

The elements of this crime are as follows:

1) the defendant did one of the following:

   - possessed or controlled for the purpose of resale,
   - sold or offered to sell,

- dispensed or gave away;

2) one of the following:

   - a drug,
   - a pharmaceutical preparation, or
   - a chemical

3) that was dispensed by a prescription and no longer under the control of a pharmacist.

See MCL 333.17766(f).

5. Possessing for the Purpose of Resale, or Selling, Offering to Sell, Dispensing, or Giving Away a Drug, Pharmaceutical Preparation, or Chemical That Has Been Damaged and Is Unfit for Human or Animal Use

The elements of this crime are as follows:

1) the defendant did one of the following:

   - possessed or controlled for the purpose of resale,
   - sold or offered to sell,
   - dispensed or gave away;

2) one of the following:

   - a drug,
   - a pharmaceutical preparation, or
   - a chemical; and

3) the drug, pharmaceutical preparation, or chemical had been damaged by heat, smoke, fire, water, or other cause; and

4) the drug, pharmaceutical preparation, or chemical was unfit for human or animal use.

See MCL 333.17766(g).

6. Preparing or Permitting the Preparation of a Prescription Drug, Except as Delegated by a Pharmacist

The elements of this crime are as follows:

1) the defendant prepared or permitted the preparation of a prescription drug, and

2) the defendant's actions were not delegated by a pharmacist.

See MCL 333.17766(h).

7. Selling a Drug in Bulk or in an Open Package at Auction Without Obtaining Approval

The elements of this crime are as follows:

1) the defendant did one of the following:

   - sold a drug in bulk, or
   - sold a drug in an open package at auction;

2) without obtaining approval in accordance with the rules of the board.

See MCL 333.17766(i).

6.9 Possession of More than 12 Grams of Ephedrine or Pseudoephedrine

A. Statute

MCL 333.17766c(1) provides as follows:

> "A person shall not possess more than 12 grams of ephedrine or pseudoephedrine alone or in a mixture."

B. Definitions

The term "mixture" has not been defined by statute. However, the Court of Appeals has held that this term is to be construed according to its common and approved usage.* *People v Barajas*, 198 Mich App 551, 555 (1993). Accordingly, the *Barajas* Court concluded that a "[mixture] . . . must be reasonably homogeneous or uniform. That is, the [controlled substance] and the filler . . . must be 'mixed' together to form a 'mixture' that is reasonably uniform. A sample from anywhere in the mixture should reasonably approximate in purity a sample taken elsewhere in the mixture." *Id*. at 556.

*See **Section 3.1**(B) for more information on the term "mixture."

For definition of the term "possession," see Section 6.8(B), above.

C. Elements of the Crime

Possession of more than 12 grams of ephedrine or pseudoephedrine. The elements of this crime are as follows:

1) the defendant possessed more than 12 grams of
   - ephedrine, or
   - pseudoephedrine,
2) under conditions that did not fall within one of the enumerated statutory exceptions (discussed below).

See MCL 333.17766c(1).

D. Statutory Exceptions

MCL 333.17766c(3) does not prohibit possession of more than 12 grams of ephedrine or pseudoephedrine under the following circumstances:

- ♦ When a person possesses ephedrine or pseudoephedrine pursuant to a license to manufacture, deliver, dispense, possess with intent to manufacture or deliver, or possess a controlled substance, prescription drug, or other drug.
- ♦ When a person possesses ephedrine or pseudoephedrine pursuant to a prescription.
- ♦ When a person possesses ephedrine or pseudoephedrine for retail sale pursuant to a license.
- ♦ When a person possesses ephedrine or pseudoephedrine in the course of his or her business of selling or transporting ephedrine to a person licensed to possess ephedrine.
- ♦ When a person, in the course of his or her business, stores ephedrine or pseudoephedrine for sale or distribution to a person licensed to possess ephedrine or to a person who in the course of his or her business sells or transports ephedrine to another who is licensed to possess ephedrine.

MCL 333.17766c(3) also exempts products that have been formulated to prevent conversion into methamphetamine and products intended primarily for administration to children under 12 years of age.

6.10 Knowingly Allowing Consumption or Possession of a Controlled Substance at a Social Gathering

A. Statute

MCL 750.141a(2)(b) provides, in pertinent part:

> "[A]n owner, tenant, or other person having control over any premises, residence, or other real property shall not . . . [k]nowingly allow any individual to consume or possess a controlled substance at a social gathering on or within that premises, residence, or other real property."

B. Definitions

1. Control Over Any Premises, Residence, or Other Real Property

"'Control over any premises, residence, or other real property' means the authority to regulate, direct, restrain, superintend, control, or govern the conduct of other individuals on or within that premises, residence, or other real property, and includes, but is not limited to, a possessory right." MCL 750.141a(1)(c).

2. Premises

"'Premises' means a permanent or temporary place of assembly, other than a residence, including, but not limited to, any of the following:

> "(*i*) A meeting hall, meeting room, or conference room.
>
> "(*ii*) A public or private park." MCL 750.141a(1)(g).

3. Residence

"'Residence' means a permanent or temporary place of dwelling, including, but not limited to, any of the following:

> "(*i*) A house, apartment, condominium, or mobile home.
>
> "(*ii*) A cottage, cabin, trailer, or tent.
>
> "(*iii*) A motel unit, hotel unit, or bed and breakfast unit." MCL 750.141a(1)(h).

4. Allow

"'Allow' means to give permission for, or approval of, possession or consumption of . . . a controlled substance, by any of the following means:

> "(*i*) In writing.
>
> "(*ii*) By 1 or more oral statements.
>
> "(*iii*) By any form of conduct, including a failure to take corrective action, that would cause a reasonable person to believe that permission or approval has been given." MCL 750.141a(1)(b).

5. Corrective Action

"Corrective action," as used above in the definition of "allow," "means any of the following:

> "(*i*) Making a prompt demand that the minor or other individual depart from the premises, residence, or other real property, or refrain from the unlawful possession or consumption of the . . . controlled substance on or within that premises, residence, or other real property, and taking additional action described in subparagraph (*ii*) or (*iii*) if the minor or other individual does not comply with the request.
>
> "(*ii*) Making a prompt report of the unlawful possession or consumption of . . . a controlled substance to a law enforcement agency having jurisdiction over the violation.
>
> "(*iii*) Making a prompt report of the unlawful possession or consumption of . . . a controlled substance to another person having a greater degree of authority or control over the conduct of persons on or within the premises, residence, or other real property." MCL 750.141a(1)(e).

6. Controlled Substance

*See **Section 1.3**(B) for a description of the schedules.

"'Controlled substance' means that term as defined in . . . [MCL 333.7104]." MCL 750.141a(1)(d). MCL 333.7104(2) defines "controlled substance" as "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72."*

7. Social Gathering

"'Social gathering' means an assembly of 2 or more individuals for any purpose, unless all of the individuals attending the assembly are members of the same household or immediate family." MCL 750.141a(1)(i).

For definition of the term "possession," see Section 6.8(B), above.

C. Elements of the Crime

Knowingly allowing consumption or possession of a controlled substance at a social gathering. The elements of this crime are as follows:

1) the defendant was an owner of, a tenant of, or a person having control over any of the following:
   - any premises,
   - any residence, or

- any other real property; and

2) the defendant knowingly allowed any individual to consume or to possess a controlled substance;

3) at a social gathering on or within that premises, residence, or other real property.

See MCL 750.141a(2)(b).

Rebuttable presumption. "Evidence of all of the following gives rise to a rebuttable presumption that the defendant allowed the consumption or possession of . . . a controlled substance on or within a premises, residence, or other real property, in violation of this section:

> "(a) The defendant had control over the premises, residence, or other real property.
>
> "(b) The defendant knew that . . . an individual was consuming or in possession of a controlled substance at a social gathering on or within that premises, residence, or other real property.
>
> "(c) The defendant failed to take corrective action." MCL 750.141a(6).

6.11 Unauthorized Sale of a Product Containing Ephedrine or Pseudoephedrine

A. Statute

MCL 333.17766f (1) provides:

> "A person who possesses products that contain any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer of ephedrine or pseudoephedrine for retail sale pursuant to a license issued under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, shall not knowingly do any of the following:
>
> > "(a) Sell any product described under this subsection to an individual under 18 years of age.
> >
> > "(b) Sell in a single over-the-counter sale more than 2 packages, or 48 tablets or capsules, of any product described under this subsection to any individual.

> "(c) Sell in a single over-the-counter sale more than 2 personal convenience packages containing 2 tablets or capsules each of any product described under this subsection to any individual."

B. Definitions

For definition of the term "mixture," see Section 6.7, above.

C. Elements of the Crime

Unauthorized sale of a product containing ephedrine or pseudoephedrine. The elements of this crime are as follows:

- a person who, pursuant to a retail sale license issued under MCL 205.51 to 205.78, knowingly does any of the following:
  - sells to a person under 18 years of age, any product that contains any compound, mixture, or preparation containing any detectable quantity of ephedrine or pseudoephedrine, a salt or optical isomer of ephedrine or pseudoephedrine, or a salt of an optical isomer of ephedrine or pseudoephedrine,
  - in a single over-the-counter sale, sells more than two packages or 48 tablets or capsules of any product described above, or
  - in a single over-the-counter sale, sells more than two personal convenience packages containing two tablets or capsules each of any product described above.

See MCL 333.17766f(1).

Exceptions. MCL 333.17766f(2) provides a number of exceptions to the crime set forth in MCL 333.17766f(1):

> "[MCL 333.17766f(1)] does not apply to the following:
>
> > "(a) A pediatric product primarily intended for administration to children under 12 years of age according to label instructions.
> >
> > "(b) A product containing pseudoephedrine that is in a liquid form if pseudoephedrine is not the only active ingredient.
> >
> > "(c) A product that the state board of pharmacy, upon application of a manufacturer or certification by the United States drug enforcement administration as inconvertible, exempts from this section because the product has been

> formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine.
>
> "(d) A product that is dispensed pursuant to a prescription."

It is an affirmative defense for an individual cited for the sale to a minor of a product containing ephedrine or pseudoephedrine under MCL 333.17766f(2)(a), that the defendant had in force at the time of the citation, and continues to have in force, a written policy for employees to prevent the prohibited sale of products under this statute. MCL 333.17766f(7).

6.12 Selling, Offering, Possessing, or Manufacturing for Sale a Drug or Device Whose Label Is Misleading

A. Statute

MCL 333.17764 provides in part:

> "A person shall not sell, offer for sale, possess for sale, or manufacture for sale a drug or device bearing or accompanied by a label that is misleading as to the contents, uses, or purposes of the drug or device."

B. Elements of the Crime

Selling, offering, possessing, or manufacturing for sale a drug or device whose label is misleading. The elements of this crime are as follows:

1) selling, offering for sale, possessing for sale, or manufacturing for sale;

2) a drug or device;

3) bearing or accompanied by a label that is misleading as to the contents, uses, or purposes of the drug or device.

See MCL 333.17764(1).

MCL 333.17764(1) specifically provides that "[i]n determining whether a label is misleading, consideration shall be given to the representations made or suggested by the statement, word, design, device, sound, or any combination thereof, and the extent to which the label fails to reveal facts material in view of the representations made or material as to consequences that may result from use of the drug or device to which the label relates under conditions of use prescribed in the label or under customary or usual conditions of use."

6.13 Adulterating a Drug or Device or Selling an Adulterated Drug

A. Statute

MCL 333.17764(2) provides:

> "(2) A person shall not knowingly or recklessly do either of the following:
>
> > "(a) Adulterate, misbrand, remove, or substitute a drug or device knowing or intending that the drug or device shall be used.
> >
> > "(b) Sell, offer for sale, possess for sale, cause to be sold, or manufacture for sale an adulterated or misbranded drug."

B. Elements of the Crimes

1. Adulterating, Misbranding, Removing or Substituting a Drug or Device

The elements of this crime are as follows:

1) knowingly or recklessly doing one of the following:
   - adulterating,
   - misbranding,
   - removing, or
   - substituting;
2) a drug or device;
3) knowing or intending that the drug or device will be used.

See MCL 333.17764(2)(a).

2. Selling, Causing to Be Sold, or Offering, Possessing, or Manufacturing for Sale an Adulterated or Misbranded Drug

The elements of this crime are as follows:

1) knowingly or recklessly doing one of the following:
   - selling,
   - causing to be sold,

- offering for sale,
- possessing for sale, or
- manufacturing for sale;

2) an adulterated or misbranded drug.

See MCL 333.17764(2)(b).

6.14 Adulterating a Drug so as to Render It Injurious to Health or Selling an Adulterated Drug or Medicine

A. Statute

MCL 750.16(1) provides:

> "(1) Except as otherwise provided in this section, a person who knowingly or recklessly commits any of the following actions is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $1,000.00, or both:
>
> > "(a) Adulterates, misbrands, removes, or substitutes a drug or medicine so as to render that drug or medicine injurious to health.
> >
> > "(b) Sells, offers for sale, possesses for sale, causes to be sold, or manufactures for sale a drug or medicine that has been adulterated, misbranded, removed, or substituted so as to render it injurious to health."

B. Elements of the Crimes

1. Adulterating, Misbranding, Removing, or Substituting a Drug or Medicine so as to Render It Injurious to Health

The elements of this crime are as follows:

1) knowingly or recklessly doing one of the following:
   - adulterating,
   - misbranding,
   - removing, or
   - substituting;
2) a drug or medicine;
3) rendering it injurious to health.

See MCL 750.16(1)(a).

2. Selling, Offering, Possessing, or Manufacturing for Sale a Drug That Has Been Adulterated, Misbranded, Removed, or Substituted so as to Render It Injurious to Health

The elements of this crime are as follows:

1) knowingly or recklessly doing one of the following:

   - selling,
   - causing to be sold,
   - offering for sale,
   - possessing for sale, or
   - manufacturing for sale;

2) a drug or medicine that has been rendered injurious to health by one of the following means:

   - adulteration,
   - misbranding,
   - removal, or
   - substitution.

See MCL 750.16(1)(b).

6.15 Mixing a Drug or Medicine so as to Injuriously Affect Its Quality or Potency or Selling Such a Drug

A. Statute

MCL 750.18 provides:

> "(1) Except for the purpose of compounding in the necessary preparation of medicine, a person shall not knowingly or recklessly mix, color, stain, or powder, or order or permit another person to mix, color, stain, or powder, a drug or medicine with an ingredient or material so as to injuriously affect the quality or potency of the drug or medicine.
>
> "(2) A person shall not sell, offer for sale, possess for sale, cause to be sold, or manufacture for sale a drug or medicine mixed, colored, stained, or powdered in the manner proscribed in subsection (1)."

B. Elements of the Crimes

1. Mixing, Coloring, Staining, or Powdering a Drug or Medicine so as to Injuriously Affect Its Quality or Potency

The elements of this crime are as follows:

1) knowingly or recklessly doing one of the following to a drug or medicine:
   - mixing,
   - coloring,
   - staining, or
   - powdering;
2) so as to injuriously affect its quality or potency.

See MCL 750.18(1).

MCL 750.18(1) exempts the mixing, coloring, staining, or powdering of a drug or medicine when it is done for the purpose of compounding in the necessary preparation of medicine.

2. Ordering or Permitting Another Person to Mix, Color, Stain, or Powder a Drug or Medicine so as to Injuriously Affect Its Quality or Potency

The elements of this crime are as follows:

1) ordering or permitting another person to do one of the following to a drug or medicine:
   - mix,
   - color,
   - stain, or
   - powder;
2) so as to injuriously affect its quality or potency.

See MCL 750.18(1).

MCL 750.18(1) exempts the mixing, coloring, staining, or powdering of a drug or medicine when it is done for the purpose of compounding in the necessary preparation of medicine.

3. Selling, Offering, Possessing, or Manufacturing for Sale a Drug or Medicine Mixed, Colored, Stained, or Powdered so as to Injuriously Affect Its Quality or Potency

The elements of this crime are as follows:

1) doing one of the following:
   - selling,

- causing to be sold,
- offering for sale,
- possessing for sale, or
- manufacturing for sale;

2) a drug or medicine whose quality or potency has been injuriously affected by one of the following means:

- adulteration,
- misbranding,
- removal, or
- substitution.

See MCL 750.18(2).

MCL 750.18(1) exempts the mixing, coloring, staining, or powdering of a drug or medicine when it is done for the purpose of compounding in the necessary preparation of medicine.

Chapter 7: Penalties

7

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In this chapter...

This chapter discusses the penalties applicable to each of the offenses discussed in Chapters 2 through 6. The discussion in this chapter is limited to the various types of penalties available or mandated for conviction of a specific offense. Generally, the offenses discussed in this benchbook are punishable by fine, imprisonment, or both. This chapter briefly identifies each offense, the monetary amount of any fine that may be imposed for conviction of the offense, and the length of imprisonment that may be imposed for

conviction of the offense. Cross-references to additional information about a particular offense discussed in Chapters 2 through 6 are noted when necessary or helpful.

> **Note:** A penalty imposed for a violation of the Controlled Substances Act is in addition to, not in lieu of, any civil penalty or sanction or any administrative penalty or sanction otherwise authorized by law for the same violation. MCL 333.7408.

7.1 §7401 Offenses: Violations Involving the Manufacture/Creation/Delivery or Possession With Intent to Manufacture/Create/Deliver

*See **Section 2.1** for case law and discussion of the conduct prohibited under §7401.

In general, MCL 333.7401(1) prohibits an unauthorized person from manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form.* MCL 333.7401(1) also prohibits a licensed practitioner from engaging in certain conduct. A practitioner licensed under the Controlled Substances Act may not dispense, prescribe, or administer a controlled substance for any purpose other than a legitimate and professionally recognized therapeutic or scientific purpose. In addition, a licensed practitioner, licensee, or applicant may not dispense, prescribe, or administer a controlled substance outside the scope of that person's practice. MCL 333.7401(1).

Violations of MCL 333.7401 are categorized by the quantity and/or type of substance involved in the prohibited conduct, and the penalty for each violation is specified in the same statutory provision describing the unlawful conduct.

A. §7401(2)(a) Offenses Involving Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances

*See **Section 1.4** for more information about major controlled substance offenses.

A violation of MCL 333.7401(2)(a)(*i*)–(*iv*) is a felony characterized as a major controlled substance offense.* The quantities specified in each provision refer to any mixture containing the prohibited substance.

1. 1,000 Grams or More—MCL 333.7401(2)(a)(*i*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 1,000 grams or more of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- life imprisonment or imprisonment for any term of years, or
- a fine of not more than $1,000,000.00, or

- both.

A term of imprisonment for a conviction of MCL 333.7401(2)(a)(*i*) may be made consecutive to a term of imprisonment imposed for the commission of any other felony. MCL 333.7401(3).

2. 450 Grams or More But Less Than 1,000 Grams—MCL 333.7401(2)(a)(*ii*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 450 grams or more but less than 1,000 grams of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- imprisonment for not more than 30 years, or
- a fine of not more than $500,000.00, or
- both.

A term of imprisonment for a conviction of MCL 333.7401(2)(a)(*ii*) may be made consecutive to a term of imprisonment imposed for the commission of any other felony. MCL 333.7401(3).

3. 50 Grams or More But Less Than 450 Grams—MCL 333.7401(2)(a)(*iii*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 50 grams or more but less than 450 grams of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- imprisonment for not more than 20 years, or
- a fine of not more than $250,000.00, or
- both.

A term of imprisonment for a conviction of MCL 333.7401(2)(a)(*iii*) may be made consecutive to a term of imprisonment imposed for the commission of any other felony. MCL 333.7401(3).

4. Less Than 50 Grams—MCL 333.7401(2)(a)(*iv*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver less than 50 grams of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- imprisonment for not more than 20 years, or
- a fine of not more than $25,000.00, or
- both.

A term of imprisonment for a conviction of MCL 333.7401(2)(a)(*iv*) may be made consecutive to a term of imprisonment imposed for the commission of any other felony. MCL 333.7401(3).

B. Ecstasy/MDMA or Methamphetamine—MCL 333.7401(2)(b)(*i*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver ecstasy (MCL 333.7212(1)(g)—MDMA or 3, 4-methylenedioxymethamphetamine) or methamphetamine (MCL 333.7214(c)(*ii*)) is a **felony** punishable by imprisonment for not more than 20 years, a fine of not more than $25,000.00, or both. MCL 333.7401(2)(b)(*i*).

C. Any Other Schedule 1, 2, or 3 Drugs Except Marijuana—MCL 333.7401(2)(b)(*ii*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver any other schedule 1, 2, or 3 drug except marijuana is a **felony** punishable by imprisonment for not more than 7 years, a fine of not more than $10,000.00, or both. MCL 333.7401(2)(b)(*ii*).

D. Schedule 4 Substances—MCL 333.7401(2)(c)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a schedule 4 substance is a **felony** punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000.00, or both. MCL 333.7401(2)(c).

E. Marijuana—MCL 333.7401(2)(d)

1. 45 Kilograms or More or 200 or More Plants—MCL 333.7401(2)(d)(*i*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 45 kilograms or more or 200 or more plants of marijuana is a **felony** punishable by imprisonment for not more than 15 years, a fine of not more than $10,000,000.00, or both. MCL 333.7401(2)(d)(*i*).

2. 5 Kilograms or More But Less Than 45 Kilograms or 20 Plants or More But Fewer Than 200—MCL 333.7401(2)(d)(*ii*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver 5 kilograms or more but less than 45 kilograms or 20 plants or more but fewer than 200 plants of marijuana is a **felony** punishable by imprisonment for not more than 7

years, a fine of not more than $500,000.00, or both. MCL 333.7401(2)(d)(*ii*).

3. Less Than 5 Kilograms or Fewer Than 20 Plants—MCL 333.7401(2)(d)(*iii*)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver less than 5 kilograms or fewer than 20 plants of marijuana is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $20,000.00, or both. MCL 333.7401(2)(d)(*iii*).

F. Schedule 5 Substances—MCL 333.7401(2)(e)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a schedule 5 substance is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $2,000.00, or both. MCL 333.7401(2)(e).

G. Prescription Forms or Counterfeit Prescription Forms—MCL 333.7401(2)(f)

A conviction for manufacturing, creating, delivering, or possessing with the intent to manufacture, create, or deliver a prescription form or a counterfeit prescription form is a **felony** punishable by imprisonment for not more than 7 years, a fine of not more than $5,000.00, or both. MCL 333.7401(2)(f).

7.2 §7401a and §7401b Offenses: Violations Involving Gamma-butyrolactone (GBL)

A. Delivery of a Controlled Substance or GBL Intending to Commit Criminal Sexual Conduct—MCL 333.7401a

A conviction for delivering a controlled substance or GBL (gamma-butyrolactone, MCL 333.7401b) to a person without that person's permission and with the intent of committing or attempting to commit criminal sexual conduct (CSC) against that person is a **felony** punishable by imprisonment for not more than 20 years.* MCL 333.7401a(1). Conviction under this statute does not require that a defendant be convicted of committing or attempting to commit any of the CSC offenses listed in the statute. MCL 333.7401a(3).

*See **Section 2.4** for more information.

In addition to a conviction and sentence under MCL 333.7401a, a defendant may be convicted and sentenced for any other crime arising from the same transaction that constitutes the basis for the MCL 333.7401a conviction. MCL 333.7401a(2).

B. Manufacture, Deliver, or Possess With Intent to Manufacture or Deliver GBL—MCL 333.7401b(3)(a)

*See **Section 2.5** for more information.

A conviction for the unauthorized manufacture, delivery, or possession with the intent to manufacture or deliver GBL (or any material, compound, mixture, or preparation containing GBL) is a **felony** punishable by imprisonment for not more than 7 years, a fine of not more than $5,000.00, or both.* MCL 333.7401b(3)(a).

A person authorized to manufacture, deliver, or possess GBL "for use in a commercial application and not for human consumption" is not subject to the prohibitions in MCL 333.7401b(1)(a). According to MCL 333.7401b(2):

> "It is an affirmative defense to a prosecution under this section that the person manufactured, delivered, possessed with intent to manufacture or deliver, or possessed gamma-butyrolactone or the material, compound, mixture, or preparation containing gamma-butyrolactone in accordance with this subsection."

C. Possession of GBL—MCL 333.7401b(3)(b)

*See **Section 3.2** for more information.

A conviction for the knowing or intentional possession of GBL (or any material, compound, mixture, or preparation containing GBL) is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $2,000.00, or both.* MCL 333.7401b(3)(b).

As with MCL 333.7401b(1)(a), above, a person authorized to manufacture, deliver, or possess GBL "for use in a commercial application and not for human consumption" is not subject to the prohibitions in MCL 333.7401b(1)(b).

7.3 §7401c Offenses: Own or Possess Equipment or Place Used to Manufacture Controlled Substances

MCL 333.7401c prohibits a trio of acts related to the production of controlled substances in §7401 (Section 7.1, above), counterfeit controlled substances (Section 7.5, below), or controlled substance analogues (Section 7.5, below). MCL 333.7401c does not apply to violations involving only cocaine-related substances as defined in MCL 333.7214(a)(*iv*), marijuana, or both. MCL 333.7401c(3).

A violation of any one of the three statutory prohibitions contained in MCL 333.7401c is punishable by the penalties discussed in subsection (D), below. A defendant may be charged with, convicted of, and punished for any other violation of law he or she committed while violating or attempting to violate MCL 333.7401c. MCL 333.7401c(4). In addition, a prison term imposed for

a MCL 333.7401c violation may be made consecutive to a term imposed for a violation arising out of the same transaction. MCL 333.7401c(5).

A. Own, Possess, or Use Location to Manufacture Controlled Substances—MCL 333.7401c(1)(a)

MCL 333.7401c(1)(a) penalizes a person who knows or has reason to know that a vehicle, building, structure, place, or area owned, possessed, or used by that person is being used to manufacture a controlled substance in violation of MCL 333.7401, a counterfeit controlled substance, or a controlled substance analogue in violation of MCL 333.7402.*

*See **Section 2.9** for more information.

B. Own or Possess Equipment Used to Manufacture Controlled Substances—MCL 333.7401c(1)(b)

MCL 333.7401c(1)(b) penalizes a person who knows or has reason to know that chemical or laboratory equipment he or she owns or possesses is being used for the purpose of manufacturing a controlled substance in violation of MCL 333.7401, a counterfeit controlled substance, or a controlled substance analogue in violation of MCL 333.7402.*

*See **Section 2.10** for more information.

C. Provide Equipment Intended for Use in the Manufacture of Controlled Substances—MCL 333.7401c(1)(c)

MCL 333.7401c(1)(c) penalizes a person who provides another person with chemical or laboratory equipment when he or she knows or has reason to know that the other person intends to use the equipment to manufacture a controlled substance in violation of MCL 333.7401, a counterfeit controlled substance, or a controlled substance analogue in violation of MCL 333.7402.*

*See **Section 2.11** for more information.

D. Penalties for MCL 333.7401c Offenses

1. Violation in the Presence of a Minor—MCL 333.7401c(2)(b)

If the violation of MCL 333.7401c occurs when a minor is present, the violation is a **felony** punishable by imprisonment for not more than 20 years, a fine of not more than $100,000.00, or both. MCL 333.7401c(2)(b).

2. Violation Involving Hazardous Waste—MCL 333.7401c(2)(c)

If the violation of MCL 333.7401c involves the unlawful generation, treatment, storage, or disposal of hazardous waste, the violation is a **felony** punishable by imprisonment for not more than 20 years, a fine of not more than $100,000.00, or both. MCL 333.7401c(2)(c). The trial court may, as a condition of sentence, order a defendant convicted of this violation to pay the costs of response activities.* MCL 333.7401c(6).

*See MCL 324.20101.

3. Violation Within 500 Feet of a Specified Location—MCL 333.7401c(2)(d)

If the violation of MCL 333.7401c occurs within 500 feet of a residence, business establishment, school property, or church or other house of worship, the violation is a **felony** punishable by imprisonment for not more than 20 years, a fine of not more than $100,000.00, or both. MCL 333.7401c(2)(d).

4. Violation Involves a Firearm or Other Device—MCL 333.7401c(2)(e)

If the violation of MCL 333.7401c involves the possession, placement, or use of a firearm or any other device intended to injure another person, the violation is a **felony** punishable by imprisonment for not more than 25 years, a fine of not more than $100,000.00, or both. MCL 333.7401c(2)(e).

5. Violation Involves the Manufacture of Methamphetamine—MCL 333.7401c(2)(f)

If the violation of MCL 333.7401c involves or is intended to involve the manufacture of methamphetamine (MCL 333.7214(c)(*ii*)), the violation is a **felony** punishable by imprisonment for not more than 20 years, a fine of not more than $25,000.00, or both. MCL 333.7401c(2)(f).

6. Any Other Violation—MCL 333.7401c(2)(a)

If the violation of MCL 333.7401c is not addressed by the provisions discussed above, MCL 333.7401c(2)(b)–(f), the violation is a **felony** punishable by imprisonment for not more than 10 years, a fine of not more than $100,000.00, or both. MCL 333.7401c(2)(a).

7.4 §7402 Offenses: Violations Involving Counterfeit Substances or Controlled Substance Analogues

*MCL 333.7402 does not apply to persons who manufacture or deliver substances under federal provisions governing new drugs or investigational use exemptions.

Except as authorized under the Controlled Substances Act,* MCL 333.7402(1) prohibits a person from creating, manufacturing, delivering, or possessing with the intent to deliver a counterfeit substance or a controlled substance analogue intended for human consumption.

A. Counterfeit Substance Offenses

1. Schedule 1 or 2 Narcotic Drugs, Ecstasy/MDMA, Cocaine-Related Substances, or Methamphetamine—MCL 333.7402(2)(a)

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a counterfeit substance classified in schedule 1 or 2 as a narcotic drug or MDMA/ecstasy (MCL 333.7212(1)(g)) or a cocaine-

related substance (MCL 333.7214(a)(*iv*)) or methamphetamine (MCL 333.7214(c)(*ii*)) is a **felony** punishable by imprisonment for not more than 10 years, a fine of not more than $10,000.00, or both.* MCL 333.7402(2)(a).

*See **Section 2.2** for more information.

2. Any Other Schedule 1, 2, or 3 Substances—MCL 333.7402(2)(b)

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver any other counterfeit substance classified in schedule 1, 2, or 3 and not otherwise addressed by MCL 333.7402(2)(a) is a **felony** punishable by imprisonment for not more than 5 years, a fine of not more than $5,000.00, or both. MCL 333.7402(2)(b).

3. Schedule 4 Substances—MCL 333.7402(2)(c)

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a counterfeit substance classified in schedule 4 is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $2,000.00, or both. MCL 333.7402(2)(c).

4. Schedule 5 Substances—MCL 333.7402(2)(d)

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a counterfeit substance classified in schedule 5 is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $2,000.00, or both. MCL 333.7402(2)(d).

B. Controlled Substance Analogue Offense—MCL 333.7402(2)(e)

A conviction for creating, manufacturing, delivering, or possessing with the intent to deliver a controlled substance analogue intended for human consumption is a **felony** punishable by imprisonment for not more than 15 years, a fine of not more than $250,000.00, or both.* MCL 333.7402(2)(e).

*See **Section 2.2** for more information.

7.5 §7403 Offenses: Violations Involving the Unauthorized Possession of Prohibited Items

In general, MCL 333.7403(1) prohibits a person from knowingly or intentionally possessing a controlled substance, a controlled substance analogue, or a prescription form unless the substance or form was obtained "directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by [the Controlled Substances Act]."*

*See **Section 3.1** for case law and discussion of the conduct prohibited under §7403.

Violations of MCL 333.7403 are categorized by the quantity and/or substance (or prescription form) involved in the prohibited conduct; the penalty for each

violation is specified in the same statutory provision describing the unlawful conduct.

A. §7403(2)(a) Offenses Involving Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances

*See **Section 1.4** for more information about major controlled substance offenses.

A violation of MCL 333.7403(2)(a)(*i*)–(*iv*) is a felony characterized as a major controlled substance offense.* The quantities specified in each provision refer to any mixture containing the prohibited substance.

1. 1,000 Grams or More—MCL 333.7403(2)(a)(*i*)

A conviction for knowing or intentional possession of 1,000 grams or more of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- life imprisonment or imprisonment for any term of years, or
- a fine of not more than $1,000,000.00, or
- both.

2. 450 Grams or More But Less Than 1,000 Grams—MCL 333.7403(2)(a)(*ii*)

A conviction for knowing or intentional possession of 450 grams or more but less than 1,000 grams of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- imprisonment for not more than 30 years, or
- a fine of not more than $500,000.00, or
- both.

3. 50 Grams or More But Less Than 450 Grams—MCL 333.7403(2)(a)(*iii*)

A conviction for knowing or intentional possession of 50 grams or more but less than 450 grams of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- imprisonment for not more than 20 years, or
- a fine of not more than $250,000.00, or
- both.

4. 25 Grams or More But Less Than 50 Grams—MCL 333.7403(2)(a)(*iv*)

A conviction for knowing or intentional possession of 25 grams or more but less than 50 grams of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- imprisonment for not more than 4 years, or
- a fine of not more than $25,000.00, or
- both.

5. Less Than 25 Grams—MCL 333.7403(2)(a)(*v*)

A conviction for knowing or intentional possession of less than 25 grams of a schedule 1 or 2 narcotic drug or a cocaine-related substance defined in MCL 333.7214(a)(*iv*) is a **felony** punishable by:

- imprisonment for not more than 4 years, or
- a fine of not more than $25,000.00, or
- both.

B. MCL 333.7403(2)(b) Offenses*

*See **Section 3.1** for more information.

1. Ecstasy/MDMA or Methamphetamine—MCL 333.7403(2)(b)(*i*)

A conviction for knowing or intentional possession of any amount of ecstasy (MDMA or 3, 4-methylenedioxymethamphetamine), MCL 333.7212(1)(g), or methamphetamine, MCL 333.7214(c)(*ii*), is a **felony** punishable by:

- imprisonment for not more than 10 years, or
- a fine of not more than $15,000.00, or
- both.

2. Controlled Substance Analogues or Any Other Schedule 1, 2, 3, or 4 Substances Not Otherwise Addressed in MCL 333.7403(2)(a), (b)(*i*), (c), or (d)—MCL 333.7403(2)(b)(*ii*)

A conviction for knowing or intentional possession of any amount of a controlled substance analogue or any schedule 1, 2, 3, or 4 substance for which a penalty is not otherwise prescribed in MCL 333.7403(2)(a), (b)(*i*), (c), or (d) is a **felony** punishable by:

- imprisonment for not more than 2 years, or

- a fine of not more than $2,000.00, or
- both.

C. Other MCL 333.7403 Offenses

1. LSD/Other Substances or Schedule 5 Substances—MCL 333.7403(2)(c)

*See **Section 3.1** for more information.

A conviction for knowing or intentional possession of "[l]ysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5" is a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $2,000.00, or both.* MCL 333.7403(2)(c).

2. Marijuana—MCL 333.7403(2)(d)

*See **Section 3.1** for more information.

A conviction for knowing or intentional possession of any amount of marijuana is a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $1,000.00, or both.* MCL 333.7403(2)(d).

3. Prescription Forms—MCL 333.7403(2)(e)

*See **Section 3.5** for more information.

A conviction for knowing or intentional possession of a prescription form is a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $1,000.00, or both.* MCL 333.7403(2)(e).

7.6 §7404 Offenses: Violations Involving the Unauthorized Use of a Controlled Substance or a Controlled Substance Analogue

*See **Section 3.6** for more information.

Except as otherwise authorized by the Controlled Substances Act, MCL 333.7404(1) prohibits the use of a controlled substance or a controlled substance analogue unless the substance or analogue was obtained as a direct result of a practitioner's valid prescription or order and the practitioner issued the prescription or order in the course of the practitioner's professional practice.*

A. Schedule 1 or 2 Narcotic Drugs, Ecstasy/MDMA, Cocaine-Related Substances, or Methamphetamine—MCL 333.7404(2)(a)

A conviction for use of a controlled substance classified in schedule 1 or 2, a substance described in MCL 333.7212(1)(g) (Ecstasy/MDMA or 3, 4-methylenedioxymethamphetamine), a substance described in MCL 333.7214(a)(*iv*) (cocaine-related substances), or a substance described in MCL 333.7214(c)(*ii*) (methamphetamine) is a **misdemeanor** punishable by

imprisonment for not more than 1 year, a fine of not more than $2,000.00, or both. MCL 333.7404(2)(a).

B. Controlled Substance Analogues or Any Other Schedule 1, 2, 3, or 4 Substances Not Otherwise Addressed in MCL 333.7404(2)(a), (c), or (d)—MCL 333.7404(2)(b)

A conviction for use of a controlled substance analogue or any schedule 1, 2, 3, or 4 substance not addressed in MCL 333.7404(2)(a), (c), or (d) is a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $1,000.00, or both. MCL 333.7404(2)(b).

C. LSD/Other Substances or Schedule 5 Substances—MCL 333.7404(2)(c)

A conviction for use of "[l]ysergic acid diethylamide, peyote, mescaline, dimethyltryptamine, psilocyn, psilocybin, or a controlled substance classified in schedule 5" is a **misdemeanor** punishable by imprisonment for not more than 6 months, a fine of not more than $500.00, or both. MCL 333.7404(2)(c).

D. Marijuana—MCL 333.7404(2)(d)

A conviction for use of marijuana is a **misdemeanor** punishable by imprisonment for not more than 90 days, a fine of not more than $100.00, or both. MCL 333.7404(2)(d).

7.7 §7407 Offenses: Miscellaneous Violations

In contrast with the offenses discussed thus far in Chapter 7, the conduct prohibited by MCL 333.7407 does not generally require direct involvement with an actual controlled substance. MCL 333.7407 states:

> "(1) A person shall not knowingly or intentionally:
>
> > "(a) Distribute as a licensee a controlled substance classified in schedule 1 or 2, except pursuant to an order form as required by section 7331.*
> >
> > "(b) Use in the course of the manufacture or distribution of a controlled substance a license number that is fictitious, revoked, suspended, or issued to another person.*
> >
> > "(c) Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.*

*See **Section 5.2** for more information.

*See **Section 5.3** for more information.

*See **Section 4.6** for more information.

*See **Section 5.6** for more information.

"(d) Furnish false or fraudulent material information in, or omit any material information from, an application, report, or other document required to be kept or filed under this article, or any record required to be kept by this article.*

*See **Section 4.7** for more information.

"(e) Make, distribute, or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon a drug or container or labeling thereof so as to render the drug a counterfeit substance.*

*See **Section 3.5** for more information.

"(f) Possess counterfeit prescription forms, except as an agent of government while engaged in the enforcement of this part.*

*See **Section 5.7** for more information.

"(2) A person shall not refuse or knowingly fail to make, keep, or furnish any record, notification, order form, statement, invoice, or other information required under this article."*

A violation of MCL 333.7407 is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $30,000.00, or both. MCL 333.7407(3).

7.8 §7407a Offenses: Attempted Violations

*See **Section 4.1** for more information.

MCL 333.7407a(1) prohibits a person from attempting to violate part 74 (MCL 333.7401 *et seq*.) of the Controlled Substances Act. MCL 333.7407a(2) further prohibits a person from knowingly or intentionally soliciting, inducing, or intimidating another person to violate part 74 of the Act.*

*Recruiting or inducing a minor to commit a felony. See **Section 7.13**.

"Except as otherwise provided in [MCL 333.7416],* a person who violates this section is guilty of a crime punishable by the penalty for the crime he or she attempted to commit, or by the penalty for the crime he or she solicited, induced, or intimidated another person to commit." MCL 333.7407a(3).

7.9 §7410 Offenses: Delivery/Possession With Intent Violations Involving Minors or School Property

A. Delivering Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances to Minor—MCL 333.7410(1)

MCL 333.7410(1) addresses an offender aged 18 or over who violates MCL 333.7401(2)(a)(*iv*) (less than 50 grams) by delivering or distributing a controlled substance in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine and related substances) to an

individual under the age of 18 who is at least three years younger than the deliverer or distributor.* A conviction of MCL 333.7410(1) is punishable by:

*See **Section 2.6** for more information.

- a fine of not more than $25,000.00 as authorized by MCL 333.7401(2)(a)(*iv*); or
- imprisonment for not less than 1 year and not more than twice the 20-year maximum term authorized under MCL 333.7401(2)(a)(*iv*); or
- both.

B. Delivering Gamma-butyrolactone (GBL) or Schedule 1, 2, 3, 4, or 5 Substances to Minor—MCL 333.7410(1)

MCL 333.7410(1) also provides the penalties for a person aged 18 or over who violates MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b by distributing or delivering any other controlled substance listed in schedules 1 to 5 or GBL to a person under age 18 who is at least three years younger than the distributor or deliverer.* A conviction for MCL 333.7410(1) under the circumstances described above is punishable by:

*See **Section 2.6** for more information.

- a fine authorized by MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b;* or
- imprisonment for not more than twice the term authorized under MCL 333.7401(2)(b), (c), or (d), or MCL 333.7401b; or
- both.

*The fine amounts and maximum terms of imprisonment vary according to the controlled substance involved.

C. Delivering Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances Within 1,000 Feet of School Property or a Library—MCL 333.7410(2)

MCL 333.7410(2) provides the penalty for a person aged 18 years or older who violates MCL 333.7401(2)(a)(*iv*) (less than 50 grams) by delivering or distributing a controlled substance described in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine and related substances) to another person on or within 1,000 feet of school property or a library.* A conviction for violating MCL 333.7410(2) is punishable by:

*See **Section 2.7** for more information.

*The trial court may depart from the mandatory minimum term for substantial and compelling reasons. MCL 333.7410(5). See **Section 8.2**(C).

- mandatory imprisonment for not less than 2 years* and not more than three times the 20-year maximum term authorized by MCL 333.7401(2)(a)(*iv*); and
- a discretionary fine not to exceed three times the $25,000.00 fine permitted under MCL 333.7401(2)(a)(*iv*).

D. Possession With Intent to Deliver Schedule 1 or 2 Narcotic Drugs or Cocaine-Related Substances Within 1,000 Feet of School Property or a Library—MCL 333.7410(3)

*See **Section 2.7** for more information.

MCL 333.7410(3) provides the penalty for a person aged 18 years or older who violates MCL 333.7401(2)(a)(*iv*) (less than 50 grams) by possessing with the intent to deliver a controlled substance described in schedule 1 or 2 that is a narcotic drug or a drug described in MCL 333.7214(a)(*iv*) (cocaine and related substances) on or within 1,000 feet of school property or a library.* A conviction for violating MCL 333.7410(3) is punishable by:

*The trial court may depart from the mandatory minimum term for substantial and compelling reasons. MCL 333.7410(5). See **Section 8.2**(C).

- mandatory imprisonment for not less than 2 years* and not more than two times the maximum term of 20 years authorized under MCL 333.7401(2)(a)(*iv*); and
- a discretionary fine not to exceed three times the $25,000.00 fine permitted under MCL 333.7401(2)(a)(*iv*).

E. Possession of GBL or Other Controlled Substances Within 1,000 Feet of School Property or a Library—MCL 333.7410(4)

*See **Section 3.3** for more information.

MCL 333.7410(4) provides the penalty for persons aged 18 years of age or older who violate MCL 333.7401b or 333.7403(2)(a)(*v*), (b), (c), or (d), by possessing GBL or a controlled substance within 1,000 feet of school property or a library.* A conviction for violating MCL 333.7410(4) is punishable by:

*The terms of imprisonment and the amounts of the fines vary with the controlled substance involved in each of these statutes.

- mandatory imprisonment for not more than two times the term of imprisonment authorized by MCL 333.7401b or MCL 333.7403(2)(a)(*v*), (b), (c), or (d),* or
- a fine of not more than twice the amount authorized by MCL 333.7401b or 333.7403(2)(a)(*v*), (b), (c), or (d), or
- both.

F. Distribution of Marijuana Without Remuneration—MCL 333.7410(7)

A person who distributes marijuana without remuneration (and not in furtherance of commercial distribution) and does not violate MCL 333.7410(1) is guilty of a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $1,000.00, or both.* MCL 333.7410(7). MCL 333.7410(7) does not apply to distribution in accordance with federal or state law.

*See **Section 2.12** for more information.

7.10 §7410a Offenses: Delivery/Possession With Intent Violations Involving Public or Private Parks

MCL 333.7410a provides an additional penalty for a person aged 18 years of age or over who violates certain provisions of the Controlled Substances Act when the unlawful conduct occurs in a public or private park or within 1,000 feet of a public or private park. Each violation of MCL 333.7410a is subject to the same penalty regardless of the substance involved in the violation. The 2-year term of imprisonment authorized for a violation of MCL 333.7410a(1) is in addition to any term of imprisonment authorized for the unlawful conduct serving as the basis for the §7410a conviction. MCL 333.7410a(2).

A. Delivery to a Minor—MCL 333.7410a(1)(a)

Delivery of a controlled substance or GBL to a minor in violation of MCL 333.7401(2)(a)(*iv*) or (2)(b)(*i*) or MCL 333.7401b when the minor is in or within 1,000 feet of a public or private park constitutes a violation of MCL 333.7410a(1)(a) punishable by imprisonment for not more than 2 years.*

*See **Section 2.8** for more information.

B. Possession With Intent to Deliver to a Minor—MCL 333.7410a(1)(b)

Possession with intent to deliver a controlled substance or GBL to a minor in violation of MCL 333.7401(2)(a)(*iv*) or (2)(b)(*i*) or MCL 333.7401b when the minor is in or within 1,000 feet of a public or private park constitutes a violation of MCL 333.7410a(1)(b) punishable by imprisonment for not more than 2 years.*

*See **Section 2.8** for more information.

C. Possession—MCL 333.7410a(1)(c)

Possession of a controlled substance or GBL in violation of MCL 333.7403(2)(a)(*v*), (b), (c), or (d) or MCL 333.7401b in a public or private park constitutes a violation of MCL 333.7410a(1)(c) punishable by imprisonment for not more than 2 years.*

*See **Section 3.4** for more information.

D. Own or Possess Equipment or a Place Used to Manufacture a Controlled Substance—MCL 333.7410a(1)(d)

*See **Sections 2.9**, **2.10**, and **2.11** for more information.

A violation of MCL 333.7401c (owning or possessing a building, a vehicle, equipment, etc. used to manufacture a controlled substance) within 1,000 feet of a public or private park constitutes a violation of MCL 333.7410a(1)(d) punishable by imprisonment for not more than 2 years.*

7.11 §7453 and §7455 Offenses: Violations Involving Drug Paraphernalia

*See **Section 4.8** for more information.

MCL 333.7453(1) prohibits selling drug paraphernalia, or offering it for sale, "knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance."*

A violation of MCL 333.7453 is a **misdemeanor** punishable by imprisonment for not more than 90 days, a fine of not more than $5,000.00, or both. MCL 333.7455(1).

*See **Section 4.9** for more information.

A person 18 years of age or older who violates MCL 333.7453 by selling or offering to sell drug paraphernalia to a minor is guilty of a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $7,500.00, or both.* MCL 333.7455(2).

7.12 §7413: Subsequent Controlled Substance Violations

MCL 333.7413 provides the penalties possible for a person convicted of a second or subsequent offense under article 7 of the Public Health Code, MCL 333.7101 to 333.7545 (controlled substances offenses). Subsequent controlled substance violations punishable under §7413 are subject to both mandatory and discretionary sentence enhancements. A comprehensive discussion of §7413 violations is found in Section 8.6 and Section 8.7.

7.13 §7416: Recruiting or Inducing a Minor to Commit a Controlled Substance Felony

*See **Section 4.4** for more information.

MCL 333.7416(1)(a) provides the penalty for a person aged 17 years or older who has recruited, induced, solicited, or coerced a minor less than 17 years of age to commit or attempt to commit a controlled substance offense that would be a felony if committed by an adult.* Offenders convicted of violating MCL 333.7416(1) may be fined up to the amount authorized for an adult convicted

of the underlying offense. In addition to any fine imposed, offenders convicted under MCL 333.7416(1) *must* be sentenced as follows:

- to a mandatory minimum term* not less than one-half the maximum term of imprisonment authorized for an adult convicted of the crime;
- to a maximum term of imprisonment that does not exceed the maximum term authorized by statute for an adult convicted of the crime;
- an offender sentenced under MCL 333.7416(1) is not eligible for probation and the sentence received must not be delayed or suspended. MCL 333.7416(2).

> **Note:** MCL 333.7416(1) does not apply to a violation of MCL 333.7401(2)(d) that involves the manufacture, delivery, possession, etc. of marijuana. MCL 333.7416(4).

*The court may depart from the minimum term for substantial and compelling reasons. MCL 333.7416(3). See **Section 8.2**(C).

7.14 Manufacture, Distribution, and Dispensing Offenses

Licensed manufacturers and distributors are subject to statutory requirements specific to the conduct of their businesses, occupations, and professional practices. The penalties provided for these statutory violations are discussed below.

A. Marking or Imprinting Prescription Drugs

MCL 333.7302a(1) states that a prescription drug manufactured or distributed in Michigan must be "clearly and prominently marked or imprinted with an individual symbol, number, company name, words, letters, marking, national drug code, or a combination of any of the foregoing that identifies the prescription drug and the manufacturer or distributor of the drug." The requirement that a prescription drug be clearly marked or imprinted does not apply to drugs compounded by licensed pharmacists.* MCL 333.7302a(5).

*See **Section 4.10** for more information.

A knowing or intentional violation of MCL 333.7302a is a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $25,000.00, or both. MCL 333.7302a(8).

B. Inventories and Annual Reports

An individual licensed to manufacture, distribute, prescribe, or dispense controlled substances under the Controlled Substances Act must "keep and maintain inventories in conformance with the record-keeping and inventory requirements of federal law and with any additional rules the administrator promulgates, unless exempted by those rules." MCL 333.7321(1). A person licensed under the Act to manufacture, distribute, prescribe, or dispense

*See **Section 6.11** for more information.

controlled substances must conduct an annual inventory of all schedule 2, 3, 4, and 5 substances in that person's possession and report this information to the administrator as required by MCL 333.7321(2).* A violation of MCL 333.7321 may be punished by a **civil fine** of not more than $25,000.00 in a circuit court proceeding. MCL 333.7321(2).

7.15 Offenses Involving Ephedrine

A. Possession of More Than 12 Grams of Ephedrine

*See **Section 6.9** for more information.

MCL 333.17766c(1) prohibits the unauthorized possession of more than 12 grams of ephedrine or pseudoephedrine, alone or in a mixture.* A violation of MCL 333.17766c(1) is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $2,000.00, or both. MCL 333.17766c(2).

B. Retail Sale Violations

*See **Section 6.11** for more information.

MCL 333.17766f prohibits specific conduct related to the authorized retail sale of any substance containing a detectable quantity of ephedrine or pseudoephedrine (or a salt or optical isomer or salt of an optical isomer of ephedrine or pseudoephedrine).* According to MCL 333.17766f(1), a person authorized to sell ephedrine or pseudoephedrine shall not knowingly:

*Compliance with an employer's written policy to prevent sales to minors is an affirmative defense to a citation issued under this subsection. MCL 333.17766f (7).

> "(a) Sell any product described under this subsection to an individual under 18 years of age.*
>
> "(b) Sell in a single over-the-counter sale more than 2 packages, or 48 tablets or capsules, of any product described under this subsection to any individual.
>
> "(c) Sell in a single over-the-counter sale more than 2 personal convenience packages containing 2 tablets or capsules each of any product described under this subsection to any individual."

Persons authorized to offer products containing ephedrine or pseudoephedrine must also post a sign near the point-of-sale that complies with the requirements listed in MCL 333.17766f(4)–(6).

A violation of MCL 333.17766f is a state **civil infraction** for which the violator may be ordered to pay a **civil fine** of not more than $50.00 for each violation. MCL 333.17766f(3).

> **Note:** Some pediatric products, products in liquid form containing an active ingredient in addition to ephedrine, products formulated so that the active ingredient cannot be converted into methamphetamine, and products dispensed pursuant to a prescription are not subject to the provisions of MCL 333.17766f. MCL 333.17766f(2)(a)–(d).

C. Dispensing or Selling Ephedrine to Minors

MCL 333.7339(1) prohibits a person from dispensing, selling, or otherwise giving an individual under the age of 18 a food product or dietary supplement containing ephedrine, as the product or supplement is defined in MCL 333.7220(1)(c)(*ii*).* MCL 333.7339(1) does not apply to physicians or pharmacists who prescribe, dispense, administer, or deliver such a product or supplement to a person under the age of 18, to a parent or legal guardian who delivers the product to a minor, or to a person authorized by the minor's parent or guardian to deliver the product to the minor. *Id*.

*See **Section 2.14** for more information.

A violation of MCL 333.7339(1) is a **misdemeanor** punishable by imprisonment for not more than 93 days, a fine of not more than $100.00, or both. MCL 333.7339(3).

D. Advertising Products Containing Ephedrine

MCL 333.7339(2) prohibits a person, in the course of selling or distributing a product or dietary supplement containing ephedrine, from "advertis[ing] or represent[ing] in any manner that the product causes euphoria, ecstasy, a 'buzz' or 'high,' or an altered mental state, heightens sexual performance, or because it contains ephedrine alkaloids, increases muscle mass."*

*See **Section 4.11** for more information.

A violation of MCL 333.7339(2) is a **misdemeanor** punishable by imprisonment for not more than 93 days, a fine of not more than $100.00, or both. MCL 333.7339(3).

E. Furnishing Ephedrine by Mail, Internet, Telephone, or Other Electronic Means

MCL 333.7340(1) prohibits an unauthorized person from using the mail, internet, telephone, or other electronic means to sell, distribute, deliver, or otherwise furnish to another individual any compound, mixture, or preparation containing a detectable quantity of ephedrine or pseudoephedrine (or any related salt or optical isomer of those substances).* A violation of MCL 333.7340(1) is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $5,000.00, or both. MCL 333.7340(3).

*See **Section 2.13** for more information.

7.16 Imitation Controlled Substance Offenses

Unless an individual is authorized to use an imitation controlled substance "as a placebo for legitimate medical, therapeutic, or research purposes," MCL 333.7341(3) prohibits the manufacture, distribution, or possession with intent to distribute an imitation controlled substance.* MCL 333.7341(7). A violation of MCL 333.7341(3) is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $10,000.00, or both. MCL 333.7341(8).

*See **Section 2.3** for more information.

*See **Section 3.7** for more information.

Except at the direction of a person authorized under MCL 333.7341(7) to use placebos for a legitimate purpose, MCL 333.7341(4) prohibits a person from using, or possessing with the intent to use, an imitation controlled substance.* A violation of MCL 333.7341(4) is punishable by a **civil fine** of not more than $100.00 and costs. *Id*. A second or subsequent violation is a **misdemeanor** punishable by imprisonment for not more than 90 days, a fine of not more than $100.00, or both. *Id*.

*See **Section 4.12** for more information.

MCL 333.7341(6) prohibits a person from placing—by electronic or print media or posting in a public place—any advertisement the person "know[s] or ha[s] reason to know that the purpose of the advertisement or solicitation is to promote the distribution of an imitation controlled substance."* A violation of MCL 333.7341(6) is a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $5,000.00, or both. *Id*.

7.17 §7405 Offenses

A. Violations Involving Practitioners and Licensees

*These offenses are discussed more fully in **Sections 5.1**, **5.4**, and **5.5**.

MCL 333.7405 prohibits practitioners and licensees from engaging in certain conduct related to some of the general requirements of individuals licensed under the Controlled Substances Act and the scope of conduct authorized by licensure under the Act.* A violation of MCL 333.7405(1)(a)–(e) may be punished in a circuit court proceeding by a **civil fine** of not more than $25,000.00. MCL 333.7406.

A violation of MCL 333.7405 prosecuted by a criminal indictment is subject to additional penalties. According to MCL 333.7406:

> "[I]f the violation [of MCL 333.7405] is prosecuted by a criminal indictment alleging that the violation was committed knowingly or intentionally, and the trier of fact specifically finds that the violation was committed knowingly or intentionally, the person is guilty of a **misdemeanor**, punishable by imprisonment for not more than 2 years, or a fine of not more than $25,000.00, or both." MCL 333.7406 (emphasis added).

B. Keeping a Drug House

*See **Section 4.5** for more information.

The prohibited conduct in MCL 333.7405(1)(d) is not limited to licensees and practitioners; rather, MCL 333.7405(1)(d) prohibits *any* individual from knowingly engaging in conduct generally described as "keeping a drug house."*

A violation of MCL 333.7405(1)(d) may be punished in a circuit court proceeding by a **civil fine** of not more than $25,000.00. MCL 333.7406. However, if the violation of MCL 333.7405(1)(d) is prosecuted by a criminal indictment and the trier of fact finds that the person knowingly or intentionally

committed the violation, additional penalties apply. When prosecuted by a criminal indictment, a knowing or intentional violation of MCL 333.7405(1)(d) is a **misdemeanor** punishable by imprisonment for not more than 2 years, a fine of not more than $25,000.00, or both. MCL 333.7406.

7.18 Violations Involving Misleading Labels and Misbranding, Substituting, or Improperly Mixing Drugs

A. Misleading Drug or Device Labels

MCL 333.17764(1) prohibits conduct involving the sale or manufacture of a drug or device labeled in a manner "that is misleading as to the contents, uses, or purposes of the drug or device."* A violation of MCL 333.17764(1) is a **misdemeanor** offense. *Id*.

*See **Section 6.12** for more information.

B. Misbranding/Adulterating/Removing/Substituting a Drug

MCL 333.17764. MCL 333.17764(2)(a) prohibits an individual from knowingly or recklessly engaging in conduct involving the adulteration, misbranding, removal, or substitution of a drug or device with the intention that the drug or device be used. MCL 333.17764(2)(b) prohibits an individual from knowingly or recklessly engaging in conduct involving the sale, possession for sale, or manufacture for sale of an adulterated or misbranded drug.*

*See **Section 6.13** for more information.

MCL 750.16. MCL 750.16 is substantially similar to MCL 333.17764. MCL 750.16(1)(a) penalizes a person who knowingly or recklessly "adulterates, misbrands, removes, or substitutes a drug or medicine so as to render that drug or medicine injurious to health." MCL 750.16(1)(b) penalizes a person who knowingly or recklessly "sells, offers for sale, possesses for sale, causes to be sold, or manufactures for sale a drug or medicine that has been adulterated, misbranded, removed, or substituted so as to render it injurious to health."*

*See **Section 6.14** for more information.

1. Violation Results in Personal Injury

MCL 333.17764. A violation of MCL 333.17764(2) resulting in personal injury is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $1,000.00, or both. MCL 333.17764(4).

MCL 750.16. A violation of MCL 750.16(1) resulting in personal injury is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $4,000.00, or both. MCL 750.16(2).

2. Violation Results in Serious Impairment

MCL 333.17764. A violation of MCL 333.17764(2) resulting in serious impairment of a body function* is a **felony** punishable by imprisonment

*As defined in MCL 257.58c.

for not more than 5 years, a fine of not more than $5,000.00, or both. MCL 333.17764(5).

*As defined in MCL 257.58c.

MCL 750.16. A violation of MCL 750.16(1) resulting in serious impairment of a body function* is a **felony** punishable by imprisonment for not more than 5 years, a fine of not more than $5,000.00, or both. MCL 750.16(3).

3. Violation Results in Death

MCL 333.17764. A violation of MCL 333.17764(2) resulting in death is a **felony** punishable by imprisonment for not more than 15 years, a fine of not more than $20,000.00, or both. MCL 333.17764(6).

MCL 750.16. A violation of MCL 750.16(1) resulting in death is a **felony** punishable by imprisonment for not more than 15 years, a fine of not more than $20,000.00, or both.

4. Violation Involved the Intent to Kill or Cause Serious Impairment to Two or More Persons

MCL 333.17764. Where an individual violates MCL 333.17764(2) with the intent to kill two or more persons or with the intent to cause two or more persons to suffer serious impairment of a body function, and the violation results in death, the individual is guilty of a **felony** punishable by life imprisonment without the possibility of parole *and* a fine of not more than $40,000.00. MCL 333.17764(7). It is not a defense to a violation of MCL 333.17764(7) that the violator did not intend to kill a specific person or did not intend to seriously impair two or more specific persons. *Id*.

MCL 750.16. Where an offender's violation of MCL 750.16(1) results in death and the offender had the intent to seriously impair or kill two or more persons, the offender is guilty of a **felony** punishable by life imprisonment without the possibility of parole, a fine of not more than $40,000.00, or both. MCL 750.16(5). It is not a defense to a violation of MCL 750.16(5) that the offender did not intend to kill a specific individual or did not intend to seriously impair two or more specific individuals. *Id*.

5. Violation Does Not Involve Injury or Death

MCL 333.17764. A violation of MCL 333.17764(2) that does not result in personal injury, serious impairment of a body function, or death is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $1,000.00, or both. MCL 333.17764(3).

MCL 750.16. A violation of MCL 750.16(1) that does not result in personal injury, serious impairment, or death is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $1,000.00, or both. MCL 750.16(1).

A person charged with violating MCL 333.17764(2) may be charged with, convicted of, and sentenced for any other violation the person committed at

the time he or she violated MCL 333.17764(2). MCL 333.17764(8). A person charged with violating MCL 750.16(1) may also be convicted and sentenced for any other violation committed by the person while violating MCL 750.16(1). MCL 750.16(7).

C. Mixing/Coloring/Staining/Powdering a Drug

MCL 750.18(1) prohibits a person from knowingly or recklessly mixing, coloring, staining, or powdering (or ordering or permitting another person to mix, color, stain, or powder) a drug or medicine with an ingredient that "injuriously affect[s] the quality or potency of the drug or medicine." MCL 750.18(2) prohibits a person from selling, possessing for sale, or manufacturing a drug or medicine that has been mixed, colored, stained, or powdered in a way that has injuriously affected its quality or potency.*

*See **Section 6.15** for more information.

1. Violation Results in Personal Injury

A violation of MCL 750.18(1) or (2) that results in personal injury is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $4,000.00, or both. MCL 750.18(4).

2. Violation Results in Serious Impairment

A violation of MCL 750.18(1) or (2) that results in serious impairment of a body function* is a **felony** punishable by imprisonment for not more than 5 years, a fine of not more than $5,000.00, or both. MCL 750.18(5).

*As defined in MCL 257.58c.

3. Violation Results in Death

A violation of MCL 750.18(1) or (2) that results in death is a **felony** punishable by imprisonment for not more than 15 years, a fine of not more than $20,000.00, or both. MCL 750.18(6).

4. Violation Involved the Intent to Kill or Cause Serious Impairment to Two or More Persons

Where an individual violates MCL 750.18(1) or (2) with the intent to kill two or more persons or with the intent to cause two or more persons to suffer serious impairment of a body function, and the violation results in death, the individual is guilty of a **felony** punishable by life imprisonment without the possibility of parole, a fine of not more than $40,000.00, or both. MCL 750.18(7). It is no defense to a charge under MCL 750.18(1) or (2) that the violator did not intend to kill a specific person or did not intend to seriously impair two or more specific persons. MCL 750.18(7).

5. Violation Does Not Involve Injury or Death

A violation of MCL 750.18(1) or (2) that does not result in death, personal injury, or serious impairment is a **felony** punishable by imprisonment for not more than 2 years, a fine of not more than $1,000.00, or both. MCL 750.18(3).

A person charged with violating MCL 750.18(1) or (2) may also be charged with, convicted of, and sentenced for any other violation committed by the person while violating MCL 750.18(1) or (2). MCL 750.18(9).

7.19 MCL 333.17766 Offenses: Violations Involving Fraud and Prescription Drugs

MCL 333.17766 prohibits a variety of conduct related to prescription drugs or the unlawful use of prescription drugs that were properly obtained. A violation of any provision of MCL 333.17766 is a **misdemeanor** offense. Exceptions to specific portions of MCL 333.17766 concerning prescription drugs at facilities operated by the Department of Corrections are found in MCL 333.17766d.

*See **Section 6.7** for more information.

Giving a false name to obtain a prescription drug. MCL 333.17766(a) prohibits a person from obtaining or attempting to obtain a prescription drug by using a false name.*

*See **Section 6.7** for more information.

Falsely representing self as a person authorized to obtain a prescription drug. MCL 333.17766(b) prohibits a person from obtaining or attempting to obtain a prescription drug by falsely representing him- or herself as a person authorized to obtain prescription drugs or as a person acting on behalf of an authorized person.*

*See **Section 6.8** for more information.

Forging/possessing a forged prescription/obtaining a prescription drug using a forged prescription. MCL 333.17766(c) prohibits a person from counterfeiting, altering, or forging a prescription. MCL 333.17766(d) prohibits the possession of a counterfeit, altered, or forged prescription. MCL 333.17766(e) prohibits a person from obtaining, possessing, or attempting to obtain a prescription drug using a counterfeit, altered, or forged prescription, or for other than a legitimate therapeutic purpose.*

*See **Section 6.8** for more information.

Unlawful conduct involving a prescription drug after it was properly dispensed. MCL 333.17766(f) prohibits a person from possessing or controlling a prescription drug for the purpose of selling, reselling, or otherwise distributing the drug after the drug has left the pharmacist's control.*

*See **Section 6.8** for more information.

Unlawful conduct involving damaged drugs unfit for use. MCL 333.17766(g) prohibits a person from possessing or controlling a drug for the purpose of selling, reselling, or otherwise distributing it when the drug is unfit for human or animal use as a result of heat, smoke, fire, water, or other damage.*

*See **Section 6.8** for more information.

Unlawful preparation or sale of a prescription drug. MCL 333.17766(h) prohibits a person from preparing a prescription drug unless delegated by a pharmacist. MCL 333.17766(i) prohibits the unauthorized sale of a drug in bulk or in an open package at auction.*

7.20 Consumption or Possession of a Controlled Substance at a Hotel or Social Gathering

A person shall not "[k]nowingly allow any individual to consume or possess a controlled substance at a social gathering on or within that premises, residence, or other real property" unless the consumption or possession of the substance is pursuant to a lawful prescription.* MCL 750.141a(2)(b) and (3). A violation of MCL 750.141a(2)(b) is a **misdemeanor** punishable by imprisonment for not more than 30 days, a fine of not more than $1,000.00, or both. MCL 750.141a(4). A second or subsequent violation is a **misdemeanor** punishable by imprisonment for not more than 90 days, a fine of not more than $1,000.00, or both. MCL 750.141a(5).

*See **Section 6.10** for more information.

MCL 750.411g(2)(a) prohibits a person or group from using or possessing a controlled substance in violation of MCL 333.7403 or MCL 333.7404 (or a substantially similar local ordinance) on the premises of a hotel or a bed and breakfast.* MCL 750.411g(2)(a) also prohibits an individual or group from leasing a hotel room or bed and breakfast room when the individual or group has reason to know that conduct in violation of MCL 333.7403 or MCL 333.7404 will occur on the premises. A violation of MCL 750.411g(2)(a) is a **misdemeanor** punishable by imprisonment for not more than 90 days, a fine of not more than $500.00, community service, or a combination of any of these penalties. MCL 750.411g(2).

*As defined in MCL 333.12901 and MCL 427.1, respectively.

7.21 Conspiracy

MCL 750.157a(a) provides the penalty for a person who conspires with at least one other person to commit an act prohibited by law when commission of the prohibited act is punishable by at least 1 year of imprisonment.* An offender convicted under MCL 750.157a(a) must be sentenced to a term of imprisonment equal to the term authorized for conviction of the offense the offender conspired to commit. In addition to a term of imprisonment, the court may impose a $10,000.00 fine on an offender convicted of conspiracy.

*See **Section 6.3** for more information.

7.22 Delivery of a Schedule 1 or 2 Controlled Substance Causing Death

MCL 750.317a penalizes the delivery of a schedule 1 or 2 controlled substance—other than marijuana—to a person whose death is caused by his or her consumption of the controlled substance.* A conviction for violating MCL 750.317a is a **felony** punishable by imprisonment for life or any term of years.

*See **Section 6.1** for more information.

7.23 Offenses Involving Inhalants

A. "Huffing"

*See **Section 6.5** for more information.

Except for the inhalation of anesthesia for medical or dental purposes, MCL 752.272 prohibits a person from "intentional[ly] smell[ing] or inhal[ing] the fumes of any chemical agent or intentionally drink[ing], eat[ing] or otherwise introduc[ing] any chemical agent into his respiratory or circulatory system" for the purpose of becoming intoxicated.* A violation of MCL 752.272 is a **misdemeanor** punishable by imprisonment for not more than 93 days, a fine of not more than $100.00, or both. MCL 752.273.

B. Nitrous Oxide

*See **Section 6.6** for more information.

Unless authorized, a person is prohibited from selling or otherwise distributing a device containing any quantity of nitrous oxide or a device to dispense nitrous oxide when the nitrous oxide will be used to cause intoxication.* MCL 752.272a(1).

A first violation of MCL 752.272a(1) is a **misdemeanor** punishable by imprisonment for not more than 93 days, a fine of not more than $100.00, or both. MCL 752.272a(2)(a).

*A prior conviction is a conviction of MCL 752.272a (1) or a substantially corresponding federal law or law of another state. See MCL 752.272a(3).

A second conviction for violating MCL 752.272a(1)* is a **misdemeanor** punishable by imprisonment for not more than 1 year, a fine of not more than $500.00, or both. MCL 752.272a(2)(b).

A third or subsequent conviction for violating MCL 752.272a(1) is a **felony** punishable by imprisonment for not more than 4 years, a fine of not more than $2,000.00, or both. MCL 752.272a(2)(c).

7.24 Providing Prisoners With Controlled Substances

A. Prison

*See **Section 6.4** for more information.

Unless specifically authorized under MCL 800.282, a person is prohibited from directly or indirectly supplying a prisoner with "any alcoholic liquor, prescription drug, poison, or controlled substance" when the prisoner is in a correctional facility or, if the person knows or has reason to know the individual is a prisoner, when the prisoner is anywhere outside of a correctional facility. MCL 800.281(1)–(2).* Unless otherwise authorized, MCL 800.281(3) prohibits a person from simply bringing "any alcoholic liquor, prescription drug, poison, or controlled substance into or onto a correctional facility."

Where the possession or delivery of the prohibited substance is not punishable by more than 5 years of imprisonment under part 74 of the Controlled

Substances Act (specifically, MCL 333.7401 to 333.7415), a violation of MCL 800.281 is a **felony** punishable by imprisonment for not more than 5 years, a fine of not more than $1,000.00, or both. MCL 800.285(1). Where the delivery or possession of the controlled substance is a felony punishable under part 74 of the Controlled Substances Act by more than 5 years of imprisonment, the person who violates MCL 800.281 by supplying a prisoner with the prohibited substance cannot be prosecuted under MCL 800.281. MCL 800.285(2).

B. Jail

MCL 801.263(1) prohibits person from bringing any controlled substance into a jail or onto any grounds used for jail purposes. MCL 801.263(1) also prohibits a person from furnishing a controlled substance to a prisoner in jail or disposing of a controlled substance in a way that permits a prisoner in jail to access the controlled substance. MCL 801.263(2) prohibits a prisoner from possessing or having control of any controlled substance not properly obtained from a licensed physician under MCL 801.264(1). A violation of MCL 801.263(1) or (2) is a **felony** punishable by imprisonment for not more than 5 years, a fine of not more than $1,000.00, or both. MCL 801.265(1).

If the violation of MCL 801.263 involves a violation of part 74 of the Controlled Substances Act punishable by imprisonment for more than 5 years, the offender shall not be prosecuted for the conduct under MCL 801.263. MCL 801.265(2).

7.25 §7408a: Licensing (Vehicle Operation) Sanctions

Except where a defendant is sentenced to life imprisonment or to a minimum term of imprisonment in excess of 1 year, vehicle operation and licensing sanctions apply to all violations of the Controlled Substances Act. MCL 333.7408a(11). Except as indicated above, these sanctions are part of any sentence or juvenile disposition imposed for a violation, attempted violation, or conspiracy to violate the Controlled Substances Act or a local ordinance that prohibits the same conduct prohibited by the Act. MCL 333.7408a(1). In determining the proper sanctions to impose, the court must consider the prior convictions appearing on a defendant's Michigan driving record and criminal history record, unless the conviction was obtained in violation of the defendant's constitutional rights. *Id*.

A. No Prior Convictions* Within 7 Years

*"Prior conviction" is defined in MCL 333.7408a (14)(g).

In addition to any other penalty or sanction imposed, a defendant convicted of a controlled substances offense who has no prior convictions within the 7 years preceding the sentencing offense is subject to the following sanctions:

- The court must order the Secretary of State to suspend the defendant's operator's or chauffer's license for 6 months. MCL 333.7408a(1)(a).

*See MCL 333.7408a(6).

- If, under MCL 333.7408a(8), there are compelling circumstances to warrant it, and if the defendant is otherwise eligible for a license, MCL 333.7408a(9), the court may order the Secretary of State to issue a restricted license* to the defendant. MCL 333.7408a(1)(a).

- The restricted license may be issued for all or a portion of the defendant's 6-month suspension, but it may not issue during the first 30 days of the suspension period. MCL 333.7408a(1)(a).

- A restricted license may not be issued to a defendant that would permit that defendant to operate a commercial vehicle hauling hazardous material. MCL 333.7408a(7).

B. One or More Prior Convictions Within 7 Years

In addition to any other penalty or sanction imposed, a defendant convicted of a controlled substances offense who has 1 or more prior convictions within the 7 years preceding the sentencing offense is subject to the following sanctions:

- The court must order the Secretary of State to suspend the defendant's operator's or chauffer's license for 1 year. MCL 333.7408a(1)(b).

*See MCL 333.7408a(6).

- If, under MCL 333.7408a(8), there are compelling circumstances to warrant it, and if the defendant is otherwise eligible for a license, MCL 333.7408a(9), the court may order the Secretary of State to issue a restricted license* to the defendant. MCL 333.7408a(1)(b).

- The restricted license may be issued for all or a portion of the defendant's 1-year suspension, but it may not issue during the first 60 days of the suspension period. MCL 333.7408a(1)(b).

- A restricted license may not be issued to a defendant that would permit that defendant to operate a commercial vehicle hauling hazardous material. MCL 333.7408a(7).

A defendant subject to licensing sanctions under MCL 333.7408a must immediately surrender his or her operator's or chauffer's license, and the court must immediately destroy the defendant's license and forward an abstract of the conviction and the sanctions ordered to the Secretary of State. MCL 333.7408a(2). If the defendant appeals the judgment to the circuit court, the court may issue an ex parte order to the Secretary of State to stay the license suspension. MCL 333.7408a(2).

As part of a defendant's sentence or juvenile disposition and in addition to the penalties and sanctions already imposed, the court may order the defendant to undergo an assessment to determine whether he or she is likely to benefit from rehabilitation services. MCL 333.7408a(3). The defendant must pay the costs of the assessment. *Id*.

If a defendant is otherwise eligible for probation, MCL 333.7408a(5), the court may also order the defendant to perform not more than 90 days of community service, or the court may order the defendant to participate in and successfully complete 1 or more rehabilitation programs. MCL 333.7408a(4)(a)–(b). A defendant may be ordered to perform community service *and* to successfully complete 1 or more rehabilitation programs. *Id*. The defendant must pay the costs of any rehabilitation program and the supervision costs incurred for his or her performance of community service. *Id*.

Where a defendant is sentenced to life imprisonment or to a minimum term of imprisonment that exceeds 1 year, the court shall not order the Secretary of State to suspend the defendant's license. MCL 333.7408a(11). In such cases, the court must transmit a record of its orders to the Secretary of State and must provide the State Police Department with a record of the penalties imposed on the defendant, including any licensing sanction or term of imprisonment. MCL 333.7408a(12).

The following table, "Reporting Circuit Court Felony Convictions to the Department of State,"* contains a detailed list of offenses and their corresponding license actions. The table may also be accessed at http://www.courts.michigan.gov/scao/resources/other/CircuitCourtConvictionsChart.pdf.

*Revised May 5, 2008.

REPORTING CIRCUIT COURT FELONY CONVICTIONS TO DEPARTMENT OF STATE

Revised May 12, 2008

With the exceptions noted, every offense is reported at time of plea or finding of guilt using the plea date in the adjudicated field on the abstract. For convictions reported only at sentencing, Felony Auto Used (1430 & 1440) and Drug Crimes (1140 & 9200), use the sentencing date in the adjudicated field on the abstract.

MCL	PACC	SOS Offense Code	Description	Abstract at Adjudication, Sentencing, or Both
257.257	257.257 (includes 257.2572 2nd and 257.2573 3rd notices)	3600	Alter/Forge/Falsify Vehicle Document of License Plate (alter title certificate, registration, plate, or temporary permit)	Adjudication
257.601b(3)	257.601B3	1802	Failure to Use Due Care and Caution Causing Death of a Construction Worker	Adjudication
257.601c(2)	257.601C3	1804	Failure to Use Care Causing Death of Person Operating Implement of Husbandry	Adjudication
257.602a(5)	257.602A5	1706	1st Degree Fleeing & Eluding	Adjudication
257.602a(4)	257.602A4-A	1707	2nd Degree Fleeing & Eluding	Adjudication
257.602a(3)	257.602A3-A	1708	3rd Degree Fleeing & Eluding	Adjudication
257.602a(2)	257.602A2	1709	4th Degree Fleeing & Eluding	Adjudication
257.617(2)	257.617	1600	Fail to Stop or Identify after Personal Injury Accident Causing Serious Impairment	Adjudication
257.617(3)	257.6173	1605	Fail to Stop or Identify after Personal Injury Accident Causing Death	Adjudication
257.625(1)	257.6251-A (includes 257.6256B 2nd and 257.6256D 3rd offense notices)	1000	Operating Under Influence of Liquor (OUIL) *Violation date before 9/30/03.*	Both
		1010	Unlawful Blood Alcohol Content (UBAC) *Violation date before 9/30/03.*	
		1020	Combined OUIL/UBAC *Violation date before 9/30/03.*	
		1100	OUI by Controlled Substance (OUID) *Violation date before 9/30/03.*	
		1110	Combined OUIL/OUID *Violation date before 9/30/03.*	
		1025	Operating While Intoxicated **Violation date on or after 9/30/03.**	
257.625(3)	257.6253-A	1200	Operating While Visibly Impaired (OWVI)	Both
		1210	OWVI by Controlled Substance (OWID)	Both
		1220	Combined OWVI/OWID	Both

MCL	PACC	SOS Offense Code	Description	Abstract at Adjudication, Sentencing, or Both
257.625(4)	257.6254	1030	OUIL/OWVI Causing Death	Both
		1120	OUID/OWVI by Controlled Substance	
257.625(4)(b)	257.6254B	1035	OUIL/OWVI Causing Death of Emergency Responder	Both
257.625(5)	257.6255-A	1040	OUIL/OWVI Causing Serious Injury	Both
		1130	OUIL/OUID Causing Serious Injury	
257.625(7)	257.6257A1 (Includes 257.6257A2 2nd offense notice)	1150	Child Endangerment	Both
257.625(8)	257.6258	1105	Operating with Presence of Drugs **Violation on or after 9/30/03.**	Both
257.625m	257.625M1 (Includes 257.625M4 2nd and 257.625M5 3rd offense notice)	1230	Operate Commercial Motor Vehicle with BAC .04-.07	Both
257.626c	257.626C	1450	Felonious Driving **Violation on or after 2/1/02.** For violations before 2/1/02 see 752.191.	Adjudication
257.653a(3)	257.653A3	1807	Failure to Yield for an Emergency Responder Causing Injury	Adjudication
257.653a(4)	257.653A4	1808	Failure to Yield for an Emergency Responder Causing Death	Adjudication
257.903	257.903 (includes 257.9032 2nd and 257.9033 3rd notice)	3320	False Certification under Vehicle Code (Perjury)	Adjudication
257.904(4)	257.9044	3235	DWLS/Revoked or Denied Causing Death	Adjudication
257.904(5)	257.9045	3245	DWLS/Revoked or Denied Causing Serious Injury	Adjudication
324.80131(4)	324.80135 324.80136	6300	Marine – Felony/Vessel Used	Adjudication
324.80176(4)	324.801764	6030	Marine – OUIL causing death	Adjudication
		6120	Marine – OUID causing death	Adjudication
324.80176(5)	324.801765	6040	Marine – OUIL causing incapacitating injury	Adjudication

MCL	PACC	SOS Offense Code	Description	Abstract at Adjudication, Sentencing, or Both
		~~6130~~	~~Marine – OUID causing incapacitating injury~~	~~Adjudication~~
324.81134(1)	324.81134 324.811341	8000	ORV – OUIL	Adjudication
		8010	ORV – OUID	Adjudication
		8015	ORV – OUIL/OUID	Adjudication
		8025	ORV – OUIL/UBAC	Adjudication
324.81134(2)	324.811342	8020	ORV – UBAC	Adjudication
324.81134(7)	324.811347	8040	ORV – OUIL causing death	Adjudication
324.81134(8)	324.811348	8050	ORV – OUIL causing incapacitating injury	Adjudication
324.82127(1)	324.821271	7000	Snowmobile – OUIL	Adjudication
		7010	Snowmobile – UBAC	Adjudication
		7020	Snowmobile – OUIL/UBAC	Adjudication
		7100	Snowmobile – OUID	Adjudication
		7110	Snowmobile – OUIL/OUID	Adjudication
324.82127(4)	324.821274	7030	Snowmobile – OUIL causing death	Adjudication
		7120	Snowmobile – OUID causing death	Adjudication
324.82127(5)	324.821275	7040	Snowmobile – OUIL causing incapacitating injury	Adjudication
		7130	Snowmobile – OUID causing incapacitating injury	Adjudication
324.82157(4)	324.821575	7300	Felony – snowmobile used	Adjudication
333.7341	333.73413 333.73414-A 333.73414-B	1140	CDL-Manufacture/Distribute Controlled Substance *Offense must occur in commercial motor vehicle.*	Sentencing
333.7401	333.740121A through 333.74012F			

MCL	PACC	SOS Offense Code	Description	Abstract at Adjudication, Sentencing, or Both
333.7402	333.74022A through 333.74022E			
333.17766a	333.17766A1 333.1776A2 333.17766A2-A 333.17766A3 333.17766A4	9200	Drug Crime – various titles *Violation date before 10/1/02.* *No abstract required if person sentenced to a minimum term of imprisonment of more than one year, pursuant to MCL 257.732(4)(e).*	Sentencing
333.7401 to 333.7455	333.74012A1 through 333.7455		Drug Crime – various titles *No abstract required if person sentenced to a minimum term of imprisonment of more than one year, pursuant to MCL 257.732(4)(e).*	
750.321	750.321-E	1400 1405	Manslaughter/Auto Used Fatality through Negligent or Criminal Operation of a Commercial Motor Vehicle	Adjudication
750.324	750.324	1410	Negligent Homicide	Adjudication
750.91	750.91	1420	Murder/Auto Used	Adjudication
750.316	750.316-A 750.316-B 750.316-C			
750.317	750.317			
750.411a(2)	750.411A3A 750.411A3B	9210	False Report of Threat of Bomb/ Harmful Device (Involving a School). Must be under age 21 at time of offense. [MCL 257.319(11), 257.303(1)(m – n)]	Adjudication
750.413	750.413	1500	Unlawful Driving Away Auto (UDAA)	Adjudication
750.479a(5)	750.479A5-A	1706	1st Degree Fleeing and Eluding *Violation date before 2/1/02*. For violations on or after 2/1/02 see 257.602a.	Sentencing if offense prior to 10/1/99. Adjudication if offense is on or after 10/1/99.
750.479a(4)	750.479A4-A	1707	2nd Degree Fleeing and Eluding	
750.479a(3)	750.479A3	1708	3rd Degree Fleeing and Eluding	
750.479a(2)	750.479A2	1709	4th Degree Fleeing and Eluding	
752.191	752.191	1450	Felonious Driving	Adjudication. Offense prior to

MCL	PACC	SOS Offense Code	Description	Abstract at Adjudication, Sentencing, or Both
				10/1/99 abstract at Sentencing.
Various	Complaint/Information must state "Felony – Auto Used"	1430	Felony Auto Used. Penalty is for 5 years or more imprisonment. (Auto must be part of the commission of the crime.)	Sentencing
Various	Complaint/Information must state "Felony – Auto Used"	1440	Felony Auto Used. Penalty is under 5 years imprisonment. (Auto must be part of the commission of the crime.)	Sentencing

Chapter 8: Sentencing

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In this chapter...

This chapter discusses the various aspects of sentencing that extend beyond the specific penalties applicable to the offenses discussed in this benchbook. Topics discussed in this chapter include consecutive and concurrent sentencing, the statutory sentencing guidelines, sentencing habitual and repeat offenders, mandatory and discretionary sentence enhancements, and §7411 dispositions. Comprehensive discussion of some topics in this chapter may be found in *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009). Cross-references to *Monograph 8* are noted where appropriate.

8.1 The Statutory Sentencing Guidelines

*See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), for detailed information about the legislative sentencing guidelines.

A comprehensive discussion of the specific provisions of the sentencing guidelines is beyond the scope of this benchbook.* However, this chapter will discuss any relevant provisions involved in imposing a sentence subject to the guidelines in cases related to the offenses described in this benchbook.

The statutory sentencing guidelines apply to felony offenses for which the penalty prescribed is an indeterminate sentence, and the sentencing court retains discretion in imposing an offender's sentence. That is, the guidelines are *not* applicable to offenses for which the applicable statute establishes a mandatory determinate penalty or a mandatory penalty of life imprisonment for conviction of the offense. MCL 769.34(5).

Specifically, the statutory sentencing guidelines apply to felony offenses listed in MCL 777.11 to 777.19 that were committed on or after January 1, 1999. MCL 769.34(2). The statutory sections listing the felony offenses to which the guidelines apply contain brief descriptions of the felonies listed there "for assistance only." MCL 777.6; MCL 777.11 to 777.19. The language contained in the statute defining the felony offense itself governs application of the sentencing guidelines. MCL 777.6.

Application of the statutory sentencing guidelines is not affected by the date of conviction or the date of sentencing—the statutory language emphasizes only "the date the crime was committed." *People v Gonzalez*, 256 Mich App 212, 227 (2003). MCL 769.34(2) states, in part:

> "Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed."

A. Offense Categories (Crime Groups)

*See **Section 8.24** for a list of all controlled substance offenses, including their crime group designations.

All felony offenses to which the sentencing guidelines apply fall into one of six offense categories. The offense category, or "crime group," assigned to an offense determines which offense variables (OVs) must be scored for that offense. The six offense 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; and (6) crimes against public safety. MCL 777.5(a)–(f). Offenses specific to article 7 of the public health code are found primarily in the controlled substance crime group, but a few crimes practically classified as controlled substance crimes are specifically listed in the public safety, public trust, and person crime groups.*

B. Crime Classes

Within each crime group, all offenses to which the guidelines apply are further categorized by the seriousness of the offense. This gradation of offense severity is indicated by the offense's crime class.* An offense's crime class is designated by the letters "A" through "H" and "M2." "M2" (second-degree murder) and "A" represent the most serious felony offenses, and the letters "B" through "H" represent the remaining felony offenses in decreasing order of severity.

*The list of controlled substance offenses in **Section 8.24** includes crime class designations.

C. Prior Record Variables (PRVs)

Prior record variables account for an offender's criminal history by assigning point values to specific circumstances of the offender's previous criminal record and his or her status at the time the sentencing offense was committed. Although the specific offense variables to be scored are determined by the crime group to which the sentencing offense belongs, all seven prior record variables are scored for each offense to which the sentencing guidelines apply, without regard to the offense's crime group.*

*See *Section 8.5, Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009).

D. Offense Variables (OVs)

Offense variables account for the circumstances involved in the commission of a crime by assigning point values to factors such as the number of victims and the extent of any injury sustained by a victim. A sentencing offense's crime group designation determines which of the offense variables are scored for that offense.*

*See Section 8.6, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009).

- "CS" is the designation used to identify crimes involving a controlled substance in the statutory lists of felony offenses to which the guidelines apply. MCL 777.5(c).
- "Pub ord" is the abbreviation used to designate crimes against public order in the statutory lists of felonies to which the guidelines apply. MCL 777.5(d).
- "Pub trst" is the designation used to identify crimes against public trust in the statutory lists of felonies to which the guidelines apply. MCL 777.5(e).
- "Pub saf" is the designation used to identify crimes against public safety in the statutory lists of felony offenses to which the guidelines apply. MCL 777.5(f).
- "Property" is the term used to designate crimes against property in the statutory lists of felonies subject to the guidelines. MCL 777.5(b).

- "Person" is the designation used to identify crimes against a person in the statutory lists of felonies to which the guidelines apply. MCL 777.5(a).

  Note: A violation of MCL 333.7401a (delivering a controlled substance/GBL with the intent to commit criminal sexual conduct) is the only offense in article 7 of the public health code designated as a crime against a person.

8.2 Sentences Imposed Under the Sentencing Guidelines

Court rule and statutory provisions require a sentencing court to use the sentencing guidelines as provided by law when determining the length of a defendant's sentence for an offense committed on or after January 1, 1999. MCR 6.425(D); MCL 769.34(2).

A. Sentencing Grids and Cells

*See Appendix B *in Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009).

Sentencing grids for all felony offenses to which the guidelines apply are located in MCL 777.61 to 777.69. There are nine different grids, one each for crimes in classes A, B, C, D, E, F, G, and H, and one for second-degree murder (M2). Each sentencing grid is divided into cells corresponding to the OV and PRV levels applicable to the crime class represented by the grid.*

The nine grids in MCL 777.61 to 777.69 contain only the sentence ranges for offenders not being sentenced as habitual offenders; statutory provisions do not contain separate grids for habitual offenders. See Section 8.5(B), below.

B. Recommended Minimum Ranges

The recommended minimum sentence range is indicated on a sentencing grid by a range of numbers in the cell located at the intersection of the defendant's OV level (the numeric total of all OVs scored for the sentencing offense and represented by the vertical axis) and the defendant's PRV level (the numeric total of all PRVs and represented by the horizontal axis). MCL 777.21(1)(c). The numeric range expressed in each cell represents the "minimum-minimum" and the "maximum-minimum" range of months from which the trial court should set a defendant's minimum sentence. An "L" in a cell indicates that, based on the defendant's OV and PRV totals, life imprisonment is an appropriate penalty for conviction of the sentencing offense.

C. Departures

For felony convictions to which the sentencing guidelines apply, a sentencing court must impose a minimum sentence within the appropriate range as calculated by the version of the guidelines applicable at the time the offense

was committed. MCL 769.34(2). A "departure" is a sentence that does not fall within the minimum sentence range indicated after properly scoring the guidelines. MCL 769.31(a). The Legislature did not distinguish between upward and downward departures; any minimum sentence not within the range indicated in the proper sentencing grid is a departure from the guidelines. *People v Hegwood*, 465 Mich 432, 440 n 16 (2001).

1. Substantial and Compelling Reason

A court is permitted to depart from the range recommended by the guidelines if the court articulates on the record a substantial and compelling reason for the departure.* MCL 769.34(3); *People v Babcock*, 469 Mich 247, 271 (2003). The trial court must explain how the reason given for the departure justifies the degree of that departure. *Babcock*, *supra* at 258–259; *People v Claypool*, 470 Mich 715, 726–727 (2004).

*See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), Sections 8.48–8.50, for a comprehensive discussion of departures.

The trial court abused its discretion when it sentenced a defendant to twice the highest minimum term recommended under the sentencing guidelines without justifying the extent of the departure on the record. *People v Smith*, 482 Mich 292, 295 (2008). The Michigan Supreme Court concluded that providing substantial and compelling reasons for a departure does not satisfy the trial court's duty to "establish why the sentences imposed were proportionate to the offense and the offender." *Id*. The Court further explained "the statutory guidelines require more than an articulation of reasons for *a* departure; they require justification for the *particular* departure made." *Id*. at 303.

The Michigan Supreme Court set out the following summary to assist trial courts in fulfilling their statutory obligations under MCL 769.34(3):

> "(1) The trial court bears the burden of articulating the rationale for the departure it made. A reviewing court may not substitute its own reasons for departure. Nor may it speculate about conceivable reasons for departure that the trial court did not articulate or that cannot reasonably be inferred from what the trial court articulated.
>
> "(2) The trial court must articulate one or more substantial and compelling reasons that justify the departure it made and not simply *any* departure it might have made.
>
> "(3) The trial court's articulation of reasons for the departure must be sufficient to allow adequate appellate review.
>
> "(4) The minimum sentence imposed must be proportionate. That is, the sentence must adequately account for the gravity of the offense and any relevant characteristics of the offender. To be proportionate, a minimum sentence that exceeds the guidelines recommendation must be more appropriate to the offense

> and the offender than a sentence within the guidelines range would have been.
>
> "(5) When fashioning a proportionate minimum sentence that exceeds the guidelines recommendation, a trial court must justify why it chose the particular degree of departure. The court must explain why the substantial and compelling reason or reasons articulated justify the minimum sentence imposed.
>
> "(6) It is appropriate to justify the proportionality of a departure by comparing it against the sentencing grid and anchoring it in the sentencing guidelines. The trial court should explain why the substantial and compelling reasons supporting the departure are similar to conduct that would produce a guidelines-range sentence of the same length as the departure sentence.
>
> "(7) Departures from the guidelines recommendation cannot be assessed with mathematical precision. The trial court must comply *reasonably* with its obligations under the guidelines . . . to further the legislative goal of sentencing uniformity." *Smith*, *supra* at 317-319.

A reason is substantially compelling if it is "objective and verifiable," if it "keenly" or "irresistibly" grabs a court's attention, if it is "of considerable worth" in deciding the length of a defendant's sentence, and if it only arises in "exceptional cases." *Babcock, supra* at 257–258. To be objective and verifiable, a reason must be based on facts or events external to the minds of the involved parties, especially the mind of the trial judge. *People v Abramski*, 257 Mich App 71, 74 (2003). An objective and verifiable factor is one capable of confirmation. *Id*.

A sentence is presumptively proportionate if it falls within the range recommended by the sentencing guidelines. *Babcock, supra* at 263–264. Where the court departs from the sentence recommended under the guidelines, the sentence must be proportionate to the seriousness of the crime and the defendant's criminal history. *Id*. at 264. Although there is likely no single correct outcome when a court considers and imposes a sentence that departs from the guidelines, whatever departure chosen by the court must fall within "the principled range of outcomes." *Id*. at 269. A departure is within the principled range of outcomes when it is a result that falls within the group of choices from which a reasonable trial judge would choose. *Id*., citing *United States v Penny*, 60 F3d 1257, 1265 (CA 7, 1995).

*Effective March 1, 2003.

The minimum recommended sentence under the statutory sentencing guidelines does not itself constitute a substantial and compelling reason to depart from a mandatory minimum sentence required by statute. However, if a substantial and compelling reason for departure exists, the recommended guidelines range may be helpful in determining the proper

extent of the departure. *People v Izarraras-Placante*, 246 Mich App 490, 498–499 (2001). In addition, the ameliorative amendments to MCL 333.7401* are not retroactive and do not constitute a substantial and compelling reason for a downward departure from the mandatory minimum sentences required under the version of MCL 333.7401 before amendment. *People v Thomas*, 260 Mich App 450, 459 (2004); *People v Michielutti*, 474 Mich 889 (2005).

2. Statutory Prohibitions Regarding Departures

The statutory sentencing guidelines expressly prohibit a sentencing court from basing a departure on specific characteristics of a defendant or his or her defense. These factors include a defendant's "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 guidelines also expressly prohibit a sentencing court from basing a departure on characteristics of the offense or the offender already addressed by the offense variables and prior record variables. However, a court may base a departure on characteristics of the offense or offender if the court concludes that the factor was given disproportionate or inadequate weight under the variable scores.* MCL 769.34(3)(b).

*See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), Sections 8.48–8.50, for a comprehensive discussion of departures.

The *Babcock* Court provided this guidance for determining when a characteristic of the offense or the offender is already adequately measured by an OV or a PRV:

> "[I]f a defendant convicted of armed robbery is scored 25 points under offense variable one because he stabbed his victim, see MCL 777.31, that the defendant stabbed his victim probably could not constitute a substantial and compelling reason to justify a departure because the Legislature has already determined what effect should be given to the fact that a defendant has stabbed his victim and the courts must abide by this determination. However, if the defendant stabbed his victim multiple times, or in a manner designed to inflict maximum harm, that might constitute a substantial and compelling reason for a departure because these characteristics may have been given inadequate weight in determining the guidelines range." *Babcock, supra* at 258 n 12.

D. Departures That Are Not Departures

*See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), Section 8.51, for more information.

In some cases, imposing a sentence not within the range recommended by the sentencing guidelines is not a departure and is not subject to the statutory provisions governing departures.* This issue arises when the statute requires a sentencing court to impose a mandatory minimum sentence or a sentence of life imprisonment. MCL 769.34(5). Where the statute mandates imposition of a specific sentence, that sentence is not subject to the sentencing guidelines. *Id*. Mandatory minimum sentences are discussed in Section 8.12, below.

A sentence departing from the range recommended under the guidelines need not be justified by a substantial and compelling reason if the sentence is imposed pursuant to a valid plea agreement. *People v Wiley*, 472 Mich 153, 154 (2005).

E. The *Tanner* Rule

The common-law *Tanner* rule applies to indeterminate sentences imposed under the statutory sentencing guidelines. The *Tanner* Court ruled that where an indeterminate sentence is imposed, the minimum sentence must not exceed two-thirds of the maximum sentence. *People v Tanner*, 387 Mich 683, 689–690 (1972). The *Tanner* rule also applies to sentence enhancements under the habitual offender statutes. *People v Wright*, 432 Mich 84, 93–94 (1989). The rule is codified in MCL 769.34(2)(b):

> "The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."

The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and *Tanner*, *supra*, is a reduction in the minimum sentence. *People v Floyd*, 481 Mich 938 (2008), citing *People v Thomas*, 447 Mich 390 (1994).

8.3 Controlled Substance Offenses Subject to the Sentencing Guidelines

*For a list of all offenses to which the guidelines apply, see Appendix F, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009).

The sentencing guidelines apply to offenses enumerated in MCL 777.11 to MCL 777.19.* Section 8.24 contains a table of all controlled substance offenses discussed in this benchbook. The table is arranged by MCL number and includes: a brief description of the offense; whether the offense is a civil infraction, a misdemeanor, or a felony; the maximum term of incarceration permitted for conviction of the offense; whether the offense is subject to the sentencing guidelines; and if the offense is subject to the guidelines, the offense's crime group and crime class.

8.4 Controlled Substance Offenses Predicated on an Underlying Felony

The offenses listed in MCL 777.18 are offenses predicated on an underlying felony, and special scoring instructions apply to those offenses. The offenses listed in MCL 777.18 are those felony offenses for which the statutory maximum penalty is "variable." "Variable" indicates that the term of imprisonment for the violations listed there is not limited to a specific number of years (as are the individual violations listed in MCL 777.11 to 777.17g) because the offenses in MCL 777.18 refer to a variety of underlying felonies to which different statutory maximum penalties apply. In addition, some provisions of the felony offenses listed in MCL 777.18 provide for mandatory minimums or double or triple times the maximum terms of imprisonment authorized in the statutory language governing the underlying felonies themselves.

Each offense listed in MCL 777.18 is assigned a crime group designation that may differ from the crime group designated for the offense when it is not the basis for an MCL 777.18 conviction. Effective January 9, 2007, 2006 PA 655 amended the scoring instructions for MCL 777.18 offenses. As amended, MCL 777.21(4) requires that the OVs appropriate to the underlying offense's crime group be scored and any additional OVs indicated by the crime group assigned under MCL 777.18.

The crime class of the offenses listed in MCL 777.18 is "SPEC" because the crime class varies according to the nature of the underlying felony. The amended statute creates a "default" class G for those situations where the offense on which the MCL 777.18 is based is not a felony offense. According to MCL 777.21(4), the crime class of an MCL 777.18 offense is the same as the underlying felony's class when there is only one underlying felony. If there are multiple underlying felonies, the crime class of the MCL 777.18 offense is the same as the felony with the highest crime class. If none of the underlying offenses are felonies, the crime class of the MCL 777.18 offense is G.

This Section lists only the controlled substance offenses contained in MCL 777.18. See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), Section 8.9, for information about the other three felonies included in MCL 777.18: MCL 750.188 (voluntarily allowing a prisoner to escape), MCL 750.237a (felony offenses committed in weapon-free school zones), and MCL 750.367a (larceny of rationed goods).

The offenses listed in MCL 777.18 that are relevant to the controlled substance violations discussed in this benchbook are as follows:

- **Delivery of a schedule 1 or 2 narcotic drug or cocaine to a minor**—MCL 333.7410(1). Penalties for this offense are found in Section 7.9(A).

- **Delivery of GBL or certain other controlled substances to a minor**—MCL 333.7410(1). Penalties for this offense are found in Section 7.9(B).
- **Delivery of a schedule 1 or 2 narcotic drug or cocaine within 1,000 feet of school property or a library**—MCL 333.7410(2). Penalties for this offense are found in Section 7.9(C).
- **Possession with intent to deliver a schedule 1 or 2 narcotic drug or cocaine within 1,000 feet of school property or a library**—MCL 333.7410(3). Penalties for this offense are found in Section 7.9(D).
- **Possession of GBL or other controlled substances on school property or library property**—MCL 333.7410(4). Penalties for this offense are found in Section 7.9(E).
- **Subsequent controlled substance violations**—MCL 333.7413(2) or (3). Penalties for these offenses are found in Sections 7.6 and 7.7.
- **Recruiting or inducing a minor to commit a controlled substance felony**—MCL 333.7416(1)(a). Penalties for this offense are found in Section 7.9.
- **Conspiracy**—MCL 750.157a(a). Penalties for this offense are found in Section 7.21.

8.5 Sentencing Habitual Offenders

Michigan's sentencing law is designed so that the punishment possible for conviction of a crime may be increased in proportion to the offender's number of previous felony convictions. MCL 769.10, MCL 769.11, and MCL 769.12 comprise the "general" habitual offender statutes. MCL 777.21 authorizes sentence enhancement under the statutory sentencing guidelines for habitual offenders. There is a critical distinction between the general habitual offender provisions of MCL 769.10, 769.11, and 769.12 and the sentence enhancements authorized by MCL 777.21. The general habitual offender statutes relate to the maximum penalty authorized by the statute under which the defendant's conduct was prohibited. These habitual offender enhancement provisions permit a sentencing court to impose on an habitual offender a sentence greater than the maximum sentence permitted by statute for a *first* conviction of the sentencing offense. The maximum term of imprisonment permitted for an habitual offender's felony conviction (as authorized under MCL 769.10, 769.11, and 769.12) must be determined by reference to the specific criminal statute the defendant's conduct violated. In contrast to the general habitual offender provisions, the enhancements authorized by MCL 777.21 increase the recommended *minimum* sentence ranges calculated under the sentencing guidelines as applied to habitual offenders.

A defendant's sentence cannot be "doubly enhanced" by application of the habitual offender statutes and any enhancement provisions contained in the statutory language prohibiting the conduct for which the defendant was convicted.* *People v Elmore*, 94 Mich App 304, 305–306 (1979); *People v Edmonds*, 93 Mich App 129, 135 (1979).

*See Section 8.17, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), for more information.

A. General Habitual Offender Statutes

As written, the general habitual offender statutes do not require a sentencing court to follow the Public Health Code's sentencing scheme unless the offender's subsequent conviction is for a major controlled substance offense. See MCL 769.10(1)(c), MCL 769.11(1)(c), and MCL 769.12(1)(c). However, it appears that a sentencing court may sentence an offender convicted of a subsequent major controlled substance offense under either of the two sentencing schemes, without regard to the directive found in the general habitual offender statutes for subsequent major controlled substance offenses. See *People v Wyrick*, 474 Mich 947 (2005).*

*See Section 8.16, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), for more information.

Statutory law defines a "felony" as "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." MCL 761.1(g). For purposes of the habitual offender statutory provisions, a "prior felony conviction" is a conviction for conduct or attempted conduct that would be a felony if committed in Michigan no matter where the crime was actually committed. MCL 769.10, 769.11, and 769.12.

When counting prior felonies under Michigan's habitual offender statutes, each felony conviction that preceded the sentencing offense is a separate felony conviction, even if more than one conviction arose from the same criminal transaction. *People v Gardner*, 482 Mich 41, 44 (2008). In *Gardner*, *supra* at 53-62, the Michigan Supreme Court rejected its previous method, set out in *People v Preuss*, 436 Mich 714 (1990), and *People v Stoudemire*, 429 Mich 262 (1987) (modified by *Preuss*, *supra* at 739), of counting multiple felonies that arose from the same criminal incident or transaction as a single felony. The Court explained that the plain language of the habitual offender statutes, MCL 769.10-769.13, "directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions." *Gardner*, *supra* at 44.

For purposes of the Public Health Code, offenses "expressly designated" as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. *People v Wyrick*, 474 Mich 947 (2005). According to the *Wyrick* Court:

> "The Court of Appeals misconstrued the Public Health Code in defining the term 'felony' for purposes of MCL 333.7401(3). MCL 333.7401(3) authorizes sentencing courts to impose consecutive, rather than concurrent, sentences when a defendant is

> convicted of 'another felony.' Defendant was convicted of marijuana possession, second offense. The Public Health Code expressly designates marijuana possession as a misdemeanor. MCL 333.7403(2)(d).
>
> "The trial court used the double-penalty provision of the Public Health Code, MCL 333.7413(2), to convert the misdemeanor into a felony. The sentence enhancement statutes do not create new offenses; they merely authorize trial courts to increase the length of time that a defendant must serve. *People v. Eason*, 435 Mich. 228, 246-249, 458 N.W.2d 17 (1990). The statute that authorizes trial courts to impose consecutive sentences for 'another felony,' MCL 333.7401(3), does not govern this case." *Wyrick, supra* at 947.

But see *Burgess v United States*, 553 US ___, ___ (2008) (a drug offense punishable by more than one year in prison under South Carolina state law constituted a felony drug offense as that term is used in the repeat offender provision of the federal Controlled Substances Act, 21 USC §841(b)(1)(A), even though South Carolina law classified the offense as a misdemeanor).

1. Second Habitual Offender Status (HO2)

A person who commits a felony in Michigan and who has been previously convicted of a felony or attempted felony (whether or not the previous conviction occurred in Michigan as long as the violation would have been a felony violation if it had been obtained in Michigan) is a second habitual offender subject to the following penalties:

- If the subsequent felony is punishable on first conviction by a term less than life imprisonment, the court may place the person on probation or sentence the person to imprisonment for a term of not more than 1–1/2 times the maximum term authorized for a first conviction, or for a lesser term. MCL 769.10(1)(a).
- If the subsequent felony is punishable on first conviction by life imprisonment, the court may place the person on probation or sentence the person to imprisonment for life, or for a lesser term. MCL 769.10(1)(b).
- If the subsequent felony is a major controlled substance offense,* the court must sentence the person as provided by MCL 333.7401 to 333.7461. MCL 769.10(1)(c). But see *Wyrick, supra* at 947.
- A defendant's maximum sentence may not be less than the maximum sentence for a first conviction of the sentencing offense. MCL 769.10(2).*

*See **Section 1.4** for more information.

*2006 PA 655, effective January 9, 2007.

2. Third Habitual Offender Status (HO3)

A person who commits a felony in Michigan and who has been convicted of any combination of two or more felonies or felony attempts (whether or not the two or more previous convictions occurred in Michigan as long as the violations would have been felony violations if the convictions had been obtained in Michigan) is a third habitual offender subject to the following penalties:

- If the subsequent felony is punishable on first conviction by a term of imprisonment less than life, the court may sentence the person to a term of imprisonment of not more than two times the maximum term permitted by law for a first conviction of the offense, or to a lesser term. MCL 769.11(1)(a).

- If the subsequent felony is punishable by life imprisonment on first conviction, the court may sentence the person to life imprisonment, or to a lesser term. MCL 769.11(1)(b).

- If the subsequent felony is a major controlled substance offense,* the court must sentence the person as provided by MCL 333.7401 to 333.7461. MCL 769.11(1)(c). But see *Wyrick*, *supra* at 947.

*See **Section 1.4** for more information.

- A defendant's maximum sentence may not be less than the maximum sentence for a first conviction of the sentencing offense. MCL 769.11(2).*

*2006 PA 655, effective January 9, 2007.

3. Fourth Habitual Offender Status (HO4)

A person who commits a felony in Michigan and who has been convicted of any combination of three or more felonies or felony attempts (whether or not the previous felony convictions were obtained in Michigan or in another state as long as the offenses would have been felony offenses if they had occurred in Michigan) is a fourth habitual offender subject to the following penalties:

- If the subsequent felony is punishable on first conviction by a maximum term of imprisonment of five years or more or for life, the court may sentence the person to life imprisonment, or to a lesser term. MCL 769.12(1)(a).

- If the subsequent felony is punishable on first conviction by a maximum term of imprisonment less than five years, the court may sentence the person to a maximum term of imprisonment of 15 years. MCL 769.12(1)(b).

- If the subsequent felony is a major controlled substance offense,* the court must sentence the person as provided by MCL 333.7401 to 333.7461. MCL 769.12(1)(c). But see *Wyrick*, *supra* at 947.

*See **Section 1.4** for more information.

*2006 PA 655, effective January 9, 2007.

- A defendant's maximum sentence may not be less than the maximum sentence for a first conviction of the sentencing offense. MCL 769.12(2).*

B. Habitual Offender Enhancement Under the Statutory Sentencing Guidelines

*The sentencing grids in Appendix B, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), include the ranges calculated for habitual offenders pursuant to MCL 777.21.

The nine sentencing grids in MCL 777.61 to 777.69 represent the proper sentence ranges for offenders *not* being sentenced as habitual offenders. Separate grids reflecting the recommended sentence ranges for habitual offenders for the same nine crime classes (A through H, and second-degree murder, M2) do not exist in the statutory provisions governing felony sentencing.* However, statutory authority exists for determining the upper limit of an habitual offender's recommended minimum sentence range by adding an incremental percentage of the range calculated for first-time offenders (or offenders who are not otherwise being sentenced as habitual offenders).

The statutory method of calculating the minimum range recommended for habitual offenders is found in MCL 777.21. MCL 777.21 authorizes an increase of 25% in the upper limit of the recommended sentence range for second habitual offenders (HO2), an increase of 50% for third habitual offenders (HO3), and an increase of 100% for fourth habitual offenders (HO4).

A portion of one of the sentencing grids is included below for reference.

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												Habitual 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

In the example grid above, the minimum sentence range for a first-time offender with a PRV level A and an OV level I is 21 to 35 months. For a defendant sentenced as a second habitual offender (HO2), the guidelines range increases to 21 to 43 months. For a third habitual offender (HO3), the

range increases to 21 to 52 months, and for a fourth habitual offender (HO4), the minimum range is 21 to 70 months. An habitual offender's maximum sentence is set by the statutory violation for which the offender is being sentenced and may be enhanced pursuant to the appropriate general habitual offender statute.

8.6 Mandatory Sentence Enhancement Involving Major Controlled Substance Offenses—§7413(1) and (3)

A "major controlled substance offense" is limited to convictions for the commission of one of the crimes described in MCL 761.2(a)–(c):*

*See **Section 1.4** for more information about major controlled substance offenses.

- a violation of MCL 333.7401(2)(a)(*i*)–(*iv*).
- a violation of MCL 333.7403(2)(a)(*i*)–(*iv*).
- conspiracy to commit an offense under MCL 333.7401(2)(a)(*i*)–(*iv*) or 333.7403(2)(a)(*i*)–(*iv*).

MCL 333.7413(1) and (3) contain mandatory sentence enhancement provisions for offenders with second or subsequent convictions of specific major controlled substance offenses. Those statutory provisions state:

> "(1) An individual who was convicted previously for a violation of any of the following offenses and is thereafter convicted of a second or subsequent violation of any of the following offenses shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term:
>
> > "(a) A violation of section 7401(2)(a)(*ii*) or (*iii*).
> >
> > "(b) A violation of section 7403(2)(a)(*ii*) or (*iii*).
> >
> > "(c) Conspiracy to commit an offense proscribed by section 7401(2)(a)(*ii*) or (*iii*) or section 7403(2)(a)(*ii*) or (*iii*).
>
> * * *
>
> "(3) An individual convicted of a second or subsequent offense under section 7410(2) or (3) shall be punished, subject to subsection (4),* by a term of imprisonment of not less than 5 years nor more than twice that authorized under section 7410(2) or (3) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7410(2) or (3); and shall not be eligible for probation or suspension of sentence during the term of imprisonment."

*Subsection (4) deals with a court's departure from the minimum term of imprisonment.

These mandatory enhancement provisions apply *only* to offenders who have been convicted of two or more of the drug-related offenses very specifically enumerated in MCL 333.7413(1) and (3). Note that not all of the major controlled substance offenses are included within the mandatory enhancement provisions of MCL 333.7413(1) and (3). In particular, MCL 333.7401(2)(a)(*i*) and (*iv*) and MCL 333.7403(2)(a)(*i*) and (*iv*) are not included in MCL 333.7413(1). The offenses addressed by MCL 333.7413(3) are predicated on the offender's violation of MCL 333.7401(2)(a)(*iv*)—a major controlled substance offense—within 1,000 feet of school property.

There is no requirement under the Public Health Code's enhancement provisions that a conviction for an offender's first offense be obtained before the commission date of the offender's second offense. Where a defendant commits an eligible second offense before he or she is convicted of the first offense, and the defendant is subsequently convicted of the second offense, MCL 333.7413(1) must be applied to the offender. The language of MCL 333.7413(1) unambiguously requires that a defendant who has been "convicted previously" of an enumerated offense and is "thereafter convicted" of a second enumerated offense be sentenced according to the provisions of 7413(1). *People v Poole*, 218 Mich App 702, 710–711 (1996).

8.7 Discretionary Sentence Enhancement—§7413(2)

Unlike the provisions in MCL 333.7413(1) and (3), MCL 333.7413(2) permits, but does not require, a sentencing court to double the term of imprisonment authorized by the applicable statute for a first conviction of the offense. In contrast to the notice requirements that apply to habitual offender sentence enhancements, no notice is required for enhancement under MCL 333.7413:

> "[A] defendant charged under a statute which provides for imposition of an enhanced sentence on an individual previously convicted of an offense under the same statute is not entitled to notice within fourteen days of arraignment of the prosecutor's intent to seek sentence enhancement or to a separate proceeding on the question whether he has previously been convicted of a narcotics offense." *People v Eason*, 435 Mich 228, 231 (1990).

The language used in MCL 333.7413(2) permits a court to impose the sentence enhancements authorized when no other statute preempts use of MCL 333.7413(2). Where an offender is convicted of a second or subsequent controlled substance offense—major *or* non-major—MCL 333.7413(2) authorizes a trial court to impose a term of imprisonment not more than twice the term permitted for a first conviction of the offense. MCL 333.7413(2) states:

> "Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this

> article may be imprisoned for a term not more than twice the term authorized or fined in an amount not more than twice that otherwise authorized, or both."

When MCL 333.7413(2) permits a court to impose a sentence of not more than twice the term otherwise authorized, the enhancement authority extends to both the minimum and maximum terms of imprisonment. *People v Williams*, 268 Mich App 416, 427–428 (2005). Therefore, a minimum sentence authorized under MCL 333.7413(2) may exceed the minimum sentence recommended under the guidelines, and the sentence imposed does not represent a departure from the guidelines. *Id*. at 430–431.

See also *People v Lowe*, 484 Mich 718, 724 (2009) ("§ 7413(2)'s authorization for a trial court to imprison a defendant for a 'term not more than twice the term otherwise authorized' signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the 'term otherwise authorized'").

MCL 333.7413(5) defines "second or subsequent offense":

> "[A]n offense is considered a second or subsequent offense, if, before conviction of the offense, the offender has at any time been convicted under this article or under any statute of the United States or of any state relating to a narcotic drug, marihuana, depressant, stimulant, or hallucinogenic drug."

Because MCL 333.7413(5) does not limit the scope of offenses that qualify as a first offense for purposes of the subsequent offender enhancement, the sentence enhancement authorized by MCL 333.7413(2) applies to repeat controlled substance offenders without regard to whether the offender's convictions are misdemeanors or felonies.

An offender's *convictions* for purposes of MCL 333.7413(2) must follow one another: there is no requirement in the statute regarding the temporal sequence of the commission dates of the offenses on which the offender's convictions are based. *People v Roseburgh*, 215 Mich App 237, 239 (1996).

8.8 Subsequent Convictions Involving Conspiracy

The enhancement mandated under MCL 333.7413(1) expressly applies to individuals previously convicted of conspiring to violate MCL 333.7401(2)(a)(*ii*) or (*iii*) or MCL 333.7403(2)(a)(*ii*) or (*iii*) who are subsequently convicted of conspiring to violate one of those same statutes. MCL 333.7413(1)(c). A defendant convicted of a second or subsequent conspiracy violation involving MCL 333.7401(2)(a)(*ii*) or (*iii*) or MCL 333.7403(2)(a)(*ii*) or (*iii*) must be sentenced to mandatory life imprisonment and is not eligible for probation, parole, or suspension of his or her sentence. MCL 333.7413(1)(c).

Because conspiracy to commit a controlled substance offense not expressly identified in MCL 333.7413(1)(c) is prosecuted under MCL 750.157a, it does not qualify as "a second or subsequent offense under [the Controlled Substances Act]." Therefore, the provisions of MCL 333.7413(2) applicable to repeat offenders do not apply to subsequent conspiracy convictions. *People v Briseno*, 211 Mich App 11, 18 (1995).

8.9 Subsequent Aiding and Abetting Offenses

*See **Section 6.2**.

A person who aids and abets in the commission of an offense is subject to the same penalties as if he or she directly committed the offense.* MCL 767.39. Because MCL 767.39 mandates prosecution, trial, conviction, and punishment as if an offender directly committed the offense charged, aiding and abetting a controlled substance offense falls within the Controlled Substances Act and is classified as an "offense under this article" for purposes of the sentence enhancements authorized by MCL 333.7413(2).

8.10 Subsequent Attempted Controlled Substance Offenses and Offenses Involving Solicitation, Inducement, or Intimidation

*See **Sections 4.1** and **4.2**.

A person who attempts to violate the Controlled Substances Act or who knowingly or intentionally solicits, induces, or intimidates another person to violate the Act is subject to the same penalties applicable to the crime he or she attempted to commit or the crime he or she solicited, induced, or intimidated another person to commit.* MCL 333.7407a(1)–(3). Because a defendant convicted under MCL 333.7407a is subject to the same penalties that apply to the crime attempted, solicited, induced, or committed through intimidation, the defendant is subject to any mandatory sentences and consecutive sentencing provisions indicated for that crime. *People v Gonzalez*, 256 Mich App 212, 229–230 (2003).

8.11 Mandatory Life Imprisonment Without Possibility of Parole

The following controlled substance offenses are punishable by mandatory life imprisonment without the possibility of parole.

- **MCL 333.7413(1)—**two or more convictions for any of the following offenses:
  - MCL 333.7401(2)(a)(*ii*) or (*iii*).*
  - MCL 333.7403(2)(a)(*ii*) or (*iii*).*

*See **Sections 2.1** and **8.6**.

*See **Sections 3.1** and **8.6**.

– conspiracy to commit a violation of MCL 333.7401(2)(a)(*ii*) or (*iii*) or MCL 333.7403(2)(a)(*ii*) or (*iii*).*

*See **Sections 2.1**, **3.1**, and **8.6**.

- **MCL 333.17764(7)**—conviction of MCL 333.17764(2) resulting in death where the offender had intent to kill or seriously impair two or more persons.*

*See **Sections 6.13** and **7.18**(B).

- **MCL 750.16(5)**—conviction of MCL 750.16(1) resulting in death where the offender had intent to kill or seriously impair two or more persons.*

*See **Sections 6.14** and **7.18**(B).

- **MCL 750.18(7)**—conviction of MCL 750.18(1) or (2) resulting in death where the offender had intent to kill or seriously impair two or more persons.*

*See **Sections 6.15** and **7.18**(C).

8.12 Mandatory Determinate Minimum Sentences

Where a statute requires a court to impose a mandatory minimum sentence, the court must impose that sentence without regard to the recommended minimum sentence under the sentencing guidelines. MCL 769.34(2)(a). Imposing a minimum sentence not within the range recommended by the guidelines is not a departure when the sentence is mandated by the statute governing the sentencing offense. *Id*.

Under MCL 333.7413(3), a person convicted of two or more offenses described in MCL 333.7410(2)* is subject to a mandatory minimum sentence of 5 years. The maximum term may not exceed 120 years—2 times the term authorized for a second or subsequent violation of MCL 333.7410(2) (60 years, which is 3 times the 20-year maximum authorized under MCL 333.7401(2)(a)(*iv*)).

*Delivery offenses prohibited by MCL 333.7401(2)(a)(*iv*) within 1,000 feet of school property or a library.

Under MCL 333.7413(3), a person convicted of two or more offenses described in MCL 333.7410(3)* is subject to a mandatory minimum sentence of 5 years. The maximum term may not exceed 80 years—2 times the term authorized for a second or subsequent violation of MCL 333.7410(3) (40 years, which is 2 times the 20-year maximum authorized under MCL 333.7401(2)(a)(*iv*)).

*Possession with intent to deliver offenses prohibited by MCL 333.7401(2)(a)(*iv*) within 1,000 feet of school property or a library.

MCL 333.7413(4) permits a sentencing court to "depart from the minimum term of imprisonment authorized under [MCL 333.7413(3)] if the court finds on the record that there are substantial and compelling reasons to do so."* The minimum recommended sentence under the statutory sentencing guidelines does not itself constitute a substantial and compelling reason to depart from a mandatory minimum sentence. However, if a substantial and compelling reason for departure exists, the recommended guidelines range may be helpful

*See **Section 8.2** for information about sentence departures.

in determining the proper extent of the departure. *People v Izarraras-Placante*, 246 Mich App 490, 498–499 (2001).

8.13 Consecutive Sentencing

Sentences run concurrently unless otherwise indicated; consecutive sentences may not be imposed unless expressly authorized by law. *People v Gonzalez*, 256 Mich App 212, 229 (2003). Where consecutive sentencing is authorized, the statutory language will indicate whether the consecutive nature of the sentence is mandatory or discretionary. A defendant's presentence report must contain "[a] statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law." MCL 771.14(2)(d). Similarly, a defendant's judgment of sentence must specify whether the sentence for which the defendant is committed to the jurisdiction of the Department of Corrections (DOC) is to run consecutively to or concurrently with any other sentence the defendant is, or will be, serving. MCL 769.1h(1). Any party—the prosecutor, the defendant, or the defense attorney—may file an objection to the consecutive or concurrent nature of sentences described in the judgment of sentence. MCL 769.1h(3).

MCL 771.14(2)(e)(*i*) requires that the sentencing guidelines be calculated for each conviction for which consecutive sentencing is required or authorized. *People v Mack*, 265 Mich App 122, 127 (2005). Where sentences will run concurrently, the sentencing guidelines need only be calculated for the offense with the highest crime class. MCL 771.14(2)(e)(*iii*); *Mack*, *supra* at 127–128.

For purposes of consecutive sentencing, a "term of imprisonment" includes a defendant's jail sentence. *People v Spann*, 250 Mich App 527, 531–533 (2002), aff'd 469 Mich 898 (2003). The *Spann* Court, *supra* at 898, noted that the Legislature uses the term "imprisonment" to refer both to confinement in prison and confinement in jail. See e.g., MCL 769.28; MCL 35.403; MCL 66.8; MCL 430.55.

For purposes of the Code of Criminal Procedure, misdemeanors punishable by more than one year ("two-year misdemeanors") are felonies for purposes of consecutive sentencing. *People v Smith*, 423 Mich 427, 434 (1985). However, for purposes of the Public Health Code, offenses "expressly designated" as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. *People v Wyrick*, 474 Mich 947 (2005) (even though punishable by not more than 2 years of imprisonment, misdemeanor possession of marijuana, second offense, does *not* constitute a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)).

Unless the Legislature clearly manifests a contrary intent, sentencing provisions in effect at the time an offense is *committed* apply to a trial court's imposition of sentence, not the amended sentencing provisions that became

effective after the offense was committed but before the defendant was sentenced. *People v Doxey*, 263 Mich App 115, 121–123 (2004); *People v Dailey*, 469 Mich 1019 (2004).

A. Conspiracy

MCL 750.157a(a) provides the penalty for a person who conspires with at least one other person to commit an act prohibited by law when commission of the prohibited act is punishable by at least one year of imprisonment.* An offender convicted under MCL 750.157a(a) must be sentenced to a term of imprisonment equal to the term authorized for conviction of the offense the offender conspired to commit. Because the language in MCL 750.157a requires that the same penalty be imposed for conspiracy as for the crime conspired, any consecutive sentencing provisions regarding the conspired offense also apply to a conspiracy conviction. *People v Denio*, 454 Mich 691, 703 (1997) (defendant's sentence for conspiracy to violate MCL 333.7401(2)(a)(*iv*) was properly made consecutive to his sentence for conspiracy to deliver marijuana).

*See **Section 6.3**.

B. Aiding and Abetting

A person who aids and abets in the commission of an offense is subject to the same penalties as if he or she directly committed the offense.* MCL 767.39. Because MCL 767.39 mandates prosecution, trial, conviction, and punishment as if an offender directly committed the offense charged, aiding and abetting a controlled substance offense is subject to the same consecutive sentencing provisions prescribed for conviction of the underlying offense.

*See **Section 6.2**.

8.14 Mandatory Consecutive Sentences

A. Major Controlled Substance Offense While a Felony Offense Is Pending Disposition

If a defendant commits a major controlled substance offense* while the disposition of another felony offense is pending, consecutive sentencing is mandatory. MCL 768.7b(2)(b). A felony is "pending disposition" for purposes of consecutive sentencing "if the second offense is committed at a time when a warrant has been issued in the original offense and the defendant has notice that the authorities are seeking him with regard to that specific criminal episode." *People v Waterman*, 140 Mich App 652, 655 (1985) (the defendant left Michigan after he was told that the police were looking for him and a warrant had issued by the time of his arrest for the subsequent offense). See also *People v Henry*, 107 Mich App 632, 637 (1981) (a felony charge was not pending where although a warrant had been issued for the defendant's first offense, the defendant was unaware that his conduct was the subject of a criminal prosecution).

*See **Section 1.4** for more information about major controlled substance offenses.

"Pending disposition" includes the entire period of time up to the date of sentencing for the pending offense. *People v Morris*, 450 Mich 316, 330–331 (1995). A felony charge is no longer pending if probation is imposed following conviction of the charge. *People v Malone*, 177 Mich App 393, 401–402 (1989); *People v Leal*, 71 Mich App 319, 321 (1976).

The nature of the offense for which an offender is ultimately convicted has no effect on the nature of the offense when it is pending disposition. For purposes of MCL 768.7b, consecutive sentencing is mandatory when an offender commits a felony while another felony charge is pending. That the pending felony is ultimately disposed of as a misdemeanor or lesser offense of the original felony charge has no effect on the consecutive sentencing mandate of MCL 768.7b. *People v Ackels*, 190 Mich App 30, 33–34 (1991).

B. Offense Punishable by Imprisonment While Offender Was Incarcerated/On Escape

An offender who is convicted of committing a controlled substance offense while incarcerated or after having escaped a penal institution is subject to mandatory consecutive sentences if the controlled substance offense is punishable by imprisonment. MCL 768.7a(1) mandates consecutive sentencing when a defendant is convicted of committing a crime—misdemeanor or felony—punishable by imprisonment when the offense was committed while the defendant was incarcerated in, or during escape from, a penal institution. *People v Weatherford*, 193 Mich App 115, 118–119 (1992). Any sentence imposed for the offender's misdemeanor conviction must be served in the custody of the Department of Corrections and consecutively to the term of imprisonment the offender was serving at the time of offense. *Id*.

The consecutive sentencing mandate of MCL 768.7a(1) applies only when the offenses were committed during incarceration or escape from a penal institution in Michigan. *People v Alexander*, 234 Mich App 665, 676–677 (1999) (consecutive sentencing did not apply to the defendant's sentence for commission of a crime in Michigan while on escape from a Louisiana prison). MCL 768.7a(1) also applies to sentences imposed for crimes committed by an offender during his or her incarceration in a federal penal or reformatory institution *located* in Michigan. *People v Kirkland*, 172 Mich App 735, 737 (1988).

An offender in the custody of a halfway house is in a penal institution for purposes of the consecutive sentencing mandate in MCL 768.7a(1). *People v Jennings*, 121 Mich App 318, 319 (1982). Consecutive sentencing also applies to offenses committed while an offender is in the custody of or on escape from a community corrections program or an extended furlough. *People v Sanders*, 130 Mich App 246, 251 (1984).

C. Felony Offense When Offender Was On Parole

A person convicted and sentenced for a felony committed while the person was on parole from a sentence for a previous offense is subject to a mandatory consecutive sentence for the subsequent offense. The term for the subsequent offense "shall begin to run at the expiration of the remaining portion of the term imposed for the previous offense." MCL 768.7a(2).

D. Other Statutes Mandating Consecutive Sentences

Several other statutes mandate consecutive sentencing in situations that do not involve the commission of an offense in addition to the offense giving rise to the specific situation.* Those statutes are: MCL 750.193(1)—defendants convicted of escape or attempting to escape confinement; MCL 750.197(2)—when a felony offender escapes or attempts to escape from jail before or after court proceedings related to a felony charge; MCL 750.349a—when a prisoner takes a hostage; MCL 750.195(2)—when an offender in jail on a felony offense escapes or attempts to escape from jail; MCL 750.227b(2)—felony-firearm conviction must be consecutive to the sentence imposed for the offense on which the felony-firearm conviction is based.

*See Section 8.28, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), for additional information.

8.15 Discretionary Consecutive Sentences

A. Major Controlled Substance Offenses

A sentence imposed for a controlled substance offense under MCL 333.7401(2)(a)* may be made consecutive to any sentence imposed for the commission of *any* other felony. MCL 333.7401(3).

*See **Sections 1.4** and **2.1** for more information.

"'Another felony' may include the commission of an additional felony violation of the same controlled substances provision, the commission of a different felony violation of the controlled substances act or the violation of any other felony provision." *People v Davenport*, 205 Mich App 399, 402 (1994).

For purposes of the consecutive sentencing provision in MCL 333.7401(3), "another felony" includes any other felony violation for which the defendant is being sentenced at the time he or she is sentenced for the controlled substance violation. *People v Morris*, 450 Mich 316, 320 (1995).

B. Violations Arising Out of the Same Transaction As The Sentencing Offense

*See **Sections 2.9**, **2.10**, and **2.11** for information about MCL 333.7401c offenses.

A court is authorized to order that a sentence of imprisonment imposed for a conviction under MCL 333.7401c be consecutive to a sentence imposed for any other offense arising out of the same transaction as the sentencing offense. MCL 333.7401c(5). MCL 333.7401c offenses involve possession of equipment or buildings for the purpose of manufacturing controlled substances in violation of MCL 333.7401 or counterfeit controlled substances in violation of MCL 333.7402.*

Discretionary consecutive sentencing also applies to offenses not involving controlled substances. In those cases, however, the violation arising out of the same transaction as the sentencing offense could be a controlled substance offense subject to consecutive sentencing at the discretion of the court. These offenses are: MCL 750.81d—assaulting or obstructing a law enforcement officer, firefighter, or emergency medical personnel; MCL 750.110a(2)—first-degree home invasion; MCL 750.479—obstructing or endangering authorized process servers; MCL 750.479b—taking a firearm or other weapon from a peace officer or corrections officer; MCL 750.529a—carjacking; and MCL 769.36—permits multiple charges against an offender under the statutes listed for each death that results from the same criminal transaction.

C. Any Other Violation, Including Those Arising Out of the Same Transaction

For a violation of any of the following statutes, a court's discretion to impose consecutive sentences is not limited to offenses arising out of the same transaction as the sentencing offense. The following statutes permit consecutive sentencing for any other violation, without regard to whether it arose from the same criminal transaction: MCL 750.119—corruption with the intent to influence the outcome of any matter pending before the court or other decision-maker; MCL 750.120a(2) and (4)—willfully attempting to influence a juror by intimidation, or retaliating or threatening to retaliate against a juror for performing his or her duties; MCL 750.122—giving or offering anything of value to encourage, discourage, or influence a witness, or retaliating against a person for having been a witness; and MCL 750.483a—withholding information ordered by the court or retaliating against an individual for reporting a crime.

D. Underlying Misdemeanor or Felony Offenses

An offender's sentence for the following offenses may be made consecutive to a sentence imposed for an underlying misdemeanor or felony offense: MCL 750.145d—using the internet or a computer to engage in prohibited conduct; MCL 750.212a—criminal conduct committed in or directed at a vulnerable target; MCL 750.227f—committing or attempting to commit a violent act

against a person while wearing body armor; and MCL 752.797—using a computer or computer network to commit a crime, to conspire to commit a crime, or to solicit another person to commit a crime.

E. Pending Felonies

With the exception of major controlled substance offenses,* MCL 768.7b(2)(a) authorizes consecutive sentencing for an offense committed pending disposition of a prior felony charge. The discretionary authority to impose consecutive sentences applies only to the "last in time" sentencing court. *People v Chambers*, 430 Mich 217, 230–231 (1988).

*See **Section 1.4** for more information.

F. Specific Offenses

Medicaid fraud. A trial court may impose consecutive sentences for an offender's "conviction of separate offenses under [the Medicaid False Claim Act]." MCL 400.609(2).

Identity theft. A sentence imposed for a violation of MCL 445.65 or MCL 445.67 (identity theft) may be made to run consecutively to any term of imprisonment imposed for another violation committed during a defendant's violation or attempted violation of MCL 445.65 or MCL 445.67, or for another violation occurring after the initial violation using information obtained as a result of the initial violation. MCL 445.69(4).

8.16 Delayed Sentencing

Delayed sentencing and deferred sentencing are often used interchangeably to refer to the statutory process described in this section. Unlike deferred adjudication, in a case involving a delayed or deferred sentence, the defendant's guilt is adjudicated and the resulting conviction remains on record without regard to the outcome of the period of delay. In delayed sentencing, the defendant is not placed on probation; that is, no sentence is imposed. Rather, the period of delay is provided to the defendant so that he or she may demonstrate to the court that probation is an appropriate sentence for the defendant's conviction. *People v Saylor*, 88 Mich App 270, 274–275 (1979). The court may require the defendant to comply with any of the applicable terms and conditions associated with a sentence of probation.* MCL 771.3(9).

*See **Section 8.22** for information about probation.

*See Section 8.41, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), for additional information about delayed sentencing.

In an action in which the defendant could be placed on probation, the court may elect to delay imposing sentence on the defendant for up to one year to allow the defendant to show that he or she is a good candidate for probation or leniency.* MCL 771.1(2). A court is not deprived of jurisdiction over a defendant whose delay in sentencing exceeds one year, as long as there is good cause for the delay. *People v Dubis*, 158 Mich App 504, 506 (1987).

Permissible conditions or terms of the delay. A trial court is authorized to impose on a defendant whose sentencing is delayed any applicable condition of probation outlined in MCL 771.3(1), (2), or (3). MCL 771.3(9). However, jail time may not be imposed as part of the delayed sentencing process because "[t]here is nothing about the ability to remain in jail . . . that is of assistance to a trial judge in determining whether or not a defendant should be placed on probation." *People v Cannon*, 145 Mich App 100, 104 (1985).

*See Sections 8.35, 8.36, 8.37, and 8.39, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009).

Supervision fees are authorized under two different statutes in cases involving delayed sentencing—MCL 771.1(3) and MCL 771.3(9). In addition to a supervision fee, a defendant whose sentence is delayed must pay the minimum state costs detailed in MCL 769.1j. MCL 771.3(9). MCL 769.1k provides a court with general authority to impose fines, costs, expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time a defendant's sentence is delayed. In addition, a defendant may be ordered to pay the costs of compelling his or her appearance. MCL 769.1k(2). MCL 769.1k(4) authorizes a court to order that a defendant pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of any penalties imposed pursuant to MCL 769.1k at any time. MCL 769.1k(5). Because MCL 771.3(9) also authorizes a trial court to impose any applicable conditions of probation listed in MCL 771.3(1), (2), and (3), a defendant may be ordered to pay any of the costs, assessments, etc. found there, including, for example, restitution under MCL 771.3(1)(e), or a crime victim assessment under MCL 771.3(1)(f).*

> **Note:** See Section 8.25 for a chart comparing factors involved in delayed sentencing, deferred adjudications, and assignments to drug court.

8.17 Deferred Adjudication of Guilt Under §7411

Delayed or deferred sentencing is not the same as a deferred adjudication of guilt. In cases involving deferred adjudication, the defendant pleads or is found guilty of the offense charged, but the adjudication is not immediately entered. Instead, the court places the defendant on probation and if the terms and conditions of probation are completed successfully, the court must discharge the defendant and dismiss the proceedings against him or her. Having successfully completed the term of probation imposed for the offense, no judgment of guilt is entered against the defendant.

If an individual violates a term or condition of probation imposed during the probation period, the court is not required to enter a judgment of guilt. When a defendant fails to comply with the terms or conditions of his or her probation, the court may exercise its discretion in determining whether to continue the probation or enter an adjudication of guilt and proceed to sentence the defendant as otherwise authorized.

Pursuant to MCL 333.7411 and subject to specific conditions, a court may defer adjudication of guilt and place an individual on probation for certain offenses involving controlled substances.

> **Note:** Deferred adjudication may also be appropriate in cases not immediately relevant to the discussion in this benchbook—violations of MCL 436.1703 (minor in possession), MCL 750.430 (impaired healthcare professional), MCL 769.4a (domestic violence/spouse abuse), MCL 762.11 (youthful trainee status), and MCL 750.350a (parental kidnapping). See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), Section 8.42.

A. Procedural Requirements

*Possession/ use of an imitation controlled substance.

Defendant must not have a previous conviction for a controlled substance violation. Except as noted below in MCL 333.7411(3), to qualify for deferral under MCL 333.7411, a defendant must have no previous convictions for an offense listed under the Controlled Substances Act or an offense under any statute of the United States or any state related to narcotic drugs, stimulants, depressants, hallucinogenic drugs, cocaine, or marijuana. MCL 333.7411(1). MCL 333.7411(3) states: "For purposes of this section, a person subjected to a civil fine for a first violation of section 7341(4)* shall not be considered to have previously been convicted of an offense under this article."

A conviction entered simultaneously with the charge to which a defendant seeks deferral under §7411 is not a "previous conviction" for purposes of §7411 and so does not render the defendant ineligible for §7411 status. *People v Ware*, 239 Mich App 437, 442 (2000).

Defendant's guilt must be established by plea or verdict. A defendant must plead guilty to or be found guilty of an offense listed in MCL 333.7411. These offenses are possession of a controlled substance under MCL 333.7403(2)(a)(*v*), and MCL 333.7403(2)(b), (c), or (d), use of a controlled substance under MCL 333.7404, and possession or use of an imitation controlled substance under MCL 333.7341 for a second time. MCL 333.7411(1).

Defendant must consent to the deferral. Deferred adjudication requires the defendant's consent. MCL 333.7411(1).

B. Conditions of Probation

Defendant is placed on probation and further proceedings are deferred. When all of the above requirements are satisfied, the court places the defendant on probation, further proceedings are deferred, and no judgment or adjudication of guilt is entered. MCL 333.7411(1).

Terms and conditions of probation are imposed pursuant to deferred adjudication provisions. When a court defers a defendant's judgment of guilt and places the defendant on probation, the court generally has discretion to impose any lawful term or condition on the defendant. MCL 771.3 and MCL 771.3c.

MCL 769.1k provides a court with general authority to impose fines, costs, expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time entry of an adjudication of guilt is deferred. In addition to any other fines, costs, and assessments ordered, a court may order a defendant to pay any costs involved in compelling his or her appearance. MCL 769.1k(2). The general authority to impose the monetary penalties listed in MCL 769.1k(1) and (2) also applies when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). MCL 769.1k(4) authorizes a court to order that a defendant pay those monetary penalties by wage assignment. In addition, a court may provide for the collection of the penalties imposed pursuant to MCL 769.1k at any time. MCL 769.1k(5).

*See **Chapter 14** for information on drug treatment courts.

Under §7411, the defendant must pay a probation supervision fee as prescribed by MCL 771.3c. MCL 333.7411(1). The statutory language in MCL 333.7411(1) expressly mentions only that a defendant may be ordered to participate in a drug treatment court, but the court is authorized to impose any other term or condition it deems appropriate to the offense and the offender.*

A defendant convicted of violating the Controlled Substances Act (except for major controlled substance offense convictions—violations of MCL 333.7401(2)(a)(*i*)–(*iv*) or MCL 333.7403(2)(a)(*i*)–(*iv*)) may, as part of the defendant's confinement or probation, be required to attend a program addressing the medical, psychological, and social effects of the misuse of drugs. MCL 333.7411(4). The defendant may be required to pay a fee for the program, and failure to complete a court-ordered program is a violation of the terms and conditions of the defendant's probation. *Id*.

If a defendant is twice convicted of violating MCL 333.7341(4),* the court must order the defendant to undergo substance abuse screening and assessment before the court imposes a sentence under MCL 333.7411(1). MCL 333.7411(5). As part of a sentence imposed under MCL 333.7411(1), the defendant may be required to participate in and successfully complete one or more appropriate rehabilitation programs. MCL 333.7411(5). The defendant must pay the costs of screening, assessment, and rehabilitative services, and failure to complete a court-ordered drug program is a violation of the defendant's probation. *Id*.

*"[A] person subjected to a civil fine for a first violation of section 7341(4) [possession/ use of an imitation controlled substance] shall not be considered to have previously been convicted of an offense under this article." MCL 333.7411(3).

C. Outcome of Probation

Failure to successfully complete the probationary period. The court has discretion to enter a judgment of guilt and proceed to sentencing when a defendant violates a term or condition of probation or otherwise fails to successfully complete a probationary period imposed under the deferral provisions of §7411. MCL 333.7411(1). Adjudication of guilt is not mandatory under §7411 under these circumstances.

Successful completion of the probationary period. Generally, a court must discharge the individual and dismiss the proceedings against him or her when the individual has fulfilled the terms and conditions of his or her probationary period. MCL 333.7411(1).

D. Terms of Dismissal

Discharge and dismissal without entering an adjudication of guilt. Discharge and dismissal under §7411 is not a conviction for purposes of the statute under which the individual was granted a deferred adjudication of guilt (MCL 333.7411) or for purposes of disqualifications or disabilities imposed by law for criminal convictions. MCL 333.7411(1). Additionally, the discharge and dismissal is not a conviction for purposes of the penalties imposed for subsequent convictions under MCL 333.7413. *Id*.

Record of deferred adjudication. The state police record and identification division must retain a nonpublic record of an arrest and discharge and dismissal under §7411. MCL 333.7411(2). See MCL 333.7411(2)(a)–(c) for circumstances under which, and people to whom, the record will be furnished. An offender whose adjudication of guilt was deferred under MCL 333.7411 and whose case is dismissed upon successful completion of the terms of probation does not qualify as "not guilty" for purposes of MCL 28.243(8), and is therefore not entitled to the destruction of his or her fingerprints and arrest card. *People v Benjamin*, 283 Mich App 526, 527, 537 (2009).

Only one discharge and dismissal is available. An individual may obtain only one discharge and dismissal under §7411. MCL 333.7411(1).

8.18 Conditional Sentences

Subject to the requirements of MCL 769.3, discussed below, a court may impose a conditional sentence when sentencing a defendant convicted of an offense punishable by a fine or imprisonment or both. Many controlled substance offenses may satisfy the statutory requirements for conditional sentences.

The conviction must be for an offense punishable by fine or imprisonment or both. When a defendant's conviction is punishable by a fine, by imprisonment, or both, and the court imposes a conditional sentence, any incarceration to which the defendant may be subject is conditioned on the defendant's payment of the fine imposed. MCL 769.3(1).

A conditional sentence requires the court to order that the defendant pay restitution in addition to the fine imposed. In addition to the fine imposed, the statutory language expressly instructs the court to order the defendant to pay restitution if a conditional sentence is imposed. MCL 769.3(1).

A defendant may avoid imprisonment if he or she pays both the fine and restitution within the time limit set by the court. The court must sentence a defendant as provided by law (according to the term of imprisonment indicated by the statute under which the defendant was convicted) if the defendant fails to pay the amounts ordered. MCL 769.3(1). A conditional sentence must express the time limit by which the fine ordered must be paid. *Id.*; *People v Tims*, 127 Mich App 564, 566 (1983).

A court may order the defendant to pay the costs of prosecution in addition to the fine imposed and restitution due. The court has discretion to order a defendant to pay the costs of prosecution when a defendant is given a conditional sentence that includes payment of a fine. The costs of prosecution may not be ordered in the absence of a fine. MCL 769.3(1). Because a defendant may be ordered to pay the costs of prosecution only if the court imposes a fine, a conditional sentence of incarceration or payment of costs only is invalid under the plain language of the statute. *Tims*, *supra* at 565–566.

With the exception of defendants convicted of CSC-I or CSC-III, the court may place a defendant on probation conditioned on his or her payment of a fine, costs, damages, or restitution. A defendant *not* convicted of CSC-I or CSC-III may avoid imprisonment and be placed on probation on the condition that the defendant pay any combination of fines, costs, damages, and restitution ordered by the court. The fines, costs, damages, and restitution must be paid in installments within the time indicated by the court in its conditional sentence. MCL 769.3(2).

A defendant who fails to make the payments ordered in a conditional sentence of probation may be sentenced as provided by law. The court has discretion to sentence a defendant as provided by law (according to the term

of imprisonment indicated by the statute under which the defendant was convicted) if the defendant defaults on any of the payments ordered. MCL 769.3(2).

Note: See Section 8.25 for a chart comparing factors involved in delayed sentencing, deferred adjudications, and assignments to drug court.

8.19 Suspended Sentences

No single statute expressly confers on a sentencing court the general authority to impose and then suspend all or a portion of a defendant's sentence.* However, the power to suspend sentences "'has been frequently and constantly exercised by courts of record before and since the adoption of the Constitution.'" *People v Cordell*, 309 Mich 585, 594 (1944), quoting *People v Stickle*, 156 Mich 557, 563 (1909). The power of suspension is an inherent, but not unlimited, judicial function; it is subject to any applicable statutory provisions and circumscribed by the executive branch's exclusive power to commute sentences and grant pardons. *Cordell, supra* at 594–595; *Oakland Co Pros v 52nd District Judge*, 172 Mich App 557, 560 (1988).

*MCL 750.165(4) (felony non-support) specifically authorizes a court to suspend a defendant's sentence if the defendant posts a bond and any sureties required by the court.

A court may not suspend a defendant's sentence once the defendant has begun serving it; a suspension in that case would be the practical equivalent of a commutation, and only the governor possesses the constitutional authority to commute a criminal sentence. *Oakland Co Pros, supra* at 559–560.

A sentence that is suspended indefinitely infringes on the powers granted to the executive and legislative branches of government. *People v Morgan*, 205 Mich App 432, 434 (1994). An indefinite suspension is not a valid sentence where a defendant's conviction was punishable by fine, prison, or probation, because the sentence is not within the sentencing alternatives defined by the Legislature in the governing statute. *Morgan, supra* at 433. Similarly, an indefinite suspension encroaches on the executive branch's exclusive power to pardon because an indefinite suspension has the practical effect of permitting a defendant to commit a crime and avoid punishment. *Id*. at 434.

8.20 Special Alternative Incarceration Units (SAIs)

When a defendant is convicted of an offense punishable by incarceration in a state prison (with the exception of the specific crimes listed in MCL 771.3b(17)), a sentencing court may order as a condition of the defendant's probation that he or she satisfactorily complete a program of incarceration in a special alternative incarceration (SAI) unit.* MCL 771.3b(1). SAI units are established and operated by the Department of Corrections (DOC); among other programming included by the DOC, SAI units are required to demand of the participants "physically strenuous work and exercise, patterned after military basic training[.]" MCL 771.3b; MCL 798.13(1); MCL 798.14(1).

*See Section 8.47, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), for more information on SAI units.

A defendant convicted of violating MCL 333.7401 or MCL 333.7403 and who has a previous conviction for a violation of MCL 333.7401 or MCL 333.7403(2)(a), (b), or (e) is not eligible for placement in an SAI unit until he or she has served the equivalent of the mandatory minimum sentence required by statute for that violation. MCL 791.234a(3).

8.21 Fines, Costs, Assessments, and Restitution

MCL 769.1k provides a general statutory basis for a court's authority to impose specified monetary penalties when sentencing a defendant and to collect the amounts owed at any time.

A. Fines

Pursuant to MCL 769.1k, courts have general authority to impose "any fine" on a convicted defendant. According to MCL 769.1k(1)(b)(*i*), at the time of sentencing or a delay in sentencing or entry of a deferred judgment of guilt, a court may impose any fine on a defendant convicted by plea (guilty or nolo contendere) or found guilty by the court after a hearing or trial. Specific authority to impose a fine, and the maximum amount of that fine, is often included in the language of the applicable penal statute.

Whenever an offense is punishable by a fine and imprisonment, the court has discretion to impose a sentence comprised of any combination of those penalties. MCL 769.5. A defendant may be imprisoned until he or she satisfies the amount of fines and costs ordered by the court, but the defendant may not be imprisoned for nonpayment beyond the time indicated in his or her sentence. *Id*. The court may require a defendant to pay by wage assignment any fine imposed under MCL 769.1k, and the court may provide that any fine imposed under MCL 769.1k be collected at any time. MCL 769.1k(4) and (5).

B. Costs

A sentencing court may not order a defendant to pay costs unless those costs are expressly authorized by a penal or procedural statute. *People v Jones*, 182 Mich App 125, 126 (1990) (the penal statute under which the defendant was sentenced, MCL 333.7401(2)(c), provided for punishment by imprisonment or fine or both, but did not expressly authorize the imposition of costs).

MCL 769.1k authorizes a court to impose "[a]ny cost in addition to the minimum state cost" when sentencing a defendant in certain circumstances.* MCL 769.1k(1)(b)(*ii*). A defendant may be ordered to pay any additional costs incurred to compel his or her attendance. MCL 769.1k(2). In addition to the authority to impose costs, MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL 769.1k(1). A court may provide for the collection of costs imposed under MCL 769.1k at any time. MCL 769.1k(5).

*When the defendant pleads guilty or nolo contendere or the court determines after trial or hearing that the defendant is guilty.

MCL 769.3 and MCL 769.1f are procedural statutes in which court-ordered costs are expressly authorized. MCL 769.3(1) authorizes conditional sentencing where a court may order a defendant to pay the costs of prosecution in cases where the defendant was convicted of an offense punishable by a fine or imprisonment or both. MCL 769.1f authorizes a sentencing court to impose the costs of prosecution (among other monetary penalties) when a defendant is convicted of the offenses listed in MCL 769.1f.

C. Minimum State Costs

MCL 769.1k provides a court with general authority to impose several specific monetary penalties at the time a defendant is sentenced, at the time a defendant's sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(a) expressly requires a court to "impose the minimum state costs as set forth in [MCL 769.1j]." The language used in MCL 769.1k(1)(a) mandates that a court impose the minimum state costs according to MCL 769.1j, and MCL 769.1j conditions the imposition of minimum state costs on whether a defendant is ordered to pay other fines, costs, or assessments. If a defendant is ordered to pay any combination of a fine, costs, or applicable assessments, the court must order the defendant to pay a minimum state cost of $60.00 for each felony conviction. MCL 769.1j(1)(a).

In addition to the authority to impose minimum state costs, MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment any of the costs authorized in MCL 769.1k(1) and (2). A court may provide for the collection of minimum state costs imposed under MCL 769.1k at any time. MCL 769.1k(5).

D. Crime Victim Assessment

Whenever an individual is charged with a felony offense and the charge "is resolved by conviction, by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal," the court must order the individual to pay a $60.00 crime victim assessment. MCL 780.905(1). In contrast to the minimum state cost, which must be ordered for each felony conviction arising from a single case, only one crime victim assessment per case may be ordered, even when the case involves multiple offenses. MCL 780.905(2).

MCL 769.1k provides a court with general authority to impose "[a]ny assessment authorized by law" on a defendant at the time a defendant is sentenced, at the time a defendant's sentence is delayed, or at the time entry of an adjudication of guilt is deferred. MCL 769.1k(1)(b)(*iv*). MCL 769.1k(4) authorizes a court to order that a defendant pay by wage assignment an assessment imposed pursuant to MCL 769.1k(1)(b)(*iv*). A court may provide

for the collection of any assessment imposed under MCL 769.1k(1) or (2) at any time. MCL 769.1k(5).

E. Restitution

Restitution is mandatory for an offender convicted of a felony offense. MCL 769.1a(2); MCL 780.766(2). Restitution is also mandatory "[f]or an offense that is resolved by assignment of the defendant to youthful trainee status, by a delayed sentence or deferred judgment of guilt, or in another way that is not an acquittal or unconditional dismissal." MCL 780.766(2).

Except for restitution payments made to certain entities—service providers or the victim services commission, for example—the court must order the convicted felon to "make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MCL 769.1a(2); MCL 780.766(2). See Chapter 10, *Crime Victim Rights Manual—Revised Edition* (MJI, 2005-April 2009), for a comprehensive discussion of restitution.

*Legal entities are not victims for purposes of MCL 780.766(4) (physical or psychological injury), or MCL 780.766(5) (injury resulting in death or serious impairment).

The amount of court-ordered restitution may not be reduced by the amount of an unpaid civil judgment obtained by the victim against the defendant. *People v Dimoski*, ___ Mich App ___, ___ (2009). MCL 780.766(8) provides in part that "[t]he court shall not order restitution to be paid to a victim . . . if the victim . . . has received or is to receive compensation for that loss . . . ." The "is to receive" language requires actual receipt of compensation or certainty regarding receipt of compensation, and does not refer to compensation with the potential to be recovered. *Dimoski*, *supra* at ___. The distinction between restitution and civil damages is reflected in the setoff scheme of MCL 780.766(9), which provides that "[a]ny amount paid to a victim . . . under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim . . . ." *Dimoski*, *supra* at ___. "Although [a] victim [may] have the benefit of both a civil judgment and an order of restitution to obtain monetary relief from [a] defendant, the availability of two methods does not mean that the victim will have a double recovery, but merely increases the potential that the perpetrator of a crime will be forced to pay for the wrongdoing committed." *Id*. at ___.

For the purposes of restitution only, "victim means an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 769.1a(1); MCL 780.766(1). With a few exceptions,* and for purposes of restitution, a victim can be

> "a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime." MCL 769.1a(1); MCL 780.766(1).

Although MCL 780.766(1) authorizes restitution for financial harm sustained by a governmental entity, restitution is not properly ordered for the routine

costs of a criminal investigation when those costs are ordinarily incurred no matter what the outcome of the investigation. *People v Newton*, 257 Mich App 61, 69–70 (2003). However, the loss of "buy money" may be included in an order of restitution because "buy money" does not represent the costs ordinarily incurred in a county's criminal investigation and would not have been subject to loss were it not for the defendant's commission of a crime. *Newton, supra* at 69; *People v Crigler*, 244 Mich App 420, 424, 427 (2001). Where a narcotics enforcement team fails to recover money expended during a criminal investigation, a victim (the enforcement team) has suffered financial harm (loss of the "buy money") as a direct result of the defendant's criminal conduct. *Crigler, supra* at 427.

8.22 Probation

MCL 771.1(1) details the offenses for which a defendant may be sentenced to probation:*

*See Section 8.40, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), for a detailed discussion of probation.

> "In all prosecutions for felonies or misdemeanors other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, or *major controlled substance offenses*, if the defendant has been found guilty upon verdict or plea and the court determines that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law, the court may place the defendant on probation under the charge and supervision of a probation officer." (Emphasis added.)

> **Note:** Although not stated in MCL 771.1(1), the court may not place a defendant on probation when the defendant was convicted of any of the offenses for which *mandatory* prison sentences are prescribed by statute.*

*See Appendix G, *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009).

Attempted offenses and orders of probation. The Legislature's omission of attempted felonies from the crimes for which probation may not be ordered is evidence of its intent that probation be an alternative to other sentences authorized for convictions under the attempt statute (MCL 750.92). *People v McKeown*, 228 Mich App 542, 545 (1998).

Order of probation. When a court sentences a defendant to probation, the court must, in a court order filed with the case and made part of the record, set the length of the probationary period and determine the terms on which the probation is conditioned. MCL 771.2(2).

Length of probation. Except as provided in MCL 771.2a, which deals with probation periods for stalking offenses, the term of probation imposed on a defendant convicted of a felony offense must not exceed 5 years. MCL 771.2(1). "Felony" includes two-year misdemeanors. MCL 761.1(g); *People v Smith*, 423 Mich 427, 434 (1985).

Lifetime probation. Effective March 1, 2003, 2002 PA 666 eliminated the "lifetime probation" provision in MCL 771.1(4). Prior to the amendment, a trial court could sentence a defendant to lifetime probation for violating or conspiring to violate MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*). 2002 PA 666 also amended MCL 771.2. Although the amendment eliminated lifetime probation, it did not affect the lifetime probation sentences imposed before the amendment's effective date. MCL 771.2(3) continues to prohibit any reduction in the probation period imposed under former MCL 771.1(4) "other than by a revocation that results in imprisonment or as otherwise provided by law."

2002 PA 710, effective April 1, 2003, amended MCL 333.7401 to add a provision allowing discharge from probation or resentencing in certain cases for defendants sentenced to lifetime probation before the effective date of the new provision. MCL 333.7401(4) states:

> "If an individual was sentenced to lifetime probation under subsection (2)(a)(*iv*) before the effective date of the amendatory act that added this subsection and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual's probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection."

Mandatory terms and conditions of probation. A sentence of probation contains a number of conditions, some of which are mandatory. During the term of an individual's probation, the probationer must comply with the mandatory conditions of probation listed in MCL 771.3(1)(a)–(h).

Discretionary terms and conditions. Discretionary conditions of probation are found in MCL 771.3(2)(a)–(q) and (3).

Financial penalties. MCL 769.1k(1)(b) provides a court with general authority to impose a fine, costs, expenses of providing legal assistance, assessments, and reimbursement under MCL 769.1f on a defendant at the time a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). In addition, a defendant may be ordered to pay any costs incurred to compel his or her appearance. MCL 769.1k(2). A defendant may be required to pay by wage assignment the penalties imposed pursuant to MCL 769.1k(1)(b). MCL 769.1k(4). The court may provide that those penalties be collected at any time. MCL 769.1k(5).

Fines. Payment of a fine imposed on a defendant sentenced to probation may be made a condition of the defendant's probation. MCL 771.3(2)(b). The

court may order the probationer to make immediate payment or the court may permit the probationer to pay within the time period of his or her probation.

Costs. The costs authorized by MCL 769.1k(1)(b)(*ii*) also apply when a defendant is placed on probation, probation is revoked, or a defendant is discharged from probation. MCL 769.1k(3). Costs as a condition of probation are authorized by MCL 771.3(2)(c).

Minimum state costs. The general authority to impose the monetary penalties listed in MCL 769.1k(1)(a) also applies to minimum state costs. Payment of the minimum state cost must be a condition of probation. MCL 769.1j(3); MCL 771.3(1)(g).

Crime victim assessment. The general authority to impose the monetary penalties in MCL 769.1k(1)(b) applies to crime victim assessments. Payment of the crime victim assessment must be made a condition of an offender's probation. MCL 771.3(1)(f).

Restitution. Restitution must be a condition of probation. MCL 771.3(1)(e).

Amending an order of probation. A sentencing court has discretion to alter the form or substance of an order of probation at any time during the probationary term. MCL 771.2(2).

Plea agreements and orders of probation. A defendant is not entitled to withdraw his or her plea or to demand specific performance of a plea agreement when a trial court imposes otherwise valid conditions on the defendant's probation that were not included in the plea agreement. *People v Johnson*, 210 Mich App 630, 634–635 (1995).

Termination of the probation period. When a probationer's term of probation terminates, the probation officer must report to the court that the probation period has ended. MCL 771.5.* The officer must also inform the court of the probationer's conduct during the probation period. *Id*. After receiving the report, the court may discharge the probationer and enter judgment of a suspended sentence, or the court may extend the probationer's supervision period up to the maximum period of probation permitted. *Id*.

*The statute does not specify the time in which this report must be made.

8.23 Parole Provisions

A comprehensive discussion of parole is beyond the scope of this benchbook. However, this section briefly outlines several parole provisions directly related to controlled substance offenses discussed elsewhere in the book.

A. Offenders Sentenced to Life Imprisonment With Possibility of Parole

*Manufacture or deliver 1 kg or more of certain schedule 1 or 2 substances. See **Section 2.1**.

According to MCL 791.234(7), a defendant convicted of violating or conspiring to violate MCL 333.7401(2)(a)(*i*)* and sentenced to life imprisonment with possibility of parole may be placed on parole pursuant to the conditions in MCL 791.234(8) under the following circumstances:

*As defined in MCL 791.234 (17)(a).

- If the offender has another conviction for a serious crime,* parole is possible after an offender has served 20 calendar years of a life sentence imposed for violating or conspiring to violate MCL 333.7401(2)(a)(*i*). MCL 791.234(7)(b).

  > **Note:** If a sentencing judge determines that an offender sentenced to life for violating MCL 333.7401(2)(a)(*i*) "has cooperated with law enforcement," the offender may be eligible for parole 2-1/2 years earlier than otherwise indicated. MCL 791.234(12).

*As defined in MCL 791.234 (17)(a).

- If the offender does not have another conviction for a serious crime,* parole is possible after an offender has served 17-1/2 calendar years of a life sentence imposed for violating or conspiring to violate MCL 333.7401(2)(a)(*i*). MCL 791.234(7)(c).

  > **Note:** If a sentencing judge determines that an offender sentenced to life for violating MCL 333.7401(2)(a)(*i*) "has cooperated with law enforcement," the offender may be eligible for parole 2-1/2 years earlier than otherwise indicated. MCL 791.234(12).

- Except for a life sentence imposed for violating or conspiring to violate MCL 333.7401(2)(a)(*i*), parole is possible after an offender has served 10 calendar years of a life sentence imposed for a crime committed before October 1, 1992. MCL 791.234(7)(a).

- Except for a life sentence imposed for violating or conspiring to violate MCL 333.7401(2)(a)(*i*), parole is possible after an offender has served 15 calendar years of a life sentence imposed for a crime committed on or after October 1, 1992. MCL 791.234(7)(a).

The period of parole for an offender released under MCL 791.234(7) must be no less than 4 years and must be subject to the parole board's "usual rules pertaining to paroles[.]" MCL 791.234(8)(d).

B. Offenders Sentenced to Life Imprisonment Before October 1, 1998

Parole eligibility for offenders sentenced to life imprisonment before October 1, 1998, for violating or conspiring to violate MCL 333.7401(2)(a)(*i*)* is subject to additional considerations. Under these circumstances, the parole board must consider the factors listed in MCL 791.234(10)(a)–(c) when determining whether an offender should be paroled:

*See **Section 2.1** for more information.

- whether the violation for which the offender was sentenced to life imprisonment was "part of a continuing series of violations" of MCL 333.7401 or MCL 333.7403.
- whether the violation was committed "in concert with 5 or more other individuals."
- whether the offender was "a principal administrator, organizer, or leader of an entity that [he or she] knew or had reason to know was organized, in whole or in part, to commit violations of . . . MCL 333.7401 or [MCL] 333.7403," and whether the violation committed by the offender was for the purpose of furthering the interests of that entity.
- whether the offender was "a principal administrator, organizer, or leader of an entity that [he or she] knew or had reason to know committed violations of . . . MCL 333.7401 or [MCL] 333.7403," and whether the violation committed by the offender was for the purpose of furthering the interests of that entity.
- whether the violation occurred in a drug-free school zone.
- whether the violation involved delivery of a controlled substance, or possession with the intent to deliver a controlled substance, to an individual under the age of 17.

C. Offenders Convicted Before March 1, 2003

An offender convicted of violating or conspiring to violate MCL 333.7401(2)(a)(*ii*) or MCL 333.7403(2)(a)(*ii*)* before March 1, 2003, is eligible for parole after the offender has served "the minimum of each sentence imposed for that violation or 10 years of each sentence imposed for that violation, whichever is less." MCL 791.234(13).

*Delivery/ possession involving more than 450g but less than 1kg.

An offender convicted of violating or conspiring to violate MCL 333.7401(2)(a)(*iii*) or MCL 333.7403(2)(a)(*iii*)* before March 1, 2003, is eligible for parole after the offender has served "the minimum of each sentence imposed for that violation or 5 years of each sentence imposed for that violation, whichever is less." MCL 791.234(14).

*Delivery/ possession involving more than 50g but less than 450g.

*Delivery/ possession involving less than 50g.

An offender convicted of violating or conspiring to violate MCL 333.7401(2)(a)(*iv*) or MCL 333.7403(2)(a)(*iv*)* before March 1, 2003, whose sentence for that offense is consecutive to a term of imprisonment imposed for any other major controlled substance violation (MCL 333.7401(2)(a)(*i*)–(*iv*) or MCL 333.7403(2)(a)(*i*)–(*iv*)) is eligible for parole "after serving 1/2 of the minimum sentence imposed for each violation of [MCL 333.]7401(2)(a)(*iv*) or [MCL 333.]7403(2)(a)(*iv*)." MCL 791.234(15). This subsection does not apply if the sentence resulted from a new offense committed while the offender was on probation or parole. *Id*.

D. Offenders Sentenced to Indeterminate Terms of Imprisonment

*MCL 791.234a governs SAI placements. See **Section 8.20** for more information.

Except as provided in MCL 791.234a,* an offender sentenced to an indeterminate term of imprisonment is generally eligible for parole after the offender "has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted[.]" MCL 791.234(1) (specific to prisoners who are *not* subject to disciplinary time) and MCL 791.234(2) (specific to prisoners who are subject to disciplinary time).

E. Offenders Sentenced to Consecutive Indeterminate Terms of Imprisonment

Generally, offenders sentenced to consecutive indeterminate terms of imprisonment are eligible for parole after having served "the total time of the added minimum terms[.]" MCL 791.234(3) (specific to prisoners who are *not* subject to disciplinary time) and MCL 791.234(4) (specific to prisoners who are subject to disciplinary time).

F. Other Violations

*Less an allowance for disciplinary credits as provided in MCL 800.33(5).

An offender not subject to disciplinary time who is convicted and sentenced for a violation of MCL 333.7401(2)(a) or (2)(b) or MCL 333.7402(2)(a) or (2)(b) is not eligible for parole "until the person has served the minimum term imposed by the court[.]"* MCL 791.233(c); MCL 791.233b(cc).

> **Note:** With regard to convictions for violating MCL 333.7401(2)(a)(*i*)–(*iv*) before March 1, 2003, the statutory directives above appear to apply to convictions obtained after March 1, 2003. MCL 791.234(13), (14), and (15), discussed in subsection (C), above, expressly apply to specific convictions obtained before March 1, 2003, and MCL 791.233(c) and MCL 791.233b(cc) contain no reference to the date on which a conviction was obtained.

G. Revocation of Parole

In addition to the provisions in MCL 791.236 applicable to parole orders involving offenders *not* convicted of certain controlled substance offenses, a parole order issued for a prisoner convicted of violating or conspiring to violate MCL 333.7401(2)(a)(*i*) or (*ii*) or MCL 333.7403(2)(a)(*i*) or (*ii*) must contain "a notice that if the parolee violates or conspires to violate article 7 of the public health code, 1978 PA 368, MCL 333.7101 to 333.7545, and that violation or conspiracy to violate is punishable by imprisonment for 4 or more years, or [if the parolee] commits a violent felony during his or her release on parole, parole shall be rescinded." MCL 791.236(10). A statutory provision identical to the one in MCL 791.236(10) appears in MCL 791.240a, a statute primarily concerned with parole violation hearings. MCL 791.240a(2).

H. Offenders Ineligible for Parole

An offender sentenced to mandatory life imprisonment for violating MCL 333.17764(7), MCL 750.16(5), or MCL 750.18(7)* is not eligible for parole, but is subject to the provisions of MCL 791.244. MCL 791.234(6)(b) and (d). According to MCL 791.244(1), one member of the parole board must interview a prisoner sentenced to life imprisonment without the possibility of parole "at the conclusion of 10 calendar years and thereafter as determined appropriate by the parole board[.]" The periodic interviews continue until a prisoner dies or is granted a reprieve or pardon. *Id*.

*These offenses are discussed in **Sections 6.13**, **6.14**, and **6.15**, respectively.

I. Offenders With a History of Substance Abuse

Specific parole provisions apply to offenders with substance abuse histories who are placed on parole under intensive, maximum, or medium supervision. MCL 791.240(2) states:

> "If a prisoner who has a history of substance abuse is placed on parole and is assigned to intensive, maximum, or medium parole supervision, the department shall require as a condition of parole that the parolee submit to substance abuse testing at least twice each month."*

*Effective January 1, 2007, 2006 PA 487.

In addition, special reporting requirements apply to parolees who are returned to prison for violations involving alcohol or drugs:

> "Not later than April 1 of each year, the department shall report to the legislature on the number of parolees who are returned to state correctional facilities for a violation of parole involving the use of alcohol or a controlled substance during the preceding calendar year. The report shall specify the number of parolees who are returned to a state correctional facility after 1 such violation, 2 such violations, 3 such violations, 4 such violations, and 5 or more such violations." MCL 791.240(3).*

*Effective January 1, 2007, 2006 PA 487.

For purposes of MCL 791.240, "substance abuse" is defined as

> "the taking of alcohol or other drugs at dosages that place an individual's social, economic, psychological, and physical welfare in potential hazard or to the extent that an individual loses the power of self-control as a result of the use of alcohol or drugs, or while habitually under the influence of alcohol or drugs, endangers public health, morals, safety, or welfare, or a combination thereof." MCL 791.240(5)(b).*

*Effective January 1, 2007, 2006 PA 487.

8.24 Table of Controlled Substance Offenses

MCL #	Description	Felony/MisD	Guide lines?	Grp	Cls	Max
333.7302a(8)	Failure to mark/imprint drugs	misdemeanor	no			1
333.7321(2)	Failure to maintain required inventory/records	civil infraction	no			fine
333.7339(2)	Unlawful advertising of a dietary product or supplement containing ephedrine	misdemeanor	no			93 days
333.7339(3)	Sale of ephedrine to minor	misdemeanor	no			93 days
333.7340(3)	Electronic sale/delivery of ephedrine	felony	yes	CS	F	4
333.7341(4)	Use/possession with intent to use imitation controlled substance — first offense	civil infraction	no			fine
333.7341(4)	Use/possession with intent to use imitation controlled substance — 2nd/subsequent	misdemeanor	no			93 days
333.7341(6)	Advertise/promote distribution of an imitation controlled substance	felony	no			2
333.7341(8)	Deliver/manufacture — imitation controlled substance	felony	yes	CS	G	2
333.7401(2)(a)(i)	Deliver/manufacture — 1,000 grams/more of certain schedule 1 or 2 substances	felony	yes	CS	A	Life
333.7401(2)(a)(ii)	Deliver/manufacture — 450+ grams/less than 1kg of certain schedule 1 or 2 substances	felony	yes	CS	A	30
333.7401(2)(a)(iii)	Deliver/manufacture — 50+ grams/less than 450g of certain schedule 1 or 2 substances	felony	yes	CS	B	20
333.7401(2)(a)(iv)	Deliver/manufacture — less than 50 grams of certain schedule 1 or 2 substances	felony	yes	CS	D	20
333.7401(2)(b)(i)	Deliver/manufacture — methamphetamine or 3, 4-methylenedioxymethamphetamine	felony	yes	CS	B	20
333.7401(2)(b)(ii)	Deliver/manufacture — certain schedule 1, 2, or 3 controlled substances	felony	yes	CS	E	7
333.7401(2)(c)	Deliver/manufacture — schedule 4 controlled substance	felony	yes	CS	F	4
333.7401(2)(d)(i)	Deliver/manufacture — 45/more kilograms of marijuana	felony	yes	CS	C	15
333.7401(2)(d)(ii)	Deliver/manufacture — 5/more kilograms/less than 45kg of marijuana	felony	yes	CS	D	7
333.7401(2)(d)(iii)	Deliver/manufacture — less than 5 kilograms or 20 plants of marijuana	felony	yes	CS	F	4
333.7401(2)(e)	Deliver/manufacture — schedule 5 controlled substance	felony	yes	CS	G	2
333.7401(2)(f)	Deliver/manufacture — prescription form or counterfeit prescription form	felony	yes	CS	D	7
333.7401a	Deliver—controlled substance/GBL, intent to commit CSC	felony	yes	Person	B	20
333.7401b(3)(a)	Deliver/manufacture — GBL	felony	yes	CS	E	7
333.7401b(3)(b)	Possession of GBL	felony	yes	CS	G	2

MCL #	Description	Felony/MisD	Guide lines?	Grp	Cls	Max
333.7401c(2)(a)	Operate/maintain controlled substance laboratory	felony	yes	CS	D	10
333.7401c(2)(b)	Operate/maintain controlled substance laboratory in presence of minor	felony	yes	CS	B	20
333.7401c(2)(c)	Operate/maintain controlled substance laboratory involving hazardous waste	felony	yes	CS	B	20
333.7401c(2)(d)	Operate/maintain laboratory near certain places	felony	yes	CS	B	20
333.7401c(2)(e)	Operate/maintain controlled substance laboratory involving firearm/other harmful device	felony	yes	CS	A	25
333.7401c(2)(f)	Operate/maintain laboratory involving methamphetamine	felony	yes	CS	B	20
333.7402(2)(a)	Deliver/manufacture — certain imitation controlled substances	felony	yes	CS	D	10
333.7402(2)(b)	Deliver/manufacture — schedule 1, 2, or 3 imitation controlled substance	felony	yes	CS	E	5
333.7402(2)(c)	Deliver/manufacture — imitation schedule 4 substance	felony	yes	CS	F	4
333.7402(2)(d)	Deliver/manufacture — imitation schedule 5 substance	felony	yes	CS	G	2
333.7402(2)(e)	Deliver/manufacture — controlled substance analogue	felony	yes	CS	C	15
333.7403(2)(a)(i)	Possess 1kg/more of certain schedule 1 or 2 substances	felony	yes	CS	A	Life
333.7403(2)(a)(ii)	Possess 450+ grams/less than 1kg of certain schedule 1 or 2 substances	felony	yes	CS	A	30
333.7403(2)(a)(iii)	Possess 50+ grams/less than 450 grams of certain schedule 1 or 2 substances	felony	yes	CS	B	20
333.7403(2)(a)(iv)	Possess 25+ grams/less than 50 grams of certain schedule 1 or 2 substances	felony	yes	CS	G	4
333.7403(2)(a)(v)	Possession of less than 25 grams of certain schedule 1 or 2 controlled substances	felony	yes	CS	G	4
333.7403(2)(b)(i)	Possession of methamphetamine or 3, 4-methylenedioxymethamphetamine	felony	yes	CS	D	10
333.7403(2)(b)(ii)	Possession of certain schedule 1, 2, 3, or 4 controlled substances or analogues	felony	yes	CS	G	2
333.7403(2)(c)	Possession of LSD, other schedule 5 drugs	misdemeanor	no			1
333.7403(2)(d)	Possession of marijuana	misdemeanor	no			1
333.7403(2)(e)	Possession of prescription forms	misdemeanor	no			1
333.7404(2)(a)	Use of schedule 1/2 narcotics/cocaine/methamphetamine	misdemeanor	no			1
333.7404(2)(b)	Use of certain schedule 1/2/3/4 analogues	misdemeanor	no			1
333.7404(2)(c)	Use of LSD, other schedule 5 substances	misdemeanor	no			6 mo
333.7404(2)(d)	Use of marijuana	misdemeanor	no			90 days
333.7405(1)(a)	Controlled substance violations by licensee	misdemeanor	yes	CS	G	2
333.7405(1)(b)	Manufacturing/distributing violations by licensee	misdemeanor	yes	CS	G	2

MCL #	Description	Felony/MisD	Guide lines?	Grp	Cls	Max
333.7405(1)(c)	Refusing lawful inspection	misdemeanor	yes	CS	G	2
333.7405(d)	Maintaining drug house	misdemeanor	yes	CS	G	2
333.7407(1)(a)	Controlled substance violations by licensee	felony	yes	CS	G	4
333.7407(1)(b)	Use of fictitious, revoked, or suspended license number	felony	yes	CS	G	4
333.7407(1)(c)	Obtaining controlled substance by fraud	felony	yes	CS	G	4
333.7407(1)(d)	False reports under controlled substance article	felony	yes	CS	G	4
333.7407(1)(e)	Possession of counterfeiting implements	felony	yes	CS	G	4
333.7407(1)(f)	Possession of counterfeit prescription form	felony	yes	CS	F	4
333.7407(2)	Refusing to furnish records	felony	yes	CS	G	4
333.7407a	Attempted controlled substance violations	varies by offense				
333.7410(1)	Deliver/possess with intent — GBL, cocaine, or schedule 1/2/3/4/5 substance to a minor	felony	yes	CS	SPEC	Var
333.7410(2)	Deliver schedule 1 narcotic/cocaine within 1,000 feet of school property or a library	felony	yes	CS	SPED	Var
333.7410(3)	Possess/intent to deliver schedule 1 narcotic/cocaine within 1,000 feet of school property or a library	felony	yes	CS	SPEC	Var
333.7410(4)	Possess GBL/certain other substances on school property or library property	felony	yes	CS	SPEC	Var
333.7410(7)	Distribution of marijuana w/o remuneration	misdemeanor	no			*90 days
333.7410a(1)(a)	Deliver GBL/other controlled substance to minor in or within 1,000 feet of a park	felony	yes	CS	G	2
333.7410a(1)(b)	Possess/intent to deliver GBL/other substance to minor in or within 1,000 feet of a park	felony	yes	CS	G	2
333.7410a(1)(c)	Possession—GBL/other substance in a park	felony	yes	CS	G	2
333.7410a(1)(d)	Equipment/place used to manufacture GBL	felony	yes	CS	G	2
333.7413(2)	Subsequent controlled substance violations	felony	yes	Pub trst	SPEC	Var
333.7413(3)	Subsequent controlled substance violations	felony	yes	Pub trst	SPEC	Var
333.7416(1)(a)	Recruiting/inducing a minor to commit a controlled substance felony	felony	yes	CS	SPEC	Var
333.7455(1)	Sell/offer for sale drug paraphernalia	misdemeanor	no			90 days
333.7455(2)	Sell/offer to sell drug paraphernalia to a minor	misdemeanor	no			1
333.17764(1)	Sell/manufacture a drug or device with misleading label	misdemeanor	no			*90 days
333.17764(3)	Adulterate, misbrand, remove, or substitute drug/device	felony	yes	Pub saf	F	2

MCL #	Description	Felony/MisD	Guide lines?	Grp	Cls	Max
333.17764(4)	Adulterate/misbrand/remove/substitute drug/device causing injury	felony	yes	Pub saf	F	4
333.17764(5)	Adulterate/misbrand/remove/substitute drug/device causing serious impairment	felony	yes	Pub saf	E	5
333.17764(6)	Adulterate/misbrand/remove/substitute drug/device causing death	felony	yes	Pub saf	C	15
333.17764(7)	Adulterate/misbrand/remove/substitute drug/device — intend death/serious impairment to 2 or more persons	felony	no			Life no parole
333.17766(a)	Obtain a prescription drug using a false name	misdemeanor	no			*90 days
333.17766(b)	Obtain a prescription drug by false representation	misdemeanor	no			*90 days
333.17766(c)	Counterfeit/alter/forge a prescription	misdemeanor	no			*90 days
333.17766(d)	Possession of counterfeit/altered/forged prescription	misdemeanor	no			*90 days
333.17766(e)	Obtain a prescription drug using counterfeit/forged/altered prescription	misdemeanor	no			*90 days
333.17766(f)	Possession/intent to sell/resell prescription drug	misdemeanor	no			*90 days
333.17766(g)	Possession/intent to sell/resell damaged drug unfit for human or animal use	misdemeanor	no			*90 days
333.17766(h)	Unauthorized preparation of prescription drug	misdemeanor	no			*90 days
333.17766(i)	Unauthorized sale of drug in bulk or at auction	misdemeanor	no			*90 days
333.17766c(2)	Possession — more than 12 grams of ephedrine or pseudoephedrine	felony	yes	CS	G	2
333.17766f(3)	Violate requirements for authorized sale of ephedrine	civil infraction	no			fine
750.16(1)	Adulterate/misbrand/remove/substitute drug or medicine	felony	yes	Person	G	2
750.16(2)	Adulterate/misbrand/remove/substitute drug or medicine causing personal injury	felony	yes	Person	F	4
750.16(3)	Adulterate/misbrand/remove/substitute drug or medicine— serious impairment of body function	felony	yes	Person	E	5
750.16(4)	Adulterate/misbrand/remove/substitute drug or medicine resulting in death	felony	yes	Person	C	15
750.16(5)	Adulterate/misbrand/remove/substitute drug/medicine— intend death or serious impairment to 2 or more persons	felony	no			Life no parole
750.18(3)	Mix/color/stain/powder a drug/medicine with ingredient affecting quality/potency	felony	yes	Person	G	2
750.18(4)	Mix/color/stain/powder a drug/medicine with ingredient resulting in personal injury	felony	yes	Person	F	4
750.18(5)	Mix/color/stain/powder a drug/medicine with ingredient reasulting in serious impairment of body function	felony	yes	Person	E	5

DEFERRED JUDGMENT OF GUILT AND DELAYED SENTENCE FOR ADULT OFFENDERS; COMPARISON OF PROCESSING

Revised 7/08

Action	Deferred Judgment of Guilt and HYTA[1]	Delayed Sentence MCL 771.1
Plea of Guilt or Finding of Guilt	Accepted and judgment of guilt not entered.	Accepted and judgment of guilt entered.
Referral	Defer further proceeding and place on probation. May place in drug treatment court if otherwise eligible.	May supervise under delay up to 1 year. The court shall enter an order stating the reason for the delay upon the court's records.
Monetary Assessments	May assess a fine, costs,[A] probation oversight, and restitution. Minimum State Cost required if any combination of fines, costs and other assessments ordered. Crime Victim Assessment required as applicable to violation. Bond shall be applied to monetary sanctions.[2]	May assess a fine, costs, probation oversight, and restitution. Minimum State Cost required if any combination of fines, costs and other assessments ordered. Crime Victim Assessment required as applicable to violation. Bond shall be applied to monetary sanctions.[2]
Caseload Reporting	Report as Guilty Plea.	Report as Guilty Plea.
MSP Criminal History Reporting	Report conviction, including monetary assessments. Refer to MCL 771.1 in free-text area of the disposition report.	Report deferred judgment of guilt.
SOS Abstract Reporting	Abstract reportable offenses pursuant to MCL 257.732.	Report deferred if Minor in possession; otherwise no reporting required.
Court Record Status	Public.	Public except Minor in possession and HYTA are not public at time of deferral/assignment.
Supervision or Probation Successful	Conviction remains. Court enters sentence for sanctions previously imposed.	Discharge from probation and dismiss.
MSP Criminal History Reporting	Report conviction only if not previously reported at time of plea.	Report successful completion of probation and dismissal.
SOS Abstract Reporting	Abstract changes to reportable offenses pursuant to MCL 257.732.	Report dismissal if Minor in possession; otherwise no reporting required.
Court Record Status	Public.	If MCL or HYTA, the entire file becomes nonpublic record ***while proceedings are deferred and the individual is on probation, and after an order of discharge and dismissal is entered***. For all other deferred judgment cases, the entire file becomes a nonpublic record ***after the order of discharge from probation is entered***.[B C]
Supervision or Probation Unsuccessful	Proceed to sentencing.	Enter conviction. Discharge probation as unsuccessful.
MSP Criminal History Reporting	Report any amended sentence, including jail time imposed when applicable.	Report date conviction entered and sentence.
SOS Abstract Reporting	Abstract changes to reportable offenses pursuant to MCL 257.732.	Report date conviction entered for a reportable offense.
Court Record Status	Public.	Public.

MCL #	Description	Felony/MisD	Guide lines?	Grp	Cls	Max
750.18(6)	Mix/color/stain/powder a drug/medicine with ingredient resulting in death	felony	yes	Person	C	15
750	Permitting consumption of controlled substance at a social gathering—first offense	misdemeanor	no			30 days
750	Permitting consumption of controlled substance—second/subsequent offense	misdemeanor	no			90 days
750	Conspiracy	varies with offense	yes	Pub saf	Spec	2/var
750	Solicitation of felony punishable by life or 5 or more years	felony	yes	Pub ord	E	5
750	Solicitation of felony punishable by less than 5 years	felony	yes	Pub ord	G	2
750	Inducing minor to commit felony	felony	yes	Person	Spec	4/var
750	Delivery of controlled substance causing death	felony	yes	Person	A	Life
750	Use/possession of controlled substance on premises of hotel or bed and breakfast	misdemeanor	no			90 days
752	Sell/distribute nitrous oxide	misdemeanor	no			93 days
752	Sell/distribute nitrous oxide — second offense	misdemeanor	no			1
752	Sell/distribute nitrous oxide — third/subsequent offense	felony	yes	Pub saf	F	4
752	Inhalation of chemical agent for purpose of intoxication	misdemeanor	no			93 days
800	Furnishing prisoner with contraband	felony	yes	Pub saf	H	5
800	Furnishing prisoner with contraband outside prison	felony	yes	Pub saf	H	5
800	Bringing contraband into a prison	felony	yes	Pub saf	H	5
800	Possession of contraband by prisoner	felony	yes	Pub saf	E	5
801	Furnishing contraband to prisoner in jail	felony	yes	Pub saf	H	5
801	Possession of contraband by prisoner in jail	felony	yes	Pub saf	H	5

Numbered items appear as footnotes on the applicable page.
Lettered items appear as endnotes on page 3.

[1] MCL 762.13, HYTA; MCL 333.7411, Controlled Substance; MCL 769.4a, Domestic Violence; MCL 750.350a, Parental Kidnapping; MCL 750.430, Health Professional Practicing Under Influence; MCL 436.1703, Minor in Possession of Alcohol, MCL 750.430, Licensed Health Care Professional Practicing under the Influence of Drug or Alcohol.
[2] MCL 769.1k, MCR 6.106(I).

8.25 Comparison of Factors Involved in Delayed

Action	Drug Court 2004 PA 224 MCL 600.1060 – 600.1082 Effective January 1, 2005	
	Defer/Delay [3]	**Traditional Processing: Not eligible for Defer/Delay** [4]
Plea of Guilt or Finding of Guilt	Accepted but judgment of guilt not entered.	Accepted and judgment of guilt entered.
Monetary Assessments	May assess a fine, costs,[A] probation oversight, and restitution, cost of treatment and program services, and drug court fee. Minimum State Cost required if any combination of fines, costs and other assessments ordered. Crime Victim Assessment required as applicable to violation. Bond shall be applied to monetary sanctions.[2]	May assess a fine and costs,[A] probation oversight, and restitution. Minimum State Cost required if any combination of fines, costs and other assessments ordered. Crime Victim Assessment required as applicable to violation. Bond shall be applied to monetary sanctions.[2]
Referral	Defer further proceedings and place on probation in drug treatment court.	Proceed to sentencing, place on probation in drug treatment court.
Caseload Reporting	Report as Guilty Plea.	Report as Guilty Plea.
MSP Criminal History Reporting	Report deferred judgment of guilt if underlying crime is reportable.[5]	Report conviction.
SOS Abstract Reporting	None.	Report conviction and sentencing if a reportable offense pursuant to MCL 257.732.
Court Record Status	File public, but record of participation in drug court is nonpublic.	File public, but record of participation in drug court is nonpublic.
Supervision or Probation Successful	If on probation, discharge and dismiss deferred proceeding.	Discharge as successful if on probation. If supervision was through entry of an order delaying sentence, court enters sentence for sanctions previously imposed. See footnote 2.
MSP Criminal History Reporting	Report successful completion of probation and dismissal, and participation in drug court.[5]	Report successful completion of probation and participation in drug court.[5]
SOS Abstract Reporting	None.	None.
Court Record Status	Drug Court participation and treatment information becomes a nonpublic record ***after the order of discharge and dismissal is entered***.[6] The entire file includes recordings of court proceedings and transcripts. Any statement or other information obtained as a result of participating in a preadmission screening and evaluation assessment under subsection MCL 600.1064(3) is confidential and is exempt from disclosure under the Freedom of Information Act and shall not be used in a criminal prosecution unless it reveals criminal acts other than, or inconsistent with, personal drug use. MCL 600.1064(4) MCR 8.119(E)(1)	The file is public, but record of participation in drug court is nonpublic. 42 CFR Part 2.
Supervision or Probation Unsuccessful	Enter conviction. Discharge probation as unsuccessful.	Discharge probation as unsuccessful.
MSP Criminal History Reporting	Report date conviction entered and sentenced, and unsuccessful participation in drug court.[5]	Report unsuccessful participation in drug court and sentence.[5]
SOS Abstract Reporting	Report date conviction entered and sentenced on drug offenses.	None.
Court Record Status	File public, but record of participation in drug court nonpublic.	File public, but record of participation in drug court nonpublic.

[3] MCL 600.1070(C) uses the word "defer" but references the delayed sentence statute, MCL 771.1. Procedure somewhat follows other deferred judgment statutes. Not eligible if violent offender. (MCL 600.1060[g]) A person with a previous drug court dismissal, or charged with a traffic offense, is not eligible for defer/delay and dismissal in drug court.

[4] Use when defendant is not eligible for discharge and dismissal, when charge is a traffic offense, or if defendant already received a deferred judgment and dismissal in either drug court or pursuant to relevant section listed in footnote 1.

[5] Because of a conflict between MCL 600.1076 and federal law, 42 CFR Part 2, the requirement to report a drug court deferral, as well as successful or unsuccessful participation in a drug court, cannot be implemented. Drug courts may access drug court participation information from DCCMIS.

[6] A conflict exists between MCL 600.1076 and federal law, 42 CFR Part 2. During the time before discharge and dismissal, the court shall maintain the file as a public record according to state law. However, during this time the court must keep any record of participation in drug court nonpublic. The requirement to report a drug-court deferral, as well as reporting the successful or unsuccessful participation in a drug court, cannot be implemented due to this conflict. However, courts must report the final entry of conviction or dismissal to MSP pursuant to MCL 769.16a.

Sentences, Deferred Adjudications, and Assignments to Drug Court

ENDNOTES:

[A] Costs on HYTA, Domestic Violence, Controlled Substance, Licensed Health Care Profession Practicing under the Influence, and Parental Kidnapping deferred judgment cases, and delayed sentence cases, are limited to the expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer. MCL 771.3(5), (9), (10).

[B] General Access information and references applicable to all non-public records:

A defendant shall be allowed access to his or her court file even if it is being maintained as a nonpublic record.

Information regarding the conviction, sentence, imprisonment, and release of a defendant contained in a nonpublic record shall be furnished to the prosecuting official for purposes of providing a victim with conviction, sentence, and release information. Const 1963, art 1, § 24.

The nonpublic record shall also be open for use by the Department of Defense, the Department of State, the Department of Transportation, the Office of Personnel Management, or agencies through which they contract to perform these services, the CIA, and the FBI for the purpose of determining eligibility for: (a) access to classified information, (b) assignment to or retention in sensitive national security duties, (c) acceptance or retention in the armed forces, and (d) appointment, retention, or assignment to a position of public trust or a critical or sensitive position while either employed by the government or performing a government contract. Access for federal agencies through a contractual arrangement is allowed. 5 USCS 9101(a) and (b).

Upon the filing of a Disclosure of Employment or Contract in Michigan School System (MC 292), a Judgment of Sentence, an Assignment to Youthful Trainee Status, or an Order of Probation when defendant has received a deferred judgment of guilt shall be furnished to the public school, school district, intermediate school district, or nonpublic school in which the person is employed, and to the Superintendent of Public Instruction, Michigan Department of Education. A certified copy of a Judgment of Sentence, an Assignment to Youthful Trainee Status, or an Order of Probation when defendant has received a deferred judgment of guilt shall be provided to the Superintendent of Public Instruction, Michigan Department of Education upon request and payment of applicable fees. (MCL 380.1535a[7] and [8], MCL 380.1539b[7] and [8]).

MCR 8.119(E)(1).

[C] Choose the applicable deferred judgment statute below for additional access eligibility to non-public records:

MCL 769.4a – Domestic Violence cases and **MCL 750.430 License Health Care Professional Practicing Under the Influence:** The nonpublic record shall only be furnished to either or both of the following: (a) a court, prosecuting attorney, or police agency for the purpose of showing whether the individual accused has already once utilized this statute; and (b) a court, police agency, or prosecutor for the purpose of determining whether the defendant in a criminal action is eligible for discharge and dismissal of proceedings by a drug treatment court under MCL 600.1076.

MCL 600.1070(b)(i) - Drug Court cases: The nonpublic record shall be open to a court, the Department of Corrections, law enforcement personnel, and prosecutors for use in the performance of their duties, or to determine whether an employee of the court, department, law enforcement agency, or prosecutor's office has violated his or her conditions of employment, or whether an applicant meets criteria for employment with the court, department, law enforcement agency, or prosecutor's office.

MCL 436.1703 - MIP cases: The nonpublic record shall be furnished to any of the following: (a) a court, prosecutor, or police agency upon request for the purpose of determining if an individual has already utilized the subsection; and (b) the Department of Corrections, a prosecutor, or a law enforcement agency upon request subject to the following conditions: (i) at the time of the request, the individual is an employee of the Department of Corrections, the prosecutor, or the law enforcement agency, or an applicant for employment with the Department of Corrections, the prosecutor, or the law enforcement agency; (ii) the record is used by the Department of Corrections, the prosecutor, or the law enforcement agency to determine whether an employee has violated his or her conditions of employment or whether an applicant meets the criteria for employment.

MCL 762.13 - HYTA cases: The nonpublic record shall be open to the courts of this state, the Department of Corrections, the Department of Human Services, law enforcement personnel, and prosecuting attorneys for use in the performance of their duties.

MCL 333.7411 - Controlled Substance cases: The nonpublic record shall be furnished to the state Department of Corrections, a law enforcement agency, a court, or the office of a prosecuting attorney subject to all of the following conditions: (i) at the time of the request, the individual is an employee of the department, law enforcement agency, court, or office of prosecuting attorney or an applicant for employment with the department, law enforcement agency, court, or office of prosecuting attorney; (ii) if the individual is an employee of the department, law enforcement agency, court, or prosecuting attorney, the date on which the court placed the individual on probation occurred after March 25, 2002; and (iii) the record shall be used by the Department of Corrections, law enforcement agency, court, or prosecuting attorney to determine whether an employee has violated his or her conditions of employment or whether an applicant meets criteria for employment.

MCL 750.350a - Parental Kidnapping cases: The nonpublic record shall only be furnished to either or both of the following: (a) a court or police agency for the purpose of showing whether the individual accused of violating this section has already once utilized this statute, and (b) a court, police agency, or prosecutor upon request for the purpose of determining whether the defendant in a criminal action is eligible for discharge and dismissal of proceedings by a drug treatment court under MCL 600.1076.

Chapter 9: Joinder and Severance of Multiple Charges and Defendants

9

9.1 Joinder and Severance of Charges Against a Single Defendant 9-1
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9.3 Defendant's Remedy Where Parties or Offenses Are Misjoined..... 9-6

In this chapter...

This chapter discusses joinder and severance of multiple charges against a single defendant, and joinder and severance of multiple defendants. Specifically, this chapter discusses MCR 6.120, MCR 6.121, and MCL 767.75.

9.1 Joinder and Severance of Charges Against a Single Defendant

MCR 6.120 governs joinder and severance of multiple charges against a single defendant. The rule is divided into three subsections:

- **Joinder in Charging a Defendant—MCR 6.120(A)**
  - permits joinder of related or unrelated offenses against a single defendant in a single information or indictment; and
  - permits consolidation for trial of multiple indictments or informations on related or unrelated offenses against a single defendant.
- **Permissive Joinder or Severance After a Defendant Has Been Charged—MCR 6.120(B)**
  - permits the court, on its own initiative, the motion of a party, or the stipulation of all parties, to join or to sever offenses charged in multiple informations or indictments against a single defendant.
- **Defendant's Right to Severance of Unrelated Offenses—MCR 6.120(C)**
  - requires the court, on a defendant's motion, to sever for separate trials offenses that are not related.

A. Joinder in Charging a Defendant

MCR 6.120(A) states:

> "(A) **Charging Joinder**. The prosecuting attorney may file an information or indictment that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial."

B. Permissive Joinder or Severance After Defendant Has Been Charged

Appropriateness of joinder or severance. MCR 6.120(B) limits joinder or severance of charges against a single defendant to those instances when it is "appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense."

Joinder is appropriate when the offenses are related. For purposes of MCR 6.120(B), offenses are related if they are based on:

- the same conduct or transaction,
- a series of connected acts, or
- a series of acts constituting parts of a single scheme or plan.

MCR 6.120(B)(1) states:

> "(B) **Postcharging Permissive Joinder or Severance**. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> > "(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
> >
> > > "(a) the same conduct or transaction, or
> > >
> > > "(b) a series of connected acts, or
> > >
> > > "(c) a series of acts constituting parts of a single scheme or plan."

Parties must be given an opportunity to be heard if the court acts on its own initiative. MCR 6.120(B)(3).

Other factors relevant to whether joinder or severance is appropriate are listed in MCR 6.120(B)(2).

- the timeliness of the motion,
- the drain on the parties' resources,
- the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence,
- the potential for harassment,
- the convenience of witnesses, and
- the parties' readiness for trial.

C. Defendant's Right to Severance of Unrelated Offenses

MCR 6.120(C) states:

> "(C) **Right of Severance; Unrelated Offenses**. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1)."

What constitutes unrelated offenses. On a defendant's motion, the court must sever for separate trials offenses that are unrelated. Offenses are unrelated when:

- the offenses are not based on the same conduct or transaction,
- the offenses are not based on a series of connected acts, or
- the offenses are not based on a series of acts constituting parts of a single scheme or plan.

Mere similarity in the nature of the facts giving rise to multiple offenses is not enough to justify joining them for trial. Joinder requires that the offenses be based on the same conduct or series of acts constituting parts of a single scheme or plan. *People v Tobey*, 401 Mich 141, 151 (1977). Similarly, where the offenses involved different victims, were remote from each other in time, and were not committed to facilitate one another, the offenses were unrelated and joinder was not proper. *People v Daughenbaugh*, 193 Mich App 506, 510–511 (1992), modified on other grounds 441 Mich 867 (1992). Likewise, where the only nexus between offenses is that the evidence in support of each charge was found in a single search of a defendant's home, the offenses are not related for purposes of joinder under MCR 6.120. *People v Beets*, 105 Mich App 350, 353 (1981). In contrast, where a defendant agreed to deliver a set amount of a controlled substance and did so by means of several deliveries

of lesser amounts of the drug over several days, the offenses arose from the same series of connected facts and joinder was proper. *People v Palacios*, 75 Mich App 284, 288 (1977).

9.2 Joinder and Severance of Multiple Defendants

MCR 6.121 governs joinder and severance of parties and offenses in cases involving multiple defendants or charges.

A. Permissive Joinder

MCR 6.121(A) governs permissive joinder. The subrule permits:

- joinder of a single charge against multiple defendants contained in a single indictment or information;
- joinder of multiple charges against multiple defendants contained in a single indictment or information; and
- consolidation of multiple indictments or informations against different defendants for trial.

Permissive joinder. MCR 6.121(A) limits joinder of multiple charges against multiple defendants in a single indictment or information to two instances:

- when each defendant is charged with accountability for each offense, or
- when the offenses are related.*

*See **Section 9.1**(B).

Specifically, MCR 6.121(A) states:

> "(A) **Permissive Joinder.** An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when
>
> > "(1) each defendant is charged with accountability for each offense, or
> >
> > "(2) the offenses are related as defined in MCR 6.120(B).
>
> "When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule."

B. Defendant's Right of Severance of Unrelated Charges

MCR 6.121(B) requires the court, on a defendant's motion, to sever offenses that are not related.

Specifically, MCR 6.121(B) states:

> "(B) **Right of Severance; Unrelated Offenses.** On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B)."

C. Defendant's Right to Severance of Related Offenses

MCR 6.121(C) requires the court, on a defendant's motion, to sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to the substantial rights of the defendant.

Specifically, MCR 6.121(C) states:

> "(C) **Right of Severance; Related Offenses.** On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant."

When severance of related offenses is required. The existence of antagonistic or inconsistent defenses does not per se require severance. Rather, severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *People v Hana*, 447 Mich 325, 359–360 (1994). More specifically, "[t]he tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other" to justify severance. *Id*. at 349. A defendant must show that his and his codefendant's defenses are mutually exclusive or irreconcilable, not merely inconsistent, in order to justify severance. *People v Cadle (On Remand)*, 209 Mich App 467, 469 (1995).

Burden of proof when moving for severance. Under MCR 6.121(C), severance is proper "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana, supra* at 346. A defendant's failure to make such a showing in the trial court precludes reversal of a joinder decision absent any significant indication on appeal that the requisite prejudice in fact occurred at trial. The affidavit must be specific enough to provide the trial court with concrete facts upon which to base its decision to sever; mere "finger pointing" will not suffice. *Id*. at 335.

D. Discretionary Severance

On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. MCR 6.121(D). Factors relevant to whether severance is appropriate include:

- the timeliness of the motion,
- the drain on the parties' resources,
- the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence,
- the convenience of witnesses, and
- the parties' readiness for trial.

Joint trials of multiple defendants favored. Public policy favors joint trials of multiple defendants because such trials promote judicial economy. *People v Hoffman*, 205 Mich App 1, 20 (1994). In addition, joint trials are favored because they avoid inconsistent verdicts and enable more accurate assessment of relative culpability, sometimes to the defendant's advantage.

Use of dual juries. The use of more than one jury at a single trial can eliminate some of the prejudice that may occur when two or more defendants are tried together. *Hana*, *supra* at 360. As the Supreme Court noted in *Hana*, the use of separate juries reduces the risk of prejudice to the defendants by allowing each jury to determine the culpability of only one defendant.

9.3 Defendant's Remedy Where Parties or Offenses Are Misjoined

Improper joinder does not justify quashing the indictment or information. Instead, the proper remedy is either severance of the improperly joined parties or offenses or, in those cases where the indictment is uncertain, amendment of the charging document to cure the defect. MCL 767.75 provides:

> "No indictment* shall be quashed, set aside or dismissed for any 1 or more of the following defects: (First) That there is a misjoinder of the parties accused; (Second) That there is a misjoinder of the offenses charged in the indictment, or duplicity therein; (Third) That any uncertainty exists therein. If the court be of the opinion that the first and second defects or either of them exist in any indictment, it may sever such indictment into separate indictments or informations or into separate counts as shall be proper. If the court be of the opinion that the third defect exists in any indictment, it may order that the indictment be amended to cure such defect."

*The term "indictment" in the Code of Criminal Procedure includes an information. MCL 761.1(d).

Chapter 10: Defenses

10

Part A—Authorization and Licensure

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10.2 Licensure Requirements 10-4
10.3 Establishing Authorization or Licensure as a Defense 10-6

Part B—Entrapment

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10.6 Common Entrapment Issues 10-12
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In this chapter...

This chapter discusses two defenses that may be raised by a defendant in a controlled substances prosecution—authorization/licensure and entrapment. A defendant may also assert a double jeopardy claim as a defense to prosecution; double jeopardy is treated in Chapter 11.

Part A—Authorization and Licensure

10.1 Prohibited Conduct Under the Controlled Substances Act

Statutory language in the Controlled Substances Act prohibits any person from engaging in specific conduct involving controlled substances unless the person is authorized to engage in the conduct. A person may be permitted to engage in conduct otherwise prohibited by the Act if the person has the proper authorization or licensure required by the Act for that conduct. Proper authorization or licensure is a defense to any charge levied under the Act, as long as the individual's conduct falls within the scope of that individual's authorization or licensure.

The Controlled Substances Act describes the conduct prohibited and provides penalties for conduct in violation of the Act. Conduct subject to penalty under the Act generally falls within one of the following categories outlined in MCL 333.7401(1), 333.7403(1), and 333.7404(1), and discussed in subsections (A) through (D), below.

A. Manufacture, Create, Deliver, or Possess With Intent

Unless a person is otherwise authorized, MCL 333.7401(1) states that an individual "shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, or a counterfeit prescription form."

*See CJI2d 12.1, 12.2, 12.3, 12.4, and 12.5.

Lack of authorization is not an element of a crime charged under MCL 333.7401(1); therefore, unless a defendant presents "some competent evidence beyond a mere assertion" of his or her authorization, the prosecution is not required to prove beyond a reasonable doubt that a defendant was not authorized to engage in the conduct for which he or she is charged under the statute. *People v Pegenau*, 447 Mich 278, 295–296 (1994); *People v Wooster*, 143 Mich App 513, 515 (1985). However, if a defendant *does* present competent evidence of his or her authorization, the prosecution must prove beyond a reasonable doubt that the defendant lacked such authorization.* *Pegenau*, *supra* at 295–296.

Writing a prescription for a controlled substance constitutes delivery of a controlled substance for purposes of MCL 333.7401(1). *People v Alford*, 405 Mich 570, 584 (1979).

B. Knowing or Intentional Possession

*A substance chemically similar to a listed controlled substance. See **Section 1.5**(C), for a complete definition.

MCL 333.7403(1) prohibits a person from possessing a controlled substance, a controlled substance analogue,* or a prescription form unless these items were properly obtained from a licensed practitioner or the person's possession of the item was otherwise authorized by the Controlled Substances Act. MCL 333.7403(1) states:

> "A person shall not knowingly or intentionally possess a controlled substance, a controlled substance analogue, or a prescription form unless the controlled substance, controlled substance analogue, or prescription form was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article."

*See CJI2d 12.4 and CJI2d 12.5.

Unless a defendant presents "some competent evidence beyond a mere assertion" of his or her authorization,* the prosecution is not required to disprove the defendant's assertion that he or she obtained the controlled substance by legal means. *People v Nunez*, 242 Mich App 610, 616 (2000); *Pegenau*, *supra* at 295-296. See also MCL 333.7531, discussed in Section 10.3, below.

C. Use

Unauthorized use of a controlled substance or controlled substance analogue is a violation of the Controlled Substances Act. MCL 333.7404(1) states:

> "A person shall not use a controlled substance or controlled substance analogue unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this article."

The prosecution is not required to prove a defendant's lack of authorization unless the defendant presents "some competent evidence beyond a mere assertion" that he or she is in lawful possession of the substance.* *Pegenau*, *supra* at 295–296.

*See CJI2d 12.6.

D. Conduct Outside the Scope of Authorization or License

The conduct authorized by a license issued under the Controlled Substances Act extends only to conduct within the scope of the license issued and within the scope of the licensee's practice. MCL 333.7401(1) states:

> "A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant."

"A physician not acting in good faith in the course of professional practice or research is not in conformity with the other provisions of the act." *Alford*, *supra* at 592. Where there was no evidence that the physician-defendant acted in bad faith when he unlawfully prescribed controlled substances to an undercover police officer, the defendant could not be bound over for trial. *People v Downes*, 168 Mich App 484, 488–489 (1988). According to the *Downes* Court,

> "The evidence at the preliminary examination established that the defendant's actions were not good medical practice. There was no proof, however, that the defendant acted in bad faith." *Downes*, *supra* at 488.

The *Downes* Court placed some importance on the fact that the defendant did not write the prescription exactly as requested by the police officer during each of the officer's visits. *Id*. On one occasion the defendant refused to prescribe another controlled substance (requested by the police officer) in addition to the substances for which the officer had previously obtained written prescriptions from the defendant. *Id*. at 487. On another occasion the defendant reduced the dosage of the drugs he prescribed to the officer. *Id*. at 486.

A similar outcome occurred in *People v Orzame*, 224 Mich App 551 (1997). In *Orzame*, as in *Downes*, *supra*, the Court stated that while the evidence may have established that the defendant's conduct was not consonant with good medical practice, no proof had been presented showing that the defendant

acted in bad faith or that he intended to prescribe or dispense controlled substances for nonmedical purposes. *Orzame*, *supra* at 565. In support of its conclusion, the Court noted that the record supported the defendant's contention that he believed the undercover agents' symptoms were genuine, the defendant prescribed the least potent dosage of the medication prescribed, and the defendant counseled a few agents about the addictive nature of the drugs. *Id*. at 566–567.

10.2 Licensure Requirements

*The statutory requirements for obtaining and retaining any of the licenses described in the Controlled Substances Act are beyond the scope of this benchbook.

A person who manufactures, distributes, prescribes, or dispenses a controlled substance must be licensed to engage in that activity. MCL 333.7303(1). Proper licensure under MCL 333.7303(1) permits a person to "possess, manufacture, distribute, prescribe, dispense, or conduct research with those substances to the extent authorized by its license and in conformity with the other provisions of this article." MCL 333.7303(2).*

A. Exceptions to Licensure Requirements

Certain unlicensed persons may lawfully possess controlled substances or prescription forms under specific circumstances:

- An agent or employee of a licensed manufacturer, distributor, prescriber, or dispenser of a controlled substance need not be licensed if the person is acting within the usual or ordinary course of his or her business or employment. MCL 333.7303(3)(a).
- A common or contract carrier or warehouse, or an employee of the carrier or warehouse, whose possession of a controlled substance or prescription form falls within the usual or ordinary course of his or her business or employment need not be licensed. MCL 333.7303(3)(b).
- No license is necessary for the ultimate user or agent whose possession of a controlled substance or prescription form is pursuant to a practitioner's lawful order or whose possession of a schedule 5 substance is lawful. MCL 333.7303(3)(c).

B. Exemption or Waiver of Licensure Requirements

The licensure requirement is waived for persons in the following circumstances:

- an officer or employee of the Drug Enforcement Agency (DEA) while engaged in the course of official duties, MCL 333.7304(1)(a);
- an officer of the United States Customs Service while engaged in the course of official duties, MCL 333.7304(1)(b);

- an officer or employee of the Food and Drug Administration (FDA) while engaged in the course of official duties, MCL 333.7304(1)(c);

- a federal officer lawfully engaged in enforcing a federal law relating to controlled substances, drugs, or customs when the officer is authorized to possess controlled substances in the course of that officer's official duties, MCL 333.7304(1)(d); and

- an officer or employee of the state of Michigan, a state agency, or a political subdivision engaged in enforcement of a state or local law relating to controlled substances when the officer or employee is authorized to possess controlled substances in the course of that person's official duties, MCL 333.7304(1)(e).

C. Scope of Exemption or Waiver

An officer, official, or employee for whom the licensure requirement is waived is authorized to handle controlled substances in a limited number of situations:

- **An exchange between two exempted officials in the course of each individual's official duties.** An official exempted under MCL 333.7304, when acting in the course of the individual's official duties, may possess and transfer a controlled substance to any other exempted official also acting in the course of that person's official duties. MCL 333.7304(2).

- **When an exempted official acquires the substance during an inspection or investigation.** An official exempted under MCL 333.7304 may acquire a controlled substance during an administrative inspection or investigation or during a criminal investigation involving the individual from whom the official acquired the controlled substance. MCL 333.7304(3).

- **When an exempted official in the course of official duties distributes the substance during an investigation.** A law enforcement officer exempted under MCL 333.7304, when acting in the course of that officer's official duties, may distribute a controlled substance to another person "as a means to detect criminal activity or to conduct a criminal investigation." MCL 333.7304(4).

The conduct authorized by MCL 333.7304(4) includes providing small samples of a controlled substance to individuals involved in setting up a "reverse buy." *People v Connolly*, 232 Mich App 425, 430–431 (1999).

Because a paid confidential informant is not a police officer or an employee of the police, the conduct authorized by an exemption under MCL 333.7304 does not apply to paid confidential informants acting as police agents. *People v Jones*, 203 Mich App 384, 388 (1994).

No liability under the Controlled Substances Act attaches to an authorized state, county, or local officer engaged in the lawful performance of that officer's duties. MCL 333.7531(3).

10.3 Establishing Authorization or Licensure as a Defense

*See CJI2d 12.4.

When a defendant argues that he or she was licensed or otherwise authorized to engage in the conduct at issue, the defendant has the burden of proving the validity of the claimed exception or exemption. MCL 333.7531(1). The prosecution is not required to disprove the existence of any exception or exemption when a defendant raises authorization or licensure as a defense. In the absence of proof, there is a rebuttable presumption that the defendant is not licensed or otherwise authorized to engage in the conduct. MCL 333.7531(2). When a defendant *does* present "some competent evidence beyond a mere assertion" of his or her authorization or licensure, the prosecution must prove beyond a reasonable doubt that the defendant lacked such authorization.* *People v Pegenau*, 447 Mich 278, 289–290 (1994) (the defendant's self-serving assertion that he possessed a controlled substance pursuant to a valid prescription was not "some competent evidence" and did not satisfy the defendant's burden of production).

*Although double jeopardy also acts as a defense to prosecution, a comprehensive discussion of the topic is reserved for **Chapter 11**.

Placing the burden of proof on a defendant who claims he or she was authorized to engage in the conduct at issue does not violate the defendant's constitutional right to due process because lack of authorization is not an element of the crime. *Pegenau*, *supra* at 289–290. In *People v Mezy*, 453 Mich 269, 283 (1996), the Court explained that where a statute fails to indicate which party is charged with the burden of proof, the Court is free to assign it as long as the defendant is not unconstitutionally saddled with the burden of persuasion with regard to an element of the crime charged. According to the *Mezy* Court, the defendant bore both the burden of production and the burden of persuasion with regard to his claim that double jeopardy precluded the prosecution against him. *Id*. at 282–283.* See also *People v Nunez*, 242 Mich App 610, 616 (2000).

Without exception, a physician whose license is suspended cannot engage in conduct requiring a license during the period of suspension; therefore, a licensed physician cannot properly delegate to a physician under suspension—an *unlicensed* physician—any tasks falling within the scope of the licensee's practice if those tasks involve conduct requiring a license. MCL 333.16215; *People v Ham-Ying*, 142 Mich App 831, 835–836 (1985).

Part B—Entrapment

10.4 Tests for Entrapment

The purpose of the entrapment defense is to deter the misuse of governmental authority by invalidating convictions or dismissing prosecutions resulting from government action that "instigat[ed] or manufacture[d] a new crime by one who would not otherwise have been so disposed." *People v Sinclair*, 387 Mich 91, 116 (1972). According to *People v Johnson*, 466 Mich 491, 498 (2002), a defendant in Michigan is considered entrapped when the situation at issue involves either of the following:

- there existed impermissible police conduct that would induce a law-abiding individual to commit a crime under similar circumstances, or
- the police conduct was so reprehensible that it cannot be tolerated.

The tests for determining whether a defendant was entrapped are objective tests that should focus on "the propriety of the government's conduct that resulted in the charges against the defendant rather than on the defendant's predisposition to commit the crime." *People v Hampton*, 237 Mich App 143, 156 (1999). A defendant cannot establish entrapment when the police simply presented the defendant with an opportunity to commit the offense for which he or she was convicted. *People v Milstead*, 250 Mich App 391, 397 (2002); *Johnson*, *supra* at 498, 503.

For example, the defendants were not entrapped when they purchased a substance made to look like crack cocaine from police officers posing as drug dealers in an area with a high level of illegal drug activity. *People v Williams*, 196 Mich App 656, 662–663 (1993). Because the police officers did not approach or initiate contact with the defendants who purchased the pseudo-crack, the police conduct in *Williams* did nothing more than provide the defendants with an opportunity to commit a crime. *Id*. at 663. The undercover operation had as its purpose the detection of crime rather than the manufacture of crime. *Id*. See also MCL 333.7304(4).

A. Causation Test

The causation test for entrapment requires the court to determine whether the police misconduct caused the individual to commit the crime. A defendant has been entrapped when the impermissible police conduct in which the defendant was involved would induce "an otherwise law-abiding person" to commit a crime under similar circumstances. *Milstead*, *supra* at 397 (a case involving conspiracy to commit murder).

The causation test asks whether the police conduct at issue was likely to result in the *instigation* of crime rather than the *detection* of crime. *People v Fabiano*, 192 Mich App 523, 527 (1992) (remanded to determine whether the

defendant was entrapped when an informant, who was also a childhood friend of the defendant, persuaded the defendant to participate in two transactions involving small amounts of cocaine and from which the defendant made no profit). In determining whether there exists a causal link between the police conduct and the defendant's conduct, "the trial court may consider the circumstances of the particular defendant and consider the effects of the police conduct upon a normally law-abiding person in the circumstances presented to the defendant." *Id*., citing *People v Juillet*, 439 Mich 34, 55 (1991).

B. Reprehensible Conduct Test

The reprehensible conduct test evaluates the police misconduct without regard to whether it caused the defendant to commit the crime. Under this test, entrapment occurs when the police conduct was so reprehensible as to be intolerable in a civilized society. *Hampton*, *supra* at 156; *Milstead*, *supra* at 397. Under the reprehensible conduct test, prosecution is barred because "the basic fairness that due process requires precludes continuation of the prosecution where the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation." *Fabiano*, *supra* at 532. See e.g., *People v Wisneski*, 96 Mich App 299, 304 (1980) (police officers implicitly approved of an informant's sexual contact with the defendant when the officers told the informant not to engage in sexual contact with the defendant "unless that's what she had to do" to obtain the evidence sought).

C. Factors Relevant to Determining Entrapment

In *Williams*, *supra* at 661–662, the Court discussed a number of factors relevant to whether the government's conduct would induce an ordinarily law-abiding citizen to engage in criminal behavior. These factors include:

- whether the informant or other government agent made any appeals to the defendant's sympathy as a friend;
- whether the defendant was known to have previously committed the crime with which he or she was charged;
- whether there were any long lapses of time between the investigation and the defendant's arrest;
- whether any incentives existed to make the crime unusually attractive to the hypothetical law-abiding citizen;
- whether there existed any offers of excessive consideration or other enticement;

- whether the defendant was guaranteed that the conduct with which he or she was charged was not illegal;*
- whether and to what extent the defendant was pressured by the police;
- whether sexual favors were offered or given to the defendant;
- whether any threats to arrest the defendant were made;
- whether there existed any government procedures tending to escalate the defendant's criminal culpability;
- whether any informant was under police control; and
- whether the criminal investigation was targeted.

*A key factor in a claim of entrapment by estoppel, discussed in **Section 10.7**, below.

In *People v Duis*, 81 Mich App 698 (1978), the Court concluded that the defendant was entrapped as a result of multiple instances of reprehensible police misconduct. In *Duis*, half of the factors important to a court's determination of an entrapment claim were clearly present:

- ♦ before the occasion on which the defendant's claim was based, the defendant had never sold drugs to the informant and, in fact, had never previously facilitated another person's drug purchase, *Duis*, *supra* at 701;
- ♦ the police informant appealed to the defendant's sympathy as a friend, *Id*. at 703;
- ♦ during the day on which the defendant's claim is based, the police informant pressured the defendant to obtain drugs by repeatedly visiting and telephoning him. On the day of the offense, the informant admittedly "bugged" the defendant until he agreed to obtain drugs for him—on that day, the informant made three visits to the defendant's home and telephoned the defendant twice, *Id*.;
- ♦ the informant was under police control—"the police promised [the informant] leniency and freedom if he arranged drug arrests. Police involvement was the very reason [the informant] entrapped [the defendant]," *Id*. at 702–703; and
- ♦ the police failed to supervise the informant's conduct, the informant was permitted "to select any victim he wished," and the police did not investigate whether the defendant was an appropriate target of the informant's efforts, *Id*. at 702.

The result of the police misconduct in *Duis*, *supra*, illustrates a situation where the police and informant joined forces in the *instigation* rather than the *detection* of crime. Said the Court:

> "The police pressure is inexcusable. It is the kind of conduct which would reasonably be expected to induce an unwilling and unready individual to commit crime. Such police methods cannot be countenanced." *Id*. at 703.

See also *People v Rowell*, 153 Mich App 99, 104–105 (1986) (defendant was entrapped where informants pressured the defendant over a long period of time), and *People v White*, 411 Mich 366, 390 (1981) (defendant was entrapped where police officers persisted in repeated efforts to purchase drugs from the defendant and the eventual purchase/exchange of drugs occurred only because of the officers' assistance).

A defendant's culpability is not escalated for purposes of entrapment when the defendant's unexpected and expanded role in the criminal enterprise did not include conduct to which the defendant expressed disagreement before the offense was committed. *People v Johnson*, 466 Mich 491, 504 (2002). In *Johnson*, the defendant believed his role was limited to protecting the buyer when the buyer purchased drugs. However, during the first transaction in which he participated, the defendant actually handled and transported the package containing drugs. After the first transaction was completed, the defendant asked the buyer to fully explain what was expected of the defendant during such transactions. After this conversation with the buyer, the defendant agreed to participate in another transaction knowing that his role required more involvement in the buyer's transactions than what the defendant initially understood.

Where an informant cooperates with police in gathering information about a criminal offense already being planned by a defendant and where the police have not encouraged the informant to recruit the defendant's participation in a separate criminal enterprise, the defendant is not entrapped. *People v Sexton*, 250 Mich App 211, 219–220 (2002) (the defendant initiated contact with the informant and, without being prompted by the informant, discussed the defendant's plan to have a witness killed).

10.5 Procedural Issues in an Entrapment Defense

A. Raising the Entrapment Defense

A defendant cannot raise an entrapment defense before bindover. Because the magistrate at a defendant's preliminary examination is not authorized to decide a claim of entrapment, the entrapment defense may not be raised at a defendant's preliminary examination. *People v Moore (On Remand)*, 180 Mich App 301, 308–310 (1989).

A defendant is not required to admit to the offense before raising an entrapment defense. A defendant may raise the entrapment defense before or during trial. *People v D'Angelo*, 401 Mich 167, 178 (1977). In some cases, a

defendant may even raise the defense after trial; however, an entrapment defense is waived if not raised before a defendant's sentencing. *People v Bailey*, 439 Mich 897 (1991).

B. Evidentiary Hearing

Entrapment is a question of law to be decided by the trial court outside the jury's presence. *D'Angelo, supra* at 177; *People v Sexton*, 250 Mich App 211, 217 (2002). To determine the question of entrapment whenever a defendant raises the defense, the trial court must conduct an evidentiary hearing similar to the hearing held when a defendant objects to the admission at trial of his or her confession on the grounds that the confession was not voluntary.* *D'Angelo, supra* at 178. Both parties may present evidence at the hearing. *Id*. Because the entrapment defense argues against prosecution, it resembles other jurisdictional defects that may preclude prosecution; therefore, the entrapment defense may be raised without deciding or assessing a defendant's guilt. *People v White*, 411 Mich 366, 387 (1981).

*A *Walker* hearing. *People v Walker (On Rehearing)*, 374 Mich 331 (1965).

Inadmissible evidence. Under Michigan's objective entrapment tests, evidence of a defendant's predisposition toward commission of the charged offense is not relevant to the court's entrapment determination. Consequently, such evidence is inadmissible at the entrapment hearing. *D'Angelo, supra* at 173.

A defendant's testimony at the entrapment hearing regarding his or her participation in the crime charged may not be admitted against the defendant at trial unless the defendant's testimony on a material matter at trial is inconsistent with testimony he or she gave at the entrapment hearing. *Id*. at 178. If the defendant's trial testimony is inconsistent with his or her entrapment hearing testimony, the court may permit admission of the previous testimony only to impeach the defendant's credibility; the previous testimony may not be admitted as substantive evidence against the defendant. *Id*.

Required findings. A trial court deciding a defendant's entrapment claim must make specific findings of fact regarding its decision. *Id*. at 183; *Sexton, supra* at 217. When a trial court determines that a defendant was entrapped, prosecution against the defendant for the charge related to the entrapment circumstances is barred. *D'Angelo, supra* at 183.

C. Jury Instruction

Because entrapment is decided by the court as a matter of law, the issue should not be submitted to the jury, and the defendant is not entitled to have the jury instructed on the entrapment issue. *D'Angelo, supra* at 178–179. Where the defendant argued the entrapment issue before the jury after the court decided against the defendant's entrapment claim at a hearing held for that purpose, the court properly instructed the jury that the issue of entrapment was not a

matter for the jury's consideration. *People v Patrick*, 178 Mich App 152, 160 (1989).

D. Burden of Proof and Standard of Review

A preponderance of the evidence is required to establish entrapment, and the defendant has the burden of proof. *People v Pegenau*, 447 Mich 278, 294 (1994).

Appellate review of a trial court's entrapment determination is for clear error. *D'Angelo, supra* at 183; *Sexton, supra* at 211.

10.6 Common Entrapment Issues

A. Whether Informant's Conduct Is Attributable to Law Enforcement Officers

Generally, the *improper* conduct of an individual acting without the approval of law enforcement cannot be attributed to police personnel later involved in the transaction arranged by the individual. *People v Jones*, 165 Mich App 670, 674 (1988); *People v Owczarzak*, 144 Mich App 65, 68–69 (1985). For purposes of the entrapment defense, however, individuals who are not members of law enforcement but who are officially encouraged or assisted in their actions by law enforcement personnel are operating as government agents and should be treated as such. *Jones, supra* at 674. An informant with whom law enforcement has had a lengthy and productive working relationship may be considered as acting with law enforcement's "official encouragement or assistance" even when law enforcement officers pursue a criminal investigation into the conduct of individuals after the individuals were first approached by the informant without orders or instruction from the officers. *Id*. at 675.

B. Effect of Guilty Plea on Entrapment Defense

As with other jurisdictional defects that implicate the state's authority to prosecute crimes, a defendant does not automatically waive an entrapment defense when he or she pleads guilty. *People v White*, 411 Mich 366, 387 (1981). Generally, where a defendant was entrapped, the state is deprived of the authority to prosecute that defendant for criminal offenses arising from the police misconduct; therefore, the defense is not waived by the defendant's guilty plea. *People v New*, 427 Mich 482, 491 (1986).

However, a defendant's unconditional guilty plea may effectively waive the defendant's ability to claim entrapment. Where a defendant tenders an unconditional guilty plea, the defendant's failure to timely raise an entrapment defense may result in waiver of the defense. *People v Crall*, 444

Mich 463, 464–465 (1993). Said the *Crall* Court: "This case falls within the general rule that an unconditional plea, which is voluntary, knowing, and intelligent, waives claims that occurred before the entry of the guilty plea." *Id*. Similarly, a defendant may expressly waive an entrapment defense when the defendant specifically confirms his or her wish to plead guilty to a charged offense rather than pursue his or her claim of entrapment with regard to the offense. *People v Knoll*, 137 Mich App 701, 702–703 (1984); *People v Virga*, 111 Mich App 807, 810 (1982).

C. Relationship Between Informant/Agent and Defendant

A law enforcement officer's reprehensible conduct involving an informant may not be relevant to a defendant's claim of entrapment. *People v Brown*, 163 Mich App 273, 276–277 (1987) (the reprehensible police conduct involved only the informant; the conduct did not alter the defendant's relationship with the informant, and therefore, it did not support the defendant's claim of entrapment). For purposes of a defendant's claim of entrapment, the police misconduct must bear directly on the defendant's relationship with the police and whether the police misconduct would have caused a normally law-abiding citizen to commit a crime. *Brown, supra* at 276.

Use of a preexisting relationship between an informant and a defendant does not in itself constitute entrapment. *People v Perry*, 75 Mich App 121, 125–126 (1977). Where police took advantage of a paid informant's intimate relationship with a defendant so that the defendant would facilitate several drug purchases for an undercover police officer, the conduct was not so reprehensible as to be entrapment as a matter of law. Critical to the *Perry* Court's conclusion was the fact that the relationship between the informant and the defendant was not created by police; the intimate relationship between the two individuals already existed before the police got involved with them. *Id*. at 126.

Where a defendant and another person participated in a shared criminal endeavor prior to the other person's involvement with police and law enforcement was not involved in creating the relationship between the defendant and that other person, the defendant is not entrapped when the other person involves the defendant in a drug transaction at a police officer's request. *People v Potra*, 191 Mich App 503, 509–510 (1992).

D. Defendant's Conduct Independent of Initial Police Misconduct

A defendant who commits a criminal offense under circumstances constituting entrapment is not immunized from culpability for his or her participation in offenses subsequent to the initial offense. *People v Johnson*, 466 Mich 491, 505 (2002). Even where a defendant's initial participation in a criminal enterprise occurred as a result of circumstances indicating

entrapment, there exists no presumption that the defendant's participation in any related future criminal offenses is tainted by the entrapment present during the defendant's initial offense. *Id*.

E. Standing/Multiple Defendants

All individuals affected by the police conduct at issue may not have standing to raise an entrapment defense even when the charges against all the individuals arose from the same criminal transaction. *People v Matthews*, 143 Mich App 45, 54-55 (1985). However, when appropriate, a trial court may properly apply its entrapment findings to multiple defendants whose charges arise from the same alleged police misconduct. *People v Forrest*, 159 Mich App 329, 333 (1987); *Matthews*, *supra* at 54.

A defendant who is unaware of the misconduct on which his or her codefendant's entrapment claim is based may not raise the defense for him- or herself. *People v Soltis*, 104 Mich App 53, 55 (1981).

F. Sentence Entrapment

As long as police officers do nothing more than provide a defendant with the opportunity to commit additional crimes, the police may refrain from arresting the defendant while engaging him or her in larger drug transactions, which exposed the defendant to increased potential penalties. *People v Ealy*, 222 Mich App 508, 510-512 (1997). A defendant's failure to hesitate in committing offenses involving larger quantities of a controlled substance is evidence against any claim of entrapment. *Id*. at 511. In addition, the *Ealy* Court noted that there was no evidence that police officers continued involving the defendant in drug purchases for the purpose of enhancing the defendant's eventual sentence once he or she was convicted. *Id*.

G. Reverse Buys

Reverse buys do not constitute entrapment when the situation merely furnishes a defendant with the opportunity to commit a criminal offense, e.g., when a defendant purchases a controlled substance from a police officer. *People v Butler*, 444 Mich 965, 965–966 (1994).

Whether a police officer who "plac[es] controlled substances in the societal stream" as part of a reverse buy has engaged in reprehensible conduct for purposes of entrapment depends on the specific circumstances of the criminal investigation. *People v Connolly*, 232 Mich App 425, 430-431 (1999). In *Connolly*, police officers authorized under MCL 333.7304(4) to distribute controlled substances in an effort to detect criminal activity did not engage in reprehensible conduct by providing small samples of a substance to persons who "shopped the substance around" in order to find a buyer for the substance in bulk. *Connolly*, *supra* at 431-432. However, police conduct under

circumstances in another case might constitute intolerably reprehensible conduct. According to the Court:

> "Had the police engaged in the distribution of a substantial quantity of the marijuana intended as bait in the sting operation, we would be inclined to say the police intended 'to commit certain criminal, dangerous, or immoral acts,' which could not be tolerated." *Id*., quoting *People v Jamieson*, 436 Mich 61, 95-96 (1990) (Cavanagh, J., concurring).

10.7 Entrapment by Estoppel

Entrapment by estoppel considers whether an individual engaged in conduct based on that individual's reasonable reliance on a government official's statement that the conduct was not unlawful. *People v Woods*, 241 Mich App 545, 554 (2000) (a "sophisticated" public official facing reelection unlawfully acted as an election assistant and claimed that the township clerk's failure to advise the defendant of the illegality relieved the defendant of culpability). Citing *Raley v Ohio*, 360 US 423 (1959), for the origins of the legal concept, the *Woods* Court summarized the defense of entrapment by estoppel:

> "The due process principle underlying the doctrine of entrapment by estoppel is fairness to a well-intentioned citizen who unwittingly breaks the law while relying on government agents' statements under circumstances where reliance is reasonable." *Woods*, *supra* at 557.

Relying primarily on federal appellate decisions in the Third and Sixth Circuit Courts of Appeal, the *Woods* Court crafted the elements of Michigan's test for entrapment by estoppel. To succeed with a defense of entrapment by estoppel, a defendant must establish all of the following by a preponderance of the evidence:

- a government official told the defendant that certain illegal/criminal conduct was legal/not criminal;
- the defendant actually relied on the government official's information;
- the defendant's reliance on the information was in good faith and reasonable in light of the circumstances (the government official's identity, the specific point of law at issue, and the substance of the official's statement); and
- prosecution would be unfair given the defendant's reliance on the government official's statement.

*The *Woods* Court also noted its agreement with *United States v Abcasis*, 45 F3d 39, 43 (CA 2, 1995), and *United States v Nichols*, 21 F3d 1016, 1018 (CA 10, 1994).

Woods, *supra* at 558–560, citing *United States v West Indies Transport, Inc*, 127 F3d 299, 313 (CA 3, 1997), and *United States v Levin*, 973 F2d 463, 488 (CA 6, 1992).*

The *Woods* Court cautioned against the indiscriminate use of this entrapment defense:

> "[T]he defense should be utilized only where an earnest, law-abiding citizen attempts in good faith to comply with the law by consulting an appropriate government official, but unfortunately receives misinformation. These are circumstances where prosecution would be so unfair as to violate the citizen's right to due process. However, when the citizen knows or should know better, but attempts to seek immunity by claiming reliance on misinformation obtained from a government employee, prosecution is not unfair and estoppel by entrapment should have no application." *Woods*, *supra* at 560 (internal citations omitted).

Chapter 11: Double Jeopardy

11

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In this chapter...

This chapter discusses the constitutional and statutory prohibitions against twice placing a person in jeopardy for the same offense. The chapter includes a discussion of the differences between the protections against successive prosecutions and multiple punishments for the same offense, and when available, case law specific to controlled substance offenses.

11.1 Protection Against Double Jeopardy

A. Constitutional Protection

Both the Michigan Constitution and the United States Constitution prohibit putting a defendant twice in jeopardy for the same offense. Michigan's double jeopardy provision is essentially the same as the federal constitution's double jeopardy provision and should be construed consistently with case law involving the Fifth Amendment to the federal constitution. *People v Ford*, 262 Mich App 443, 447 (2004).

♦ **Michigan Constitution**

"No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15.

♦ **United States Constitution**

"No person . . . shall [] be subject for the same offence to be twice put in jeopardy of life or limb[.]" US Const, Am V.

"The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second

> prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574 (2004) (citations omitted).

Multiple or successive prosecutions. Generally, the prohibition against double jeopardy protects a defendant from being tried more than once for the same offense when a previous trial resulted in a conviction or an acquittal. The prohibition against successive prosecutions for the same offense imposes a limitation on the prosecution; without regard to whether a defendant's trial ended in conviction or acquittal, the defendant cannot again be tried for the "same offense." *People v Mitchell*, 456 Mich 693, 695 (1998); *People v Sturgis*, 427 Mich 392, 398 (1986).

Multiple punishments. The prohibition against double jeopardy provides criminal defendants with a separate protection against being subject to multiple punishments for the same offense. *Ford*, *supra* at 447. The prohibition against multiple punishments for the same offense ensures that the sentences imposed by trial courts fall within the limits set by the Legislature. *Mitchell*, *supra* at 695; *Sturgis*, *supra* at 399. With respect to multiple punishments, the double jeopardy protection restrains the prosecution and the courts, not the Legislature. The double jeopardy clause does not encumber the Legislature's authority to establish more than one penalty for the same offense. *Mitchell*, *supra* at 695.

The scope of double jeopardy protection in either area—successive prosecutions or multiple punishments—is determined by the definition of "same offense" (discussed in Sections 11.2 and 11.3, below) as applied to the specifics of each case. *Sturgis*, *supra* at 399.

B. Statutory Protection

MCL 763.5 prohibits "any subsequent prosecution" for an offense after a defendant has been acquitted of the charge at an earlier trial:

> "No person shall be held to answer on a second charge or indictment for any offense for which he has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by him in bar of any subsequent prosecution for the same offense."

After a defendant is acquitted or convicted on an indictment, MCL 768.33 prohibits prosecuting the defendant for different degrees of the offense or for an attempt to commit the offense:

> "When a defendant shall be acquitted or convicted upon any indictment for an offense, consisting of different degrees, he shall not thereafter be tried or convicted for a different degree of the same offense; nor shall he be tried or convicted for any attempt to

> commit the offense charged in the indictment or to commit any degree of such offense."

For offenses under the Controlled Substances Act, MCL 333.7409 provides statutory protection against multiple prosecutions in different jurisdictions for the "same act":

> "If a violation of this article [article 7 of the public health code—the Controlled Substances Act] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state."

MCL 333.7409 precludes successive prosecutions under federal or state law involving the same *act*, not the same *offense*. *People v Zubke*, 469 Mich 80, 85 (2003). For purposes of MCL 333.7409, "it is a defendant's actions that must be compared, not the elements of the crimes."* *Zubke, supra* at 85.

*Additional information about this statutory protection against double jeopardy appears in **Section 11.4**.

11.2 Successive Prosecutions: Same-Elements Test

Michigan uses the same-elements test to determine whether the prohibition against double jeopardy is violated when multiple charges are brought against a defendant for conduct related to a single criminal transaction. *People v Nutt*, 469 Mich 565, 568, 596 (2004). In *Nutt*, the Michigan Supreme Court overruled its decision in *People v White*, 390 Mich 245 (1973), in which the Court disapproved of the same-elements test and adopted the same-transaction test as Michigan's means of resolving double jeopardy issues.* The same-transaction test generally prohibited serial prosecutions of a defendant for entirely different crimes arising from a single criminal episode or "transaction." *Nutt, supra* at 568.

*The same-elements test was used in Michigan until 1973 when *White* was decided.

In *Nutt*, the defendant pleaded guilty in a Lapeer County Court of one count of second-degree home invasion. *Id*. at 569. Later, the defendant was bound over for trial in Oakland County on the charge of receiving and concealing a stolen firearm obtained in the defendant's admitted participation in the Lapeer County theft. *Id*. at 570. The defendant moved to dismiss the receiving and concealing charge because *White* required the state "to join at one trial all charges arising from a continuous time sequence that demonstrated a single intent and goal." *Id*.

*The *Blockburger* test also applies to determining legislative intent when a defendant raises a double jeopardy claim based on multiple punishments.

Double jeopardy after *Nutt*. The same-elements test is commonly referred to as the *Blockburger* test.* *Nutt, supra* at 576; *Blockburger v United States*, 284 US 299, 304 (1932). The *Blockburger* test "'focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'" *Nutt, supra* at 576, quoting *Iannelli v United States*, 420 US 770, 785 n 17 (1975). According to the *Blockburger* Court:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger, supra* at 304; *Nutt, supra* at 577–578.

Applying the same-elements test to the *Nutt* case, the Court determined that the defendant could properly be tried for the receiving and concealing charge even though she pleaded guilty to the offense during which the stolen property was obtained. Because the elements required to convict her of each offense were not identical, the defendant's protection from double jeopardy was not violated. *Nutt, supra* at 593. Specifically, the defendant's conviction for second-degree home invasion required proof that (1) the defendant entered a dwelling by breaking or the defendant entered without permission, and (2) the defendant entered with the intent to commit a felony or larceny in the dwelling. *Id.*; MCL 750.110a(3). The defendant's conviction for receiving and concealing a stolen firearm required proof that (1) the defendant received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan, (2) a stolen firearm or stolen ammunition, and (3) the defendant knew that the firearm or ammunition was stolen. *Nutt, supra* at 593; MCL 750.535b(2). According to the Court:

> "Clearly, there is no identity of elements between these two offenses. Each offense requires proof of elements that the other does not. Because the two offenses are nowise the same offense under either the Fifth Amendment or art 1, § 15, we affirm the result reached by the Court of Appeals majority and hold that defendant is not entitled to the dismissal of the Oakland County charge." *Nutt, supra* at 593.

11.3 Multiple Punishments: Legislative Intent Test

A defendant's only interest in the multiple punishment prohibition is "'not having more punishment imposed than that intended by the Legislature.'" *People v Ford*, 262 Mich App 443, 448 (2004), quoting *People v Robideau*, 419 Mich 458, 485 (1984). The multiple punishment component of double jeopardy jurisprudence depends for its application on whether the "[L]egislature intended to authorize cumulative punishments." *People v Calloway*, 469 Mich 448, 451 (2003), citing *Ohio v Johnson*, 467 US 493, 499 n 8 (1984).

The *Blockburger** test for determining whether the protection against double jeopardy prohibits multiple prosecutions is the appropriate test for determining whether double jeopardy considerations bar multiple punishments. *People v Bobby Lynell Smith*, 478 Mich 292, 316 (2007). In *Smith*, the Michigan Supreme Court expressly stated that the definition of "same offense" for purposes of the multiple punishments strand of the prohibition against double jeopardy is the same as the definition of "same offense" determined by the Court in *People v Nutt*, 469 Mich 565 (2004), for purposes of the multiple prosecutions strand.

**Blockburger v United States*, 284 US 299, 304 (1932).

The *Blockburger* test evaluates whether the Legislature intended more than one punishment when a defendant's conduct in a single incident (the "same transaction") violates more than one statute. *Ford, supra* at 448–449.

> "A presumption arises under *Blockburger* that a legislature intends multiple punishments where two distinct statutes cover the same conduct but each requires proof of an element the other does not; the contrary presumption arises when the elements of one offense are encompassed in the elements of the other." *Id*.

Even when the offenses are based on the same conduct, dual convictions for a higher offense and a lesser *cognate* offense are permitted when the Legislature intended to impose cumulative punishments for similar crimes. *People v Werner*, 254 Mich App 528, 535–537 (2002). The Legislature has expressly authorized multiple punishments in the following instances:

- MCL 333.7401a—delivery of GBL in the commission or attempted commission of CSC-1, CSC-2, CSC-3, CSC-4, or assault with intent to commit CSC. The statutory language specifically states: "A conviction or sentence under this section does not prohibit a conviction or sentence for any other crime arising out of the same transaction." MCL 333.7401a(2).

- MCL 333.7401c—possession of equipment used to manufacture a controlled substance or providing a place for the manufacture of controlled substances. The statutory language specifically states: "This section does not prohibit the person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section." MCL 333.7401c(4).

- MCL 333.7408—general authority for imposing both criminal and civil penalties for violations of the Controlled Substances Act. The statutory language specifically states: "A penalty imposed for a violation of this article is in addition to, and not in lieu of, a civil or administrative penalty or sanction otherwise authorized by law." MCL 333.7408.

*See Chapter 15 for a detailed discussion of forfeiture.

Civil forfeitures. Civil forfeiture of property resulting from the same criminal transaction for which the defendant was convicted and sentenced does not ordinarily violate a defendant's double jeopardy protection against multiple punishments.* *People v Acoff*, 220 Mich App 396, 398 (1997), citing *United States v Ursery*, 518 US 267 (1996). There is a presumption that a double jeopardy analysis does not apply in cases of civil forfeiture but in rem civil forfeitures (actions involving an individual's property rights) are not completely immune from encroaching on a defendant's protection from multiple punishments. *Acoff, supra* at 398. A double jeopardy inquiry is appropriate if the "'clearest proof' indicates that the in rem forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding." *Id*., quoting *Ursery, supra* at 278.

11.4 Separate Sovereigns

Double jeopardy does not bar successive state and federal prosecutions for offenses arising from the same criminal episode. *People v Davis*, 472 Mich 156, 162 (2005), citing *Bartkus v Illinois*, 359 US 121 (1959). Because federal and state prosecutorial authority is derived from two distinct and independent sources, a defendant whose conduct violates both federal and state law commits two offenses subject to punishment by both sovereigns.

The dual sovereignty rule for successive federal and state prosecutions also applies to cases involving successive state prosecutions. Successive state prosecutions do not violate a defendant's double jeopardy protections if the entities involved are "separate sovereigns." *Davis, supra* at 158. A state is a sovereign separate from another state when it derives its prosecutorial authority from a source independent of the other state's source of authority. *Id*. at 166–167.

In *Davis*, the defendant stole a car in Michigan and drove it to Kentucky where he was apprehended. After the defendant pleaded guilty and was sentenced for charges brought against him in Kentucky, the state of Michigan charged the defendant with unlawfully driving away a motor vehicle and with receiving/concealing stolen property. *Davis* expressly overruled *People v Cooper*, 398 Mich 450 (1976), upon which the defendant relied when he argued that double jeopardy considerations prohibited Michigan from prosecuting him a second time for offenses related to a single criminal episode unless Michigan's interests in prosecuting him were substantially different from Kentucky's interests.

According to the *Davis* Court, United States Supreme Court precedent (*Bartkus, supra*, and *Heath v Alabama*, 474 US 82 (1985)) required that *Cooper* be overruled. In *Bartkus*, the Court concluded that "successive state and federal prosecutions based on the same transaction or conduct were not barred by the Double Jeopardy Clause." *Davis, supra* at 162, citing *Bartkus, supra* at 122–124. In *Heath*, the Court explained that the same analysis applies to cases of dual sovereignty when the two entities involved are states. When a defendant by the same conduct breaks a law in each of two states, the defendant has committed two separate offenses. *Davis, supra* at 166–167, citing *Heath, supra* at 88–89.

In *People v Zubke*, 469 Mich 80 (2003), the Michigan Supreme Court ruled that the state's possession with intent to deliver charge was not precluded under MCL 333.7409 by the defendant's federal drug conspiracy conviction because the conduct on which the federal conviction was based was not the "same act" on which the state charge relied. MCL 333.7409 states:

> "If a violation of [the Controlled Substances Act] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state."

Referring to the dictionary definition of "act," the Court reasoned that the state's prosecution would be barred if the "thing done" or "deed" giving rise to the federal conviction was the same "thing done" or "deed" on which the state charge was based. *Zubke, supra* at 84.

The *Zubke* Court concluded that the "thing done" for federal purposes was the conspiracy itself—the defendant's agreement with others to possess and distribute cocaine. *Id*. at 84. For state purposes, however, the "thing done" was the defendant's actual physical possession or control of the cocaine. Ruling there was no double jeopardy violation, the Court stated simply:

> "[T]he act of possessing is not subsumed within the act of conspiracy, nor is the act of conspiring subsumed within the act of possessing." *Id*. at 85 n 5.

The *Zubke* Court also overruled *People v Avila (On Remand)*, 229 Mich App 247 (1998), which held that MCL 333.7409 precluded successive prosecutions when the offenses "*arose out of* the same acts." *Zubke, supra* at 85, quoting *Avila, supra* at 251 (emphasis added).

11.5 Jury Verdicts and Deadlocks

*In a bench trial, jeopardy attaches once the court begins hearing evidence. *People v Hicks*, 447 Mich 819, 830 n 17 (1994), citing *Serfass v United States*, 420 US 377, 388 (1975).

Generally, when a defendant decides to be tried by a jury, jeopardy attaches when a jury is selected and sworn for the defendant's trial.* *Crist v Bretz*, 437 US 28, 35 (1978), and *People v Henry*, 248 Mich App 313, 318 (2001). When a jury is seated and sworn, "the defendant has 'a constitutional right to have his case completed and decided by that tribunal.'" *Henry, supra* at 318, quoting *People v Dry Land Marina, Inc*, 175 Mich App 322, 325 (1989).

> "The underlying principle of [double jeopardy] protection is to prevent the state from making 'repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" *Henry, supra* at 318, quoting *Green v United States*, 355 US 184, 187–188 (1957).

There is no violation of a defendant's due process rights when a defendant is retried on the same offense after a jury was unable to reach a unanimous verdict on the charged offense after two previous trials. *People v Sierb*, 456 Mich 519, 533 (1998). Double jeopardy protection is not offended in this case because the original jeopardy has not been terminated, i.e., there has not been an assessment of the sufficiency of the prosecution's proofs. *People v Mehall*, 454 Mich 1, 5 (1997).

When a verdict is announced. Once announced, a jury's verdict is final, and once a jury has been dismissed after announcing its verdict, that jury may not be recalled to further consider its verdict in the matter. *Henry, supra* at 319–320. "Although a jury is free to change the form and substance of a verdict to coincide with its intentions at any point before its discharge, once discharged the panel is defunct as a legal body and is therefore without power to alter or amend the verdict." *Id*. After official discharge, a jury functions no differently than 12 unsworn community members whose relationship with the case (and with each other in that context) has terminated. *Id*. at 319, citing *People v Rushin*, 37 Mich App 391, 398–399 (1971).

If a juror indicates his or her disagreement with the jury's verdict during polling, the court must discontinue the poll and send the jury back to further deliberate. *People v Echavarria*, 233 Mich App 356, 362 (1999).

11.6 Mistrials and Retrials

A defendant may be retried for the same offense under specific circumstances without violating his or her protection against double jeopardy.

Retrial is permissible when a mistrial was a manifest necessity or when a defendant consents to a mistrial and the mistrial was caused by the court's or

the prosecutor's innocent conduct or by factors beyond the court's or the prosecutor's control. *People v Echavarria*, 233 Mich App 356, 363 (1999). See *People v Gaval*, 202 Mich App 51, 53–54 (1993) (the defendant could be retried after the court declared a mistrial when a *codefendant's* counsel introduced at trial evidence earlier ruled inadmissible against the defendant).

If a defendant expressly objects to a mistrial, the court may not declare a mistrial unless manifest necessity demands it. *People v Sierb*, 456 Mich 519, 525 (1998). When a mistrial is granted on the basis of manifest necessity, double jeopardy principles do not prohibit retrying the defendant on the same charge. *Echavarria*, *supra* at 363. Because manifest necessity is not a precisely defined concept, it must be determined on a case-by-case basis. *Id*. "Manifest necessity 'appears to refer to the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible.'" *Id*., quoting *People v Rutherford*, 208 Mich App 198, 202 (1994).

When a jury is unable to reach a unanimous verdict, there exists the requisite manifest necessity for declaration of a mistrial. *People v Thompson*, 424 Mich 118, 124 (1985), citing *Richardson v United States*, 468 US 317, 320–321 (1984). A trial court's mistrial declaration is accorded great deference. MCR 6.420(D) explains a trial court's options and responsibilities when a jury is unable to reach a unanimous verdict:

> "Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury." MCR 6.420(D).

Generally, a defendant's motion for mistrial constitutes consent to the declaration of a mistrial. *People v Booker*, 208 Mich App 163, 174 (1995). Therefore, a defendant waives any double jeopardy claim when he or she requests or consents to a mistrial. *People v Dawson*, 431 Mich 234, 253, 257 (1988). A defendant's potential double jeopardy claim is also waived when defense counsel's conduct causes the mistrial. *Id*. However, a defendant's double jeopardy claim may be preserved when the *prosecutor's* intentional misconduct prompts the defendant's motion for a mistrial. *Id*.; *People v Hicks*, 447 Mich 819, 828 n 15 (1994), citing *Oregon v Kennedy*, 456 US 667, 676 (1982).

In *Oregon v Kennedy*, *supra*, the United States Supreme Court clearly established the parameters of a double jeopardy inquiry in cases where a prosecutor's misconduct prompted a defendant's motion for mistrial:

> "Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id*. at 675–676.

Even when a defendant refuses to consent to a mistrial, his or her consent is presumed when the defendant clearly expresses an unwillingness to continue the current trial. *Echavarria, supra* at 364–365. However, "a defendant's mere silence or failure to object to the jury's discharge is not 'consent.'" *Lett, supra* at 211. "[T]o determine whether consent makes retrial permissible under double jeopardy principles, the relevant issue is whether a defendant consented to the discontinuance of the trial, rather than whether he formally consented to the declaration of a mistrial." *People v Tracey*, 221 Mich App 321, 329 (1997).

11.7 Waiver and Forfeiture

*See **Chapter 9** for a detailed discussion of joinder and severance.

Where a defendant has actively sought to prevent multiple charges against him or her from being tried in a single trial, the defendant waives a double jeopardy claim with regard to subsequent prosecutions for any severed and untried charges.* *People v Hoag*, 89 Mich App 611, 616–617 (1979). In other words, a defendant waives any claim that all charges should have been tried at a single trial when the defendant him- or herself succeeded in severing the offenses for trial purposes. *Id*. at 615.

*Guilty pleas are discussed in more detail in **Section 11.8**, below.

A guilty plea waives a defendant's challenge to all non-jurisdictional errors; however, a guilty plea may not waive a defendant's right to challenge a jurisdictional error—an error that casts doubt on the state's authority to prosecute the defendant and that would preclude a valid conviction against the defendant regardless of factual guilt.* *People v Smith*, 438 Mich 715, 721 (1991), overruled in part on other grounds 475 Mich 245 (2006). "[A] jurisdictional defect or its equivalent has been found when the defendant raises the issue of . . . double jeopardy[.]" *People v Carpentier*, 446 Mich 19, 47 (1994). A defendant's guilty plea establishes factual guilt and "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." *People v New*, 427 Mich 482, 487–488 (1986).

A defendant forfeits his or her double jeopardy claim as it relates to a guilty plea when the defendant fails to appear at sentencing for the offense to which he or she pleaded guilty. *People v Washington*, 461 Mich 294, 296 (1999).

11.8 Guilty Pleas

A guilty plea waives a defendant's challenge to all non-jurisdictional errors—those errors that would preclude a valid conviction against the defendant. *People v Smith*, 438 Mich 715, 721 (1991), overruled in part on other grounds 475 Mich 245 (2006), citing *People v New*, 427 Mich 482, 487–488 (1986). A defendant's claim of double jeopardy constitutes a jurisdictional defect or its equivalent and is not automatically waived by a defendant's guilty plea. *People v Carpentier*, 446 Mich 19, 47 (1994).

Jeopardy does not attach to charges that are dismissed as part of a defendant's plea agreement. *People v Mezy*, 453 Mich 269, 276 (1996). MCR 6.312 states:

> "If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered."

Double jeopardy concerns do not prevent reinstatement of an original felony charge when a guilty plea entered to a reduced charge is overturned on appeal. *People v Howard*, 212 Mich App 366, 370 (1995).

Where a trial court improperly accepts a defendant's plea to a lesser charge despite the prosecutor's objection, double jeopardy considerations do not bar the state from retrying the defendant on the original greater charge. *Genesee Pros v Genesee Circuit Judge*, 391 Mich 115, 122–123 (1974).

When a sentencing court imposes a sentence lower than the one agreed to by the prosecutor in a sentencing or plea agreement, the prosecutor is entitled to withdraw from the plea agreement. *People v Siebert*, 201 Mich App 402, 405 (1993); *People v Killebrew*, 416 Mich 189 (1982).

MCR 6.310(E) stops short of authorizing a prosecutor to withdraw from a plea agreement when the sentencing court imposes a lesser sentence than the sentence reflected by the sentencing agreement. However, the *Siebert* Court noted that MCR 6.310(E)* does not preclude prosecutorial withdrawal under these circumstances. *Siebert, supra* at 406. According to the *Siebert* Court, neither MCR 6.310(E) nor *Killebrew* specifically authorizes a prosecutor to withdraw from a sentence agreement when the trial court fails to honor the terms of the agreement, but neither are the two authorities inconsistent with permitting the prosecutor to withdraw under these circumstances. *Siebert, supra* at 408. According to the *Siebert* Court, permitting a trial court to accept a plea agreement but impose a lower sentence than the one specified in the agreement "would effectively [permit the court to] assume the prosecutor's constitutional authority to determine the charge or charges a defendant will face." *Id*. at 410.

*MCR 6.310(E) was MCR 6.310(C) when this case was decided.

11.9 Acquittals

MCL 763.5 prohibits "any subsequent prosecution" for an offense after a defendant has been acquitted of the charge at an earlier trial:

> "No person shall be held to answer on a second charge or indictment for any offense for which he has been acquitted upon the facts and merits of the former trial but such acquittal may be pleaded or given in evidence by him in bar of any subsequent prosecution for the same offense."

Whether dismissal of a case constitutes an acquittal may sometimes be difficult to determine. The manner in which the trial court characterizes its dismissal of a case may not accurately or completely reflect whether the dismissal represents that some or all of the factual elements of the offense charged were resolved. *People v Anderson*, 409 Mich 474, 486 (1980). For example, despite the trial court's attempt to stay entry of its ruling pending appellate review, double jeopardy prevented retrying the defendant after the trial court determined as a matter of law the defendant could not be convicted of the charges and granted the defendant's motion for directed verdicts of acquittal. *People v Nix*, 453 Mich 619, 626–627 (1996). Similarly, a defendant may not be retried or subjected to further criminal proceedings on a charge dismissed by the trial court for insufficient evidence because such a dismissal is "a ruling that as a matter of law the State's evidence is insufficient to establish [the defendant's] factual guilt." *Smalis v Pennsylvania*, 476 US 140, 144 (1986). The *Smalis* Court further stated:

> "[W]hether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Id*. at 145, citing *Arizona v Rumsey*, 467 US 203, 211–212 (1984).

A trial court's acceptance of a defendant's plea to one charge may effectively acquit the defendant of other charges. Double jeopardy principles prohibit a subsequent prosecution when the trial court accepts a defendant's plea to a lesser charge in the face of the prosecution's objection, dismisses the greater charge, and discharges the jury that had been seated to try the defendant on that charge. *Anderson*, *supra* at 479. The trial court's conduct in *Anderson* functioned as an acquittal of the greater charge, even though the trial court erred when it prematurely accepted the defendant's plea to manslaughter and dismissed the jury already seated to try the defendant on the first-degree murder charge. *Id.* at 493. According to the *Anderson* Court:

> "[T]he judge should have allowed the prosecution to present all of its witnesses. [The judge] could then have entertained a motion for a directed verdict. *Fong Foo* [*v United States*, 369 US 141 (1962),] demonstrates, however, that a procedural error, even of this magnitude, does not change the finality of an acquittal, any more

> than would an erroneous determination on the elements of the crime charged." *Id*.

Because the trial court in *Anderson* effectively resolved "some or all of the factual elements" in the charge against the defendant, the court's action constituted an acquittal of the original greater offense. *Id*. at 479. In contrast to *Anderson*, when a trial court sua sponte vacates a defendant's conviction on the basis of its own error in instructing the jury but makes no comment on the facts or evidence presented in the case, the court has not resolved any factual elements, and retrial on the same charge is not prohibited. *People v Torres*, 452 Mich 43, 46 (1996).

Even after a trial court granted the defendants' motion to suppress evidence, found the defendants not guilty of the charged offenses in the absence of that evidence, and dismissed the case, double jeopardy did not bar retrial because no decision was reached on the merit of the charged offenses. *People v Roig*, 448 Mich 883 (1995). The facts in *Roig* are as follows:

> "At the close of proofs, both defendants moved for a directed verdict on the ground that evidence of the cocaine was obtained during an illegal search and seizure and, therefore, should be suppressed. The court initially denied the motions but, following closing arguments, it held that the evidence was the product of an unconstitutional search and seizure. The court therefore suppressed the evidence, found both defendants not guilty and dismissed the charges." *People v Roig*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 1997 (Docket No. 184599).

The prosecution appealed the trial court's ruling and in the *Roig* case's first time before the Court of Appeals, the Court concluded that regardless of the timeliness of the defendants' motion, double jeopardy barred retrial of the defendants for the same charges. *People v Roig*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 1994 (Docket No. 162338). The Supreme Court reversed the ruling and held that "there was no double jeopardy violation where defendants' acquittals were not on the merits." *People v Roig*, 448 Mich 883 (1995).

After declaring a mistrial, the court may grant the defendant's motion for directed verdict. Entry of the verdict under such circumstances operates as an acquittal on the merits so that double jeopardy principles bar a retrial. *People v Mehall*, 454 Mich 1, 5 (1997). The *Mehall* Court explained:

> "A defendant may not be retried after an acquittal that is granted on the basis of insufficient evidence. However, the trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action.

* * *

> "[E]ven an order that is not termed an acquittal may, in fact, rest upon a finding of insufficient evidence. In such a circumstance, the defendant could not be retried. Conversely, an action that is labeled an acquittal may, in truth, be premised on a different ground than insufficient evidence. In that situation, it would not violate principles of double jeopardy to retry the defendant." *Mehall, supra* at 5 (internal citations omitted).

Implicit acquittals. A greater offense and its lesser included offenses are considered the same offense for purposes of the double jeopardy protection against successive prosecutions. *People v Henry*, 248 Mich App 313, 324 n 38 (2001), citing *Brown v Ohio*, 432 US 161, 168–169 (1977). Where a defendant is acquitted of the greater offense, prosecution for a lesser included offense is precluded by the prohibition against double jeopardy. *Henry, supra* at 324. Similarly, where a defendant is convicted of a lesser included offense, the defendant may not be retried for the greater offense; in such a case, conviction of the lesser offense functions as an acquittal of the greater offense. *Price v Georgia*, 398 US 323, 329 (1970), citing *Green v United States*, 355 US 184 (1957). When a jury is "given a full opportunity to return a verdict" on a greater offense and instead convicts the defendant of a lesser charge, the defendant is no longer in jeopardy on the greater charge and may not again be placed in jeopardy on that charge, without regard to whether conviction of the lesser offense is overturned and retrial is ordered. *Price, supra* at 328–329, citing *Green, supra* at 191. According to the *Price* Court:

> "[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." *Price, supra* at 329.

In some cases, when an initial trial outcome involves an offense with greater and lesser degrees, even an uncertain resolution of the charges may operate to bar retrial. *People v Booker*, 208 Mich App 163, 173 (1995). In *Booker*, the trial court erred in accepting a verdict convicting a defendant of voluntary manslaughter where a juror expressed doubt about whether the defendant's conduct was intentional. Because the juror's uncertainty was limited to whether involuntary or voluntary manslaughter was the proper verdict, the defendant was implicitly acquitted of first- and second-degree murder, and double jeopardy principles barred retrial on those charges.

11.10 Prosecutorial Appeals

The prosecution may appeal in any case where further proceedings are not precluded by double jeopardy concerns. *People v Hutchinson*, 224 Mich App 603, 606–607 (1997). MCL 770.12 specifically authorizes certain

prosecutorial appeals "if the protection against double jeopardy . . . would not bar further proceedings against the defendant." However, even though retrial after acquittal is barred by double jeopardy, the prosecution may appeal an acquittal if it is seeking reinstatement of an earlier verdict of conviction. *Hutchinson, supra* at 607. See also *People v Torres*, 452 Mich 43, 46 (1996) (where the defendant's conviction was vacated, retrial on the same offense did not violate double jeopardy principles).

In *Hutchinson*, nine months after a bench trial in which the trial judge found the defendant guilty of possessing more than 650 grams of cocaine, the trial court unilaterally and without offering any "facts or circumstances that would logically justify [the court's] finding" revised the verdict so that it reflected a conviction for attempted possession of more than 650 grams of a controlled substance. *Hutchinson, supra* at 605. On the prosecutor's appeal, the Court of Appeals reinstated the trial court's original verdict and explained:

> "The trial court proffered no reasoned explanation that would justify a finding of guilty of only attempted possession, in the face of proofs establishing only actual possession, either on the basis of the facts originally found or any subsequent clarification.
>
> "Such alteration of the original reasoned verdict of guilty is precluded on both double jeopardy principles and public policy grounds." *Hutchinson, supra* at 606.

11.11 Case Law Involving Specific Offenses

This section contains case law discussing double jeopardy in the context of controlled substance offenses and offenses commonly committed in conjunction with controlled substance offenses.

A. Attempt

Attempted *delivery* of controlled substances under the Controlled Substances Act is not prosecuted under the general attempt statute, MCL 750.92, because the definition of delivery for purposes of the Act includes the "attempted transfer" of a controlled substance from one person to another. MCL 333.7105(1). The general attempt statute, MCL 750.92, applies only "when no express provision is made by law" to adjudicate the attempted criminal conduct at issue. Where a trial court mistakenly convicted the defendants of attempted cocaine delivery under the general attempt statute, double jeopardy concerns barred the court from correcting the error by entering guilty verdicts against the defendants for attempted delivery under MCL 333.7401. *Wayne Co Pros v Recorder's Court Judge*, 177 Mich App 762, 765–766 (1989). In convicting the defendants of attempted delivery under MCL 750.92 in *Wayne Co Pros*, the trial court "specifically found that there was insufficient evidence of an 'attempt' by the defendants to convict them of delivery of cocaine under [MCL 333.7401] of the controlled substances act." *Wayne Co*

Pros, supra at 765. Because the attempt offense under the general attempt statute was a "lesser" offense of delivery under MCL 333.7401 (pursuant to MCL 750.92, the supposed lesser offense was the *attempt to attempt* delivery of a controlled substance), the defendant was acquitted of the "greater" offense (attempted delivery under MCL 333.7401) by his conviction of the "lesser" offense (attempted attempted delivery). *Wayne Co Pros, supra* at 764–766.

B. Conspiracy

*For further discussion of conspiracy and double jeopardy, see **Section 6.3**(B).

A defendant can be convicted of a substantive offense and conspiracy to commit that offense without violating double jeopardy principles. *People v Carter*, 415 Mich 558, 569 (1982), overruled in part on other grounds 419 Mich 458 (1984).* Similarly, consecutive sentences for a controlled substance offense and conspiracy to commit that offense do not violate the prohibition against double jeopardy. *People v Denio*, 454 Mich 691, 709–710 (1997). In addition to the Legislature's unambiguous intention to penalize both commission of the substantive offense and conspiracy to commit the offense even when the conduct occurs in the same criminal transaction, the offenses themselves violate different social norms and present to society the threat of differing degrees of danger. *Id*. at 710–711. Conspiracy is an ongoing offense until evidence demonstrates that the offender has abandoned or withdrawn from the criminal agreement to commit the substantive offense. *Id*. at 711. In contrast to the substantive offense committed, conspiracy is an offense intended to *result in commission of the substantive offense* the Legislature intended to prevent, and a conspiracy presents this threat daily. *Id*. See also *People v Rodriguez*, 251 Mich App 10, 18–22 (2002).

Where multiple conspiracies are charged, a defendant's prima facie case in support of a double jeopardy claim requires a showing that the conspiracy charges at issue are similar and that there was a substantial overlap in the times at which each conspiracy took place. *People v Mezy*, 453 Mich 269, 277 (1996). Once a defendant has satisfied the initial burden, the burden shifts to the government to show why double jeopardy does not bar the prosecution. *Id*. This must be established by a preponderance of the evidence. *Id*. To determine whether there is more than one conspiracy for purposes of double jeopardy, a trial court should consider the following factors:

- overlap in the times during which the conspiracies allegedly occurred;
- the identities of the individuals acting as coconspirators;
- the similarity of the statutory offenses charged in the indictments;
- the overt acts charged by the government; and
- the places where events alleged to be part of the conspiracies took place. *Id*.

C. Possession and Possession With Intent to Deliver

Where a defendant is convicted of possession of marijuana in an earlier trial (later reversed on evidentiary grounds), the prosecution may not retry the defendant on the greater charge of possession with intent to deliver marijuana at a second trial based on the same criminal transaction. *People v Head*, 211 Mich App 205, 212 (1995). Conviction of the lesser offense is an acquittal of the greater offense.

Where possession of a controlled substance is "a necessary incident to the very delivery for which [a defendant is] also convicted," double jeopardy considerations prohibit convicting a defendant of possession and delivery of the controlled substance. *People v Martin*, 398 Mich 303, 309 (1976) (the heroin delivered to the undercover officer was the same heroin for which the defendant was convicted of possession). However, where a defendant's possession of a controlled substance is distinct from the possession necessary to delivery of the controlled substance, double jeopardy concerns do not prevent convicting the defendant of delivery and possession. *People v Jackson*, 153 Mich App 38, 49–51 (1986) (the marijuana used in the delivery was distinct from the quantity of marijuana found at the defendant's home).

D. Operating a Methamphetamine Laboratory

The Legislature did *not* intend multiple punishments when a defendant was convicted of both operating/maintaining a methamphetamine laboratory and operating/maintaining a methamphetamine laboratory within 500 feet of a residence. *People v Meshell*, 265 Mich App 616, 631–632 (2005). Under the "same-elements" test, there exists a presumption that the Legislature did not intend multiple punishments because all the elements of one offense are contained in the elements of the other offense. Further evidence that multiple punishments were not intended is found in the statutory language that provides for more severe punishment when the conduct prohibited under MCL 333.7401c(2)—operating/maintaining a methamphetamine laboratory—occurs in certain locations or under certain circumstances (e.g., in the presence of a minor, involving possession or use of a firearm, etc.).

E. Multiple Controlled Substances Offenses Involving Similar Circumstances

Where the only characteristics two controlled substance offenses had in common were the time and place at which the substances were discovered, separate charges and convictions did not offend double jeopardy. *People v Fowlkes*, 130 Mich App 828, 833–834 (1984), referring to *People v Plato*, 114 Mich App 126, 133 (1981). In *Fowlkes*, separate convictions *did* violate the defendant's protection against double jeopardy because the evidence showed that the defendant obtained possession of the drugs at the same time and in a single transaction from the same individual. *Fowlkes*, *supra* at 834. Because "there were no 'significant intervening circumstances' or new criminal

conduct by the defendant between the seizure of the coin envelopes just outside the house and the discovery of the heroin packets near the defendant in the upstairs bedroom," the aggregate "sameness" of the separate charges violated the prohibition against double jeopardy. *Id*. at 835.

F. Felony-Firearm

The felony-firearm statute is not a sentence enhancement statute; therefore, with the exception of the offenses noted in MCL 750.227b, a defendant may be charged with and convicted of separate offenses arising from the same conduct on which the defendant's felony-firearm conviction was based. *People v Mitchell*, 456 Mich 693, 697–698 (1998). The felony-firearm statute represents the Legislature's intent to create an additional felony offense for cases in which a firearm is involved in an offender's commission of another felony offense. *Id*.

*18 USC §844(h)(2).

United States v Ressam, 553 US ___, ___ (2008) (a federal statute prohibiting the carrying of explosives during the commission of a felony* requires only that the explosives were carried during a defendant's commission of *any* felony; application of the statute is not limited to the commission of felonies bearing some relationship to the explosives themselves).

Felony-firearm and felon in possession. Double jeopardy is not implicated when a defendant is convicted of both felony-firearm and felon in possession. *People v Calloway*, 469 Mich 448, 451–452 (2003).

> "Because the felon in possession charge is not one of the felony exceptions in the [felony-firearm] statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." *Calloway*, *supra* at 452.

G. Felony Murder

**Blockburger v United States*, 284 US 299 (1932).

"[C]onvicting and sentencing a defendant for both first-degree felony murder and the predicate felony does not violate the 'multiple punishments' strand of the Double Jeopardy Clause *if* each offense has an element that the other does not." (Emphasis added). *People v Ream*, 481 Mich 223, 240-241 (2008), overruling *People v Wilder*, 411 Mich 328, 342 (1981). The *Ream* Court reiterated its holding in *People v Smith*, 478 Mich 292, 316 (2007), that the *Blockburger** test should be employed to determine whether the protection against double jeopardy prohibits multiple punishments; multiple punishments are authorized if each statute requires proof of an additional fact not required by the other. *Ream*, *supra* at 228. In *Ream*, *supra* at 225-226, the Supreme Court held that there was no double jeopardy violation where the defendant was convicted and sentenced for both first-degree felony murder and the predicate felony of first-degree criminal sexual conduct (CSC-1). One element required to prove first-degree felony murder, but not required to prove CSC-1, is the killing of a human being. *Id*. at 241. One element of CSC-

1, but not an element of first-degree felony murder, is sexual penetration. *Id*. Because each of the offenses contained an element that the other did not, they were not the "same offense" and the defendant could be punished for both. *Id*. at 241-242.

Chapter 12: Search and Seizure

12

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In this chapter...

This chapter provides a comprehensive overview of the very broad subject area of searches and seizures. Although a detailed discussion of each topic addressed in this chapter is beyond the scope of this benchbook, this chapter contains a summary of the issues that arise most frequently in the area of searches and seizures.

Part A—Introduction

12.1 Protection Against Unreasonable Searches and Seizures

Unreasonable searches and seizures are prohibited by the Michigan Constitution and the United States Constitution. Const 1963, art 1, §11; US Const, Am IV. In addition, under both the Michigan Constitution and the United States Constitution, probable cause is required before a warrant may be issued. Const 1963, art 1, §11; US Const, Am IV. Subject to a limited

number of specific exceptions, warrantless searches and seizures are per se unreasonable. *Katz v United States*, 389 US 347, 357 (1967); *People v Champion*, 452 Mich 92, 98 (1996).

The Michigan Constitution states:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state." Const 1963, art 1, §11.

The United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV.

A. Warrant Requirement

*See *Criminal Procedure Monograph 1: Issuance of Complaints & Arrest Warrants—Third Edition* (MJI, 2006-April 2009), for detailed information.

Although warrantless arrests are permitted under certain circumstances,* the Fourth Amendment and Michigan's Constitution both ordinarily require the police to obtain a warrant supported by probable cause before effecting an arrest or conducting a search. *People v Levine*, 461 Mich 172, 178 (1999), citing *Maryland v Dyson*, 527 US 465, 466 (1999).

Where an arrest warrant is required, probable cause must exist to support issuance of the warrant. "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonable, trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Champion*, *supra* at 115.

*See *Criminal Procedure Monograph 2: Issuance of Search Warrants—Third Edition* (MJI, 2006-April 2009), for detailed information.

Search warrants may properly issue when there is probable cause to believe that evidence of a crime or contraband will be found at the location stated in the warrant.* *People v Ulman*, 244 Mich App 500, 509 (2001). Probable cause is a fairly definitive construct; probable cause exists when there is "'[a] fair probability that contraband or evidence of a crime will be found in a particular place.'" *Levine*, *supra* at 185, quoting *Illinois v Gates*, 462 US 213, 238 (1983). Determining whether probable cause exists requires an analysis of the "totality of the circumstances." *Levine*, *supra* at 179; *Gates*, *supra* at 232, 238.

The affidavit or warrant request must state a nexus between the place to be searched and the evidence sought, and the belief that the items sought will be found at the search location must be supported by more than mere suspicion. *United States v Williams*, 544 F3d 683, 686 (CA 6, 2008). "A magistrate may infer a nexus between a suspect and his [or her] residence, depending upon 'the type of crime being investigated, the nature of [the] things to be seized, the extent of an opportunity to conceal the evidence elsewhere and the normal inferences that may be drawn as to likely hiding places.'" *Id*. at 687, quoting *United States v Savoca*, 761 F2d 292, 298 (CA 6, 1985).

"[A]n issuing judge may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking." *Williams*, *supra* at 687. This is because a sufficient nexus (between the place to be searched and the evidence sought) exists to search the residence of a known drug dealer after he or she has been arrested for possession of drugs. *United States v Miggins*, 302 F3d 384, 393-394 (CA 6, 2002). "Although a defendant's status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in [a] defendant's home . . . there is support for the proposition that status as a drug dealer plus observation of drug activity near [a] defendant's home is sufficient to establish probable cause to search the home." *United States v Berry*, 565 F3d 332, 339 (CA 6, 2009). In *Berry*, a defendant's prior status as a drug dealer, and the discovery of crack cocaine during a search of the defendant's car after he was arrested in the residence's driveway, supported the search warrant authorizing a search of the defendant's home, even though the police had not observed specific drug activity near the defendant's home. The inference that a drug dealer keeps evidence of wrongdoing in his or her residence is permissible if the affidavit supporting the issuance of the search warrant independently corroborates the fact that the defendant was a known drug dealer at the time the police sought to search the defendant's residence. *United States v McPhearson*, 469 F3d 518, 524 (CA 6, 2006). This rationale is not limited to defendants engaged in the immediate distribution of drugs; it also extends to the manufacture of controlled substances because "the manufacturer is only a step away from dealing in his product." *United States v Kenny*, 505 F3d 458, 462 (CA 6, 2007).

Further, "an issuing judge may infer that a suspect keeps the instrumentalities or fruits of his [or her] criminal activity at his [or her] residence, even when that criminal activity is not drug trafficking." *Williams*, *supra* at 690 (search warrant affidavit established a sufficient nexus between the defendant's suspected possession of firearms and his residence to support the issuing judge's probable cause determination).

Warrant requirements based on information from a confidential informant. It is unnecessary to determine for purposes of MCL 780.653 whether an anonymous informant had personal knowledge of the information contained in the affidavit on which a search warrant is based when the affidavit contains additional information sufficient in itself to support a finding of probable cause. *People v Keller*, 479 Mich 467, 477 (2007).* In *Keller*, the information contained in the affidavit supported the magistrate's

*Reversing *People v Keller*, 270 Mich App 446 (2006).

conclusion that it was fairly probable that contraband would be found in the defendants' home because the affidavit was based in part on the small amount of marijuana discovered in the defendants' trash. *Id*. Although the evidence discovered in the defendants' trash did not support the anonymous informant's allegation that the defendants were engaged in drug trafficking, the evidence from the defendants' trash adequately established the probable cause necessary to justify a search of the defendants' home for additional contraband. *Id*. at 483. According to the Court, "Because this officer uncovered direct evidence of illegal activity, the marijuana, it was unnecessary to delve into the veracity of the source." *Id*. at 477.

B. Admissibility of Evidence Seized Without a Warrant

Where a person's protection against unreasonable searches and seizures is violated, the exclusionary rule generally prohibits the use in a criminal prosecution of any evidence obtained as a result of a constitutional violation. *People v Cartwright*, 454 Mich 550, 558 (1997).

*The applicability/inapplicability of the exclusionary rule and exceptions to the rule are discussed in Sections 12.13, 12.14, 12.15, and 12.16, below.

Determining whether a warrantless search or seizure is reasonable requires a court to balance the government interest allegedly furthered by the intrusion against the individual's right to be free of arbitrary police interference. *Terry v Ohio*, 392 US 1, 21 (1968). Subject to specific exceptions, the exclusionary rule bars the use of evidence obtained as a result of a search or seizure in violation of the Fourth Amendment.* *People v Goldston*, 470 Mich 523, 528 (2004); *Mapp v Ohio*, 367 US 643, 655, 660 (1961).

C. Good-Faith Exception to an Invalid Warrant

*See Section 2.13, *Criminal Procedure Monograph 2: Issuance of Search Warrants—Third Edition* (MJI, 2006-April 2009), for more information.

The good-faith exception to the exclusionary rule, adopted in Michigan by *Goldston*, *supra*, and first announced in *United States v Leon*, 468 US 897 (1984), may prevent the automatic exclusion of evidence obtained from a law enforcement officer's reasonable good-faith reliance on a search warrant later found to be defective. The good-faith exception to the exclusionary rule applies only to situations in which a search and seizure occurred pursuant to a warrant.*

See *People v Hellstrom*, 264 Mich App 187, 191, 199–200 (2004) (even where the affidavit contained no allegations that the defendant used a video recorder, camera, or computer in the commission of the crimes with which he was later charged, officers executing a search warrant could reasonably rely on affidavits in support of the warrant based on an officer's experience with similar cases, that defendants who assault young females in their home "are known to have items of sexual gratification inside their homes, computers and other devices").

The good-faith exception to the exclusionary rule may not apply to evidence obtained pursuant to a search warrant when the warrant was issued on the

basis of the affiant's admitted and purposeful false statements. *People v Williams*, 240 Mich App 316, 319-320 (2000).

Part B—Warrantless Searches/Seizures of a Person

12.2 Warrantless Seizures of a Person

Warrantless seizures are per se unreasonable unless one of several very specific exceptions applies to the seizure. *Katz v United States*, 389 US 347, 357 (1967); *People v Champion*, 452 Mich 92, 98 (1996).

A person is seized for purposes of the Fourth Amendment whenever there is the slightest application of force or a nonphysical show of authority to which the person submits; therefore, a person who flees from police is not seized within the meaning of the Fourth Amendment. *California v Hodari D*, 499 US 621, 626 (1991).

A person is "seized" for purposes of the Fourth Amendment when, in light of all the circumstances, a reasonable person believed that he or she was not free to leave. *People v Jenkins*, 472 Mich 26, 32–35 (2005). A person is also seized for Fourth Amendment purposes when law enforcement officers refuse to leave the person's home after the person so requests. *People v Bolduc*, 263 Mich App 430 (2004).

Where police officers knocked on a defendant's door and asked him repeatedly to step outside but did not threaten to compel his exit, did not touch him until after he stepped out of the house, and did not draw their weapons or otherwise make a show of force, the officers did not constructively enter the defendant's home in violation of his Fourth Amendment right to privacy.* *People v Gillam*, 479 Mich 253, 266 (2007). Consequently, evidence discovered in the defendant's home following his arrest was properly admitted against the defendant at trial. *Id*.

*The Court declined to recognize the doctrine of constructive entry for purposes of Michigan law.

A passenger in a vehicle stopped by the police is seized for purposes of the Fourth Amendment and may properly challenge the constitutionality of the traffic stop. *Brendlin v California*, 551 US ___ (2007). According to the *Brendlin* Court, the passenger's formal arrest did not constitute the time at which the passenger was seized; rather, the passenger was seized at the moment the car in which he was riding came to a stop on the side of the road.

"A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Arizona v Lemon Johnson*, 555 US ___, ___ (2009). "An officer's inquiries into matters

unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop." *Id*. at ___. In *Lemon Johnson*, *supra* at ___, a policewoman "was not constitutionally required to give [the defendant, who was a backseat passenger,] an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."

In *People v Shabaz*, 424 Mich 42, 56-58 (1985), the Michigan Supreme Court described the three tiers of police-citizen encounters identified by Justice White in *Florida v Royer*, 460 US 491 (1983) (plurality). These three levels of police-citizen encounters are discussed in the subsections below.

A. Consensual Encounters—Tier 1

An encounter described as a "tier 1" encounter is a public encounter between a police officer and an individual during which the officer asks questions of the individual. The individual is under no obligation to answer the officer's questions and may walk away from the officer at any time, with or without responding to the officer's questions. The individual may not be even briefly detained unless the officer has reasonable and objective grounds for the detention, and an individual's failure to cooperate under these circumstances does not alone supply the officer with grounds for detention. *Shabaz*, *supra* at 56-57, citing *Royer*, *supra* at 497-498.

A consensual encounter between an officer and a private citizen does not implicate the citizen's constitutional right to be free from unreasonable searches and seizures. *Jenkins*, *supra* at 32-33. An initially consensual encounter may become a seizure when, based on the information obtained and observations made, an officer develops reasonable suspicion that the citizen has been involved in criminal activity. Evidence discovered as a result of these legal detentions is properly seized at the time the individual citizen is seized. *Id*. at 32-35.

B. Investigatory Stops (*Terry* Stops & Traffic Stops)—Tier 2

A brief investigatory stop based on an officer's reasonable suspicion that an individual has committed or is about to commit a crime is a "tier 2" encounter. This brief interference with an individual's freedom is a limited exception to the requirement that probable cause must exist to justify any kind of restraint. The police may not detain the individual longer than necessary to determine whether criminal activity is afoot and may not conduct a full search of the individual's person, automobile, or other personal effects. *Shabaz*, *supra* at 57, citing *Royer*, *supra* at 499.

1. *Terry* Stops

A police officer may make a valid investigatory stop when the officer possesses a reasonable suspicion that criminal activity has occurred or is about to occur. *Champion, supra* at 98. "A brief, on-the-scene detention of an individual is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention." *People v Custer*, 465 Mich 319, 327 (2001), citing *Michigan v Summers*, 452 US 692, 699–700 (1981).

In *Terry v Ohio*, 392 US 1, 21 (1968), the United States Supreme Court established the standard for conducting a valid investigatory stop—a *Terry* stop. A police officer may lawfully seize a person—make a *Terry* stop—if the officer can articulate a particularized and objective basis for possessing a reasonable suspicion that the person seized is or was engaged in criminal activity. *Id*. at 21–22. "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *Champion, supra* at 98, citing *United States v Sokolow*, 490 US 1 (1989).

In *Shabaz, supra*, plainclothes police officers improperly seized the defendant based on the following conduct:

- officers saw the defendant on a street in a high-crime neighborhood at night;
- officers saw the defendant leave an apartment building at which "the observing officers had previously made a number of arrests for concealed-weapons violations and narcotics offenses";
- officers saw the defendant "stuff[] a [small] paper bag like under his vest [or] in his pants" after the defendant looked toward the officers' unmarked police vehicle; and
- the defendant "took off running" when the officers stopped the unmarked vehicle in which they were riding. *Shabaz, supra* at 60.

The *Shabaz* Court concluded that these circumstances failed to provide more than "a naked and generalized suspicion" that the defendant might be engaged in criminal wrongdoing. According to the Court:

> "Considering the totality of the circumstances with which the police were confronted before the defendant began to run, it is clear that the officers were entirely without authority to confront the defendant and require him to submit to an investigatory stop and interrogation because, on the basis of what they had observed, the officers had no articulable or particularized grounds to suspect, reasonably, that the defendant was, had been, or was about to be engaged in criminal activity. Nothing in their observation of him to that point provided the objectively reasonable and articulable suspicion that would justify the

> limited intrusion upon the defendant's liberty and privacy interests permitted under *Terry*.
>
> * * *
>
> "The officers were not in uniform, they were driving an unmarked car, they did not identify themselves as police and, upon first observing the defendant, they slowed their vehicle, fixed their attention on the defendant, and then pursued him. It is not unreasonable to expect that a citizen walking along the street in a high-crime area in the dark of night, who is being scrutinized and then 'tailed' by three unknown persons in a 'private' motor vehicle, would vacate the area at flank speed." *Shabaz*, *supra* at 62, 64.

But see *Illinois v Wardlow*, 528 US 119, 125 (2000), where, in an area known for heavy narcotics trafficking, the defendant's "unprovoked flight [in the presence of a caravan of police vehicles wa]s simply not a mere refusal to cooperate." According to the Court, "Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." *Id*.

A police officer may properly stop an individual to confirm or dispel a reasonable suspicion—a suspicion based on information received from a reliable confidential informant—that the individual had recently been involved in a drug transaction. *People v Dunbar*, 264 Mich App 240, 246–247 (2004), overruled on other grounds by *People v Harvey Jackson*, 483 Mich 271 (2009).

In determining "'whether the information from [a] citizen-informant carrie[s] enough indicia of reliability to provide the [police] with a reasonable suspicion,'" the trial court should consider: "'(1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors.'" *People v Horton*, 283 Mich App 105, 109 (2009), quoting *People v Tooks*, 403 Mich 568, 577 (1978). In *Horton*, *supra* at 107, the police received in-person information from a citizen who declined to identify himself that a black male, approximately 30 years of age who "seemed to be pretty nervous and upset" was driving a burgundy Chevrolet Caprice at a gas station one mile away, and was waving an "[U]zi type weapon" with a long clip. The Court of Appeals held that "[t]he totality of the circumstances provided reasonable suspicion for the police to briefly detain [the] defendant" because "[t]he descriptive information was detailed, and the police corroborated it in less than five minutes." *Id*. at 113. The Court further commented that "[t]he facts fit the observation made in *Tooks*, *supra* at 577, that 'information provided to law enforcement officers by concerned citizens who have personally observed suspicious activities is entitled to a finding of reliability when the information is sufficiently detailed and is corroborated within a reasonable period of time by the officers' own observations.'" *Horton*, *supra* at 113.

The length of time during which a defendant is detained may affect the reasonableness of the initial stop. "[W]hether a detention is too long in duration to be justified as an investigatory stop [turns on] whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped." *People v Chambers*, 195 Mich App 118, 123 (1992) (20-minute detention was reasonable where the police followed footprints in the snow to determine the origin of property the defendants were suspected of stealing).

An investigatory stop may result in an arrest based on other information gained and observations made.* *Jenkins*, *supra* at 32–35.

*Evidence seized as a result of an investigatory stop is discussed in **Section 12.3**.

2. Traffic Stops

If a law enforcement officer has probable cause to believe a driver has violated a traffic law, the officer may stop the vehicle. *Whren v United States*, 517 US 806, 813 (1996).

A police officer needs no probable cause or articulable suspicion to conduct a computer check of a vehicle's license plate number; an investigatory traffic stop is justified where a computer check reveals that the vehicle's registered owner is subject to arrest and there exists no visible evidence contradicting the inference that the driver of the vehicle is the registered owner. *People v Jones*, 260 Mich App 424, 427–429 (2004).

A law enforcement officer is permitted to detain a driver stopped for a traffic violation in order to question the driver about the driver's destination and travel plans. *People v Williams*, 472 Mich 308, 316 (2005). The officer's authority to ask questions extends to follow-up questions prompted by suspicious or implausible answers to questions posed by the officer. *Id*.

A collection of apparently "innocent" acts, in the aggregate and in light of an officer's experience, may constitute the reasonable suspicion required to make an investigatory traffic stop. *People v Oliver*, 464 Mich 184, 200–201 (2001) (investigatory stop was justified where, among other factors, circumstances supported the officer's inference that suspects in the bank robbery would use a getaway vehicle, the vehicle stopped was near the crime scene, the stop was made within 15 minutes of the reported crime, and the physical appearance of the occupants in the vehicle was consistent with the limited description of the suspects in the robbery).

However, circumstances that merely suggest that an individual may be involved in criminal activity are generally insufficient to establish the requisite reasonable suspicion for stopping a vehicle. *People v LoCicero (After Remand)*, 453 Mich 496, 505–508 (1996). In *LoCicero*, a police officer stopped a vehicle after watching the vehicle rendezvous with another vehicle in one parking lot, follow that vehicle to another parking lot, and then park three cars away from that vehicle in the second lot. *Id*. at 499. After parking in the second lot, the passenger in the vehicle later stopped by the officer got out of the car and got into the passenger side of

the other car. *Id*. After a few minutes, the second car drove the passenger to the first car where the driver of the first car stood waiting. *Id*. On these facts alone, the officer instructed a marked car to stop the vehicle. *Id*. Said the Michigan Supreme Court:

> "[The defendants'] conduct might have given rise to a hunch that they were engaged in criminal activity, but a hunch is not sufficient to give rise to reasonable suspicion. A hunch might provide a reason to observe the persons under surveillance further, or to run the license plates of their vehicles. An officer testifying that he inferred on the basis of his experience and training is obliged to articulate how the behavior that he observed suggested, in light of his experience and training, an inference of criminal activity.
>
> * * *
>
> "In this case, however, there was no articulation of how [the defendants'] conduct translated into potential criminal behavior other than the bald assertion by an officer that the situation looked like a drug transaction may be occurring." *Id*. at 505–506.

C. Arrests—Tier 3

An arrest based on probable cause that an individual has committed, is committing, or is about to commit a crime is a "tier 3" encounter. *Shabaz, supra* at 59.

*See Section 1.2, *Criminal Procedure Monograph 1: Issuance of Complaints & Arrest Warrants—Third Edition* (MJI, 2006-April 2009), for more information.

Where an officer has probable cause to arrest a person, the resulting custodial arrest is a reasonable intrusion under the Fourth Amendment. *People v Champion*, 452 Mich 92, 115 (1996). To justify a person's warrantless arrest, an officer must have information sufficient to show that an offense has occurred and that the person arrested committed that offense.* *Id*.

> "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id*.

A law enforcement officer with reasonable cause to believe an individual has committed a Controlled Substances Act violation punishable by at least one year of imprisonment is expressly authorized to arrest that individual without a warrant. MCL 333.7501 states:

> "A sheriff, deputy sheriff, or local or state police officer who has reasonable cause to believe that a violation of this article punishable by imprisonment for 1 year or more has taken place or

> is taking place and reasonable cause to believe that an individual has committed or is committing the violation, may arrest that individual without a warrant for that violation whether or not the violation was committed in the law enforcement officer's presence."

MCL 764.15, 764.15a, 764.15b, 764.15e, and 764.15f detail other circumstances under which a warrantless arrest is expressly permitted by law.* Authority for warrantless arrests made by federal law enforcement officers is found in MCL 764.15d.

*Circumstances include alcohol/drug-related accidents, PPO violations, crimes committed in an officer's presence, etc.

12.3 Warrantless Searches of a Person

A. Stop and Frisk

A search following a valid investigatory stop—a "stop and frisk" for weapons—is permissible to ensure the officer's safety and the safety of the public. Because "[t]he sole justification of the search in [such a] situation is the protection of the police officer and others nearby, [the search] must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry v Ohio*, 392 US 1, 29 (1968). The scope of a warrantless "[stop and frisk] must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id*. at 19.

A proper "stop and frisk" for weapons consists only of patting down a defendant's outer clothing; a police officer may not reach under a defendant's outer garments or into a defendant's pockets unless that action is necessary to remove a weapon identified during the patdown. *Id*. at 30. A proper patdown for weapons is "confined [] strictly to what [i]s minimally necessary to learn whether [a defendant is] armed and to disarm [him or her]." *Id*. A patdown for weapons during an investigatory stop is not "a general exploratory search for whatever evidence of criminal activity" might be found on a defendant's person. *Id*.

An officer is permitted to frisk a passenger during a traffic stop when the totality of circumstances supports the officer's conclusion that the passenger might have a weapon. *People v Custer*, 465 Mich 319, 329 (2001). In *Custer*, the defendant was a passenger in a vehicle stopped by police. The driver of the vehicle was arrested and when he reached into his pocket for money with which to cover the cost of towing his vehicle, a bag of marijuana dropped to the ground. The cash the driver pulled from his pocket totaled approximately $500 and consisted primarily of tens and twenties. The officers asked the defendant to get out of the car and conducted a patdown search for weapons. Because marijuana and a large amount of cash were discovered on the driver, and because drug offenses often involve weapons, the officers concluded that the defendant might possess a weapon. That the officers did not fear for their own safety is largely irrelevant to the propriety of the search as long as there

was a reasonable possibility that the defendant might be carrying a weapon. *Id*. at 328-330.

See also *Arizona v Lemon Johnson*, 555 US ___, ___ (2009), quoting *Knowles v Iowa*, 525 US 113, 117-118 (1998), "officers who conduct 'routine traffic stop[s]' may 'perform a "patdown" of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous.'" In *Lemon Johnson*, *supra* at ___, the defendant was a backseat passenger in a car stopped for a vehicular violation. While one officer, a policewoman, obtained preliminary information from the defendant, she noticed that the defendant's clothing suggested that he was affiliated with a gang. *Id*. at ___. She also noticed that the defendant was carrying a police scanner in his shirt pocket. *Id*. at ___. Because she wished to obtain "intelligence about the gang [the defendant] might be in," the officer asked the defendant to get out of the vehicle so that she could question him away from the front-seat passenger. *Id*. at ___. Based on her suspicions that the defendant might be armed, the policewoman patted him down for safety reasons when he got out of the car. *Id.* at ___. The policewoman felt a gun during the patdown, and she handcuffed the defendant when he started to struggle. *Id*. at ___. The trial court's denial of the defendant's motion to suppress the evidence was proper because the stop was lawful and the policewoman had reasonable cause to suspect that the defendant was armed and dangerous. *Id*. at ___.

B. Incident to Arrest

No warrant is required to conduct a search of a defendant incident to that person's arrest. *Chimel v California*, 395 US 752, 763 (1969). The scope of a search incident to arrest is limited to the arrestee's person and the area immediately surrounding the arrestee; it does not extend to other rooms or areas of an arrestee's house. *Id*. at 763-764. As long as an officer has probable cause for an arrest, a search of any container within the control area of the arrestee is within the permissible scope of a search incident to arrest. *People v Champion*, 452 Mich 92, 115-116 (1996). A search of a container is not justified if the contents of the container are themselves the basis for probable cause to arrest. *Id*. at 116-117.

Where a defendant was arrested and placed in a holding cell, a court officer—as a search incident to arrest—was authorized to examine the defendant's coat for any personal belongings before returning it to the defendant. *People v Houstina*, 216 Mich App 70, 75 (1996).

The Fourth Amendment is not violated where the police make an arrest based on probable cause and conduct a search incident to the arrest, even if the arrest was prohibited by state law. *Virginia v Moore*, 553 US ___, ___ (2008) (police arrested the defendant for an "unarrestable" offense under state law). "[O]fficers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." *Id*. at ___. This rule covers any "lawful arrest," i.e., "an arrest based on probable cause." *Id*. at ___. While some States have taken "lawful" to mean in "compliance with

state law," the United States Supreme Court intends "lawful" to mean in "compliance with constitutional constraints." *Id*. at ___, citing *United States v Robinson*, 414 US 218 (1973).

C. Exigent Circumstances

Because a police officer reasonably believed that failure to take immediate action might have resulted in the destruction of evidence, the United States Supreme Court upheld a warrantless search involving the collection of blood from a defendant arrested for criminal drunk driving. *Schmerber v California*, 384 US 757, 770 (1966).

Part C—Warrantless Searches/Seizures of Property

12.4 When the Search Is Not a Search

Warrantless searches are permissible under several carefully drawn exceptions to the warrant requirement.* There are situations where the "search" conducted by law enforcement does not constitute action contemplated by the Fourth Amendment and thus, for which no exception to the warrant requirement is necessary. For Fourth Amendment purposes, a search occurs "when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *People v Taylor*, 253 Mich App 399, 404 (2003), citing *Katz v United States*, 389 US 347 (1967).

*See Section 2.14, *Criminal Procedure Monograph 2: Issuance of Search Warrants—Third Edition* (MJI, 2006-April 2009).

Using drug-sniffing canines to detect the presence of illegal drugs is not a search for purposes of the Fourth Amendment. *United States v Place*, 462 US 696, 706 (1983). A person has no legitimate expectation of privacy in contraband.* *Illinois v Caballes*, 543 US 405, 408 (2005). See also *People v Jones*, 279 Mich App 86, 93 (2008) ("a canine sniff is not a search within the meaning of the Fourth Amendment as long as the sniffing canine is legally present at its vantage point when its sense is aroused").

*See **Section 12.12**(B) for further discussion of the expectation of privacy.

A search or seizure involving abandoned property is presumptively reasonable because the owner of abandoned property has no reasonable expectation of privacy in that property. Consequently, the Fourth Amendment does not apply to abandoned property. *Taylor*, *supra* at 406.

An individual may abandon property for purposes of the Fourth Amendment without losing his or her ownership interest in that property. *People v Darrin Henry*, 477 Mich 1123 (2007) (peremptory reversal of *People v Darrin Henry*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2006 (Docket No. 266153)).

Under the circumstances present in *Darrin Henry*, *supra*, the Michigan Supreme Court explained that for Fourth Amendment purposes, the defendant abandoned the property at issue when

> "[he] placed a bag containing illegally copied recordings on an electric box attached to a utility pole when he saw an unmarked police car approaching him. In doing so, defendant left the bag in a public place where any passerby could have access to it. Defendant thus voluntarily 'left behind or otherwise relinquished his interest' in the bag. He had no reasonable expectation of privacy in the bag once he abandoned it by the pole. *Colbert*, *supra* at 176.[*] Moreover, he did not object or assert his ownership when the police officer walked over to the bag and looked inside. Defendant's silence reflects his intent to distance himself from any connection with the bag when he set it down." *Darrin Henry*, *supra* at 1123.

* *United States v Colbert*, 474 F2d 174 (CA 5, 1973).

12.5 Exigent Circumstances Doctrine

The exigent circumstances doctrine permits police officers to conduct warrantless searches where the circumstances indicate the need for swift police action and there is no time to secure a warrant. *Michigan v Tyler*, 436 US 499, 509 (1978). Exigent circumstances include situations where, without timely police action, there is a risk that evidence may be removed or destroyed, that persons suspected of criminal conduct may escape, or that any delay could further harm a person who is injured and in need of medical attention.* See *People v Snider*, 239 Mich App 393 (2000).

*See **Section 12.6**, below, for a discussion of the exigent circumstances known as the emergency doctrine.

A slight delay that would result from preparing the necessary papers and presenting them to a magistrate is not an exceptional circumstance justifying a warrantless search. *Johnson v United States*, 333 US 10, 15 (1948) (failure to obtain a warrant was not justified where the suspect was unlikely to flee, the place to be searched was a permanent residence, and there was no danger that contraband would be removed or destroyed).

In *People v Blasius*, 435 Mich 573 (1990), the Michigan Supreme Court provided a few guidelines for determining whether exigent circumstances justified a warrantless search:

> "First, the police may of course undertake no nonconsensual residential search or seizure without a showing of probable cause. Therefore, a court reviewing an entry without a warrant by the police on the basis of exigent circumstances should first determine whether probable cause exists that the premises contain contraband or evidence of a crime.
>
> "Second, where officers seek to justify an entry without a warrant for the purpose of securing the premises pending a warrant, they

> must show the existence of an actual emergency and articulate specific and objective facts which reveal a necessity for immediate action." *Id*. at 593–594.

The *Blasius* Court emphasized that a mere possibility that evidence might be lost or destroyed did not constitute an exigent circumstance. *Id*. at 595. According to the Court, whether the possible destruction of evidence constitutes an exigent circumstance depends on answering this question: "Can the police produce specific facts supporting a reasonable and objective belief that there is an imminent risk of removal of evidence by suspects or third parties?" *Id*.

A police officer's warrantless entry into a defendant's home may be justified under the exigent circumstances doctrine when the officer is responding to a home security alarm, and the officer's decision to enter the premises is reasonable under the totality of the circumstances. *United States v Brown*, 449 F3d 741 (CA 6, 2006).

A police officer may conduct a warrantless protective sweep of premises when the officer believes such a search is necessary to protect the safety of the officer or others. *People v Cartwright*, 454 Mich 550, 559 (1997). "[T]he validity of an entry for a protective search without a warrant depends on the reasonableness of the response, *as perceived by police*." *Id*. (Emphasis in original.)

12.6 Emergency Doctrine

The emergency doctrine applies under exigent circumstances in which the police reasonably believe that an individual is physically injured and in need of medical attention or that there is a danger that physical injury might occur. *People v Snider*, 239 Mich App 393, 410-411 (2000) (warrantless entry/search of a suspect's room was permitted where police arrived at the scene of a motel shooting and the dying victim told police who shot him and in what room the shooter was staying).

See also *People v Beuschlein*, 245 Mich App 744, 757-758 (2001), where the emergency aid exception justified the officer's warrantless entry into the home where domestic violence had been reported, the 911 caller indicated there were weapons in the house, the officer's initial knock went unanswered, and the officer heard "wrestling" and "shuffling" noises inside the house.

The emergency aid exception justified the warrantless entry of the defendant's parents' home, where officers, looking through a window in the front door to the house, saw a motionless person slumped over the kitchen table in close proximity to a rifle and a box of ammunition. *People v Tierney*, 266 Mich App 687, 704-705 (2005). Based on these specific and articulable facts, officers had a reasonable belief that the person slumped over the table may have shot himself and needed emergency medical assistance. *Id*.

Where "officers were confronted with ongoing violence occurring within [a] home" during their investigation of a neighbor's early morning complaint about a loud party, exigent circumstances justified the officers' warrantless entry. *Brigham City, Utah v Stuart*, 547 US 398, 400, 405 (2006) (emphasis omitted). In *Brigham City*, the police officers were responding to a "loud party" complaint when they heard people shouting inside the residence at the address to which they responded. The officers walked down the driveway to further investigate and saw two juveniles drinking beer in the backyard of the residence. Through a screen door and some windows, the officers observed a physical altercation in progress in the kitchen. The officers saw one of the adults spitting blood in the kitchen sink after a juvenile punched him in the face, and when the other adults attempted to restrain the juvenile using force enough to move the refrigerator against which the juvenile was pinned, one of the officers opened the screen door and announced their presence. The officers' presence went unnoticed until one of them walked into the kitchen and repeated the announcement. The individuals in the kitchen eventually realized that police officers were present and stopped struggling with the juvenile. *Id*. at 401.

The warrantless entry of the home in *Brigham City* was permitted because the circumstances supported the officers' "objectively reasonable basis for believing that an occupant [wa]s seriously injured or imminently threatened with such injury." *Id*. at 400. Whether an officer's subjective motivation for a warrantless entry is to provide emergency assistance to an injured person or to seize evidence and effectuate an arrest is irrelevant to a determination of reasonableness. *Id*. at 404-405. If an officer's action is justified under an objective view of the circumstances, the action is reasonable for Fourth Amendment purposes, regardless of the officer's state of mind. *Id*.

The emergency aid exception to the search warrant requirement justified the warrantless entry of a defendant's home when, after responding to a complaint of a disturbance, the police saw in the driveway a vehicle with blood on the hood and its front end smashed, blood on clothes inside the vehicle, damaged fenceposts in the yard, three broken house windows, a locked back door, and a blockaded front door, where the defendant, who was inside the home screaming and throwing things, ignored the police officers' questions about whether he needed medical help for the cut on his hand and refused to respond to the officers' knock on the door. *Michigan v Fisher (Jeremy)*, US , (2009). The United States Supreme Court analyzed the facts under *Brigham City*, 547 US 398:

> "A straightforward application of the emergency aid exception, as in *Brigham City*, dictates that the officer's entry was reasonable. Just as in *Brigham City*, the police officers here were responding to a report of a disturbance. Just as in *Brigham City*, when they arrived on the scene they encountered a tumultuous situation in the house—and here they also found signs of a recent injury, perhaps from a car accident, outside. And just as in *Brigham City*, the

> officers could see violent behavior inside. Although [the police] did not see punches thrown, as did the officers in *Brigham City*, they did see [the defendant] screaming and throwing things. It would be objectively reasonable to believe that [the defendant's] projectiles might have a human target (perhaps a spouse or a child), or that [the defendant] would hurt himself in the course of his rage. In short, we find it as plain here as we did in *Brigham City* that the officer's entry was reasonable under the Fourth Amendment." *Fisher (Jeremy)*, ___ US at ___.

The Court held that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception[,]" and reiterated that "the test . . . is not what [the officer] believed, but whether there was 'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger[.]" *Fisher (Jeremy)*, ___ US at ___, quoting *Brigham City*, 547 US at 406. The Court reversed the Michigan Court of Appeals, holding that "[i]t was error for the Michigan Court of Appeals to replace that objective inquiry into appearances with its hindsight determination that there was in fact no emergency." *Fisher (Jeremy)*, *supra* at ___. The Court held that "[i]t sufficed to invoke the emergency aid exception that it was reasonable to believe that [the defendant] had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that [the defendant] was about to hurt, or had already hurt, someone else." *Id*. at ___.

12.7 Plain View Doctrine

A police officer may seize contraband in plain view and without obtaining a warrant if the officer is lawfully in a position to view the object, the object's incriminating character is immediately apparent to the officer, and the officer has lawful access to the object. *Horton v California*, 496 US 128, 136–137 (1990). See also *People v Fletcher*, 260 Mich App 531, 550–551 (2004) (documents not listed in a search warrant were properly seized because their incriminating nature was immediately apparent to the officer—in a homicide investigation, the documents provided evidence of the defendant's illicit affair with a woman not the defendant's wife).

The plain view doctrine contemplates only the actual seizure of an item—the doctrine disallows any searching, no matter how minimal. *People v Champion*, 452 Mich 92, 101 (1996). If an officer cannot determine whether the object is contraband without conducting a further search, the plain view doctrine does not authorize the officer to seize the object without a warrant nor does it authorize the officer to further manipulate the object in order to determine the nature of the item. *Arizona v Hicks*, 480 US 321, 326 (1987) (moving an item in order to see the item's serial number was impermissible because moving an item to determine its lawfulness exceeds the scope of the plain view doctrine).

Because an individual's privacy interests in an item are significantly diminished when the item is removed from his or her pocket during a patdown, a law enforcement officer may conduct a cursory examination of the item's exterior surfaces if discovery of the item resulted from a lawful search and seizure. *People v Custer*, 465 Mich 319, 333-336 (2001) (because the cards were lawfully seized from the defendant during a patdown, the officer could lawfully handle the cards and turn them over to view both sides). The Court discussed the distinction between *Custer*, where manipulation of the item seized was permissible, and the facts in *Hicks*, *supra* at 325–326, where manipulation of the item was impermissible:

> "In *Hicks*, *supra* at 326, the United States Supreme Court held that the police could not move stereo equipment to see the serial numbers on it because the police lacked probable cause to believe it was contraband *before* they moved it. However, in this case, the Court of Appeals correctly determined that the photographs had already been lawfully seized by the police. Where *Hicks* involved a preseizure movement or action by the police, the present case involves a postseizure movement or action. The police cannot manipulate an object in order to determine whether it is contraband; it must be immediately apparent from plain view or plain feel that the object is contraband. *Id*. In the present case, the police did not move the object to examine it more closely to determine whether it was, in fact, contraband; rather, the police already had probable cause to believe that it was contraband upon plain feel, and only after the object was validly seized did they move the object to examine it more carefully. Because the officer had already lawfully seized the photographs when he turned them over to examine their fronts, and because defendant's reasonable expectation of privacy in the outer surfaces of those photographs had, at the least, been significantly diminished, there was no constitutional 'search' for purposes of the Fourth Amendment." *Custer*, *supra* at 336.

The plain view exception does not apply when the officer is not lawfully in the place from which he or she observed the evidence. *People v Galloway*, 259 Mich App 634, 639-642 (2003) (marijuana plants growing in a shed behind the defendant's house were inadmissible at trial because although the plants were in plain view from the officer's vantage point in the defendant's backyard, the officer's vantage point resulted from an unlawful entry into the defendant's backyard).

12.8 "Plain Feel" Exception

In *Minnesota v Dickerson*, 508 US 366 (1993), the United States Supreme Court extended the factors justifying the plain view exception to the warrant requirement to situations in which a law enforcement officer conducting a lawful patdown immediately recognizes the incriminating character of an

object on a suspect's person based only on the contraband's "feel." *People v Champion*, 452 Mich 92, 100-105 (1996).

In *Champion*, the search and seizure was proper based on reasonable suspicion under the totality of the following circumstances: the defendant got out of his car and walked away when he saw the police car and uniformed officers; one of the officers recognized the defendant and was aware of the defendant's prior convictions involving drugs and weapons; the location was a high drug crime area; the defendant's hands were tucked into the front of his sweatpants and he repeatedly refused to remove his hands when requested; and the officer knew from his 20 years of experience in law enforcement that contraband is often carried in pill bottles like the one felt during the defendant's patdown. *Champion*, *supra* at 111–112. Based on these circumstances, the Court ruled that the evidence was properly admissible under the plain feel exception:

> "We cannot imagine that any reasonable person in [the officer's] position, given all the above circumstances, could have concluded that [the defendant] was carrying prescription medication, or any other legitimate item, in the pill bottle in his groin region." *Id*. at 112.

The *Champion* Court emphasized the importance of the totality of circumstances in determining whether evidence is properly seized under the plain feel exception. Specifically, the Court explained:

> "[I]f the pill bottle in [defendant's] possession had been found in his jacket pocket, or if [defendant] had not had his hands inside his sweatpants and he had no pockets in which to carry a pill bottle, the result may have been different. It is only under the totality of the circumstances before us, i.e., the defendant's furtive behavior, his refusal to remove his hands from his sweatpants, the officer's recognition of defendant, and his knowledge of defendant's past involvement in drug crimes, that we find that removal of this particular pill bottle was authorized." *Id*. at 113.

Whether an officer is correct in his or her conclusion regarding the illegality of an item seized during a valid patdown is irrelevant to the lawfulness of the item's seizure. *People v Custer*, 465 Mich 319, 332 (2001) (believing that the cards he felt in the defendant's pocket contained blotter acid, the officer properly seized them; that the cards seized were actually photographs did not affect the lawfulness of the search and seizure).

12.9 Open Fields Exception

Michigan's Constitution includes an anti-exclusionary provision regarding evidence seized outside the curtilage of a dwelling house. Const 1963, art 1, §11. In part, the provision states: "The provisions of this section shall not be

construed to bar from evidence in any criminal proceedings any narcotic drug, firearm, bomb, explosive, or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in the state."

An area surrounding a barn on a defendant's property, 50 yards from the defendant's home and its enclosed yard, is not within the curtilage of the home, and the warrantless seizure of evidence from that area is lawful. *United States v Dunn*, 480 US 294, 303-304 (1987).

12.10 Consent to Search

An individual may waive his or her Fourth Amendment rights and consent to a search of his or her person or premises. *People v Marsack*, 231 Mich App 364, 378 (1998). An individual's consent is valid when, in light of the totality of circumstances, "consent is unequivocal, specific, and freely and intelligently given." *Id*. The scope of a consent search extends to what is objectively reasonable under the circumstances—specifically, a consent search is limited in scope to what a typical reasonable person would have understood based on the discussion between the officer and the individual who consented to the search. *People v Frohiep*, 247 Mich App 692, 703 (2001). A person may revoke his or her consent. *Id*.

A. By Defendant

Where the traffic stop and resulting detention are reasonable, the defendant's consent to the search of the vehicle was valid. *People v Williams*, 472 Mich 308, 318 (2005). When a seizure is reasonable no Fourth Amendment violation occurs and no inquiry is needed as to whether the officer effecting the stop "had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics." *Id*.

A lawfully seized individual may voluntarily consent to a search without first having been advised that he or she is free to go or that he or she could refuse consent. *Ohio v Robinette*, 519 US 33, 39 (1996). Where the initial traffic stop is lawful, an officer may ask questions of the defendant—including whether he or she would consent to a search of the vehicle—even when the questions are not related to the reason for the traffic stop. An officer's subjective motivation is irrelevant to the validity of a defendant's consent under such circumstances. *Id*. at 38-39.

A defendant's consent is not valid when police officers exceed the constitutional limits of a properly conducted "knock and talk" interaction with the defendant and in doing so, create a coercive environment in which the defendant's subsequent cooperation could not be considered voluntary. *People v Bolduc*, 263 Mich App 430, 436-443 (2004).

> **Note:** A "knock and talk" encounter is a law enforcement tactic used when an officer possesses information that warrants further investigation but not enough information to constitute probable cause for a search warrant. *People v Frohiep*, 247 Mich App 692, 694, 697 (2001). An officer initiating the encounter approaches the person suspected of the illegal activity by knocking on the door to the person's home, identifies him- or herself as a law enforcement officer, and after engaging the person in conversation, asks the person for consent to search the home for contraband. *Id*.

Applying the standard test to the facts in *Bolduc*, the Court concluded that under the totality of circumstances—the "knock and talk" encounter occurred inside the defendant's home where no real retreat was possible beyond the verbal and physical indication given by the defendant that he wished the officers to leave. Under those circumstances, a reasonable person would not have felt free to ignore the police officers' presence and go about his business. *Id.* at 441. According to the Court:

> "By failing to leave defendant's home when requested to do so, the police officers suggested that they were in control of the situation and would not accept defendant's exercise of the right to preclude them from further activity at the home.
>
> * * *
>
> "Unlike in a street encounter, a person such as defendant does not have the option of testing whether he is actually confined by the police by simply walking away. Where was defendant to go to avoid the intrusion of the police upon his own property? At that point, defendant had done everything that was reasonably possible for him to convey the message that the police were no longer welcome in his home." *Id.* at 441–443.

Because the evidence was obtained after the coercive "knock and talk" incident inside the defendant's home, the coercion tainted any evidence obtained as a result of the officers' initial visit to the defendant's home. The incriminating evidence obtained during the defendant's later "cooperation" with the officers "ensued from the police officers' improper conduct in failing to leave when requested . . . [and was] properly suppressed as the fruit of the illegal seizure . . . ." *Id.* at 444.

Where a defendant freely and voluntarily consents to "'a complete search of [his] motor vehicle . . . , including the interior, trunk, engine compartment, and all containers therein,'" it is objectively reasonable for law enforcement officers to believe that the defendant consented to a search of the information stored in his laptop computer—the laptop computer being a "container" of data. *People v Dagwan*, 269 Mich App 338, 344-345 (2005). According to the *Dagwan* Court, the scope of the search was objectively reasonable because

> "the object of the police search was broad: to look for anything illegal, including stolen property. We conclude that a reasonable person would know that computers may be used to commit crimes. See MCL 750.145d. Further, we conclude that a reasonable person would know that computers can contain illegal child sexually abusive material in the form of stored electronic images. MCL 750.145c(1)(m). Second, the written consent to search that defendant signed was broad and all encompassing.
>
> * * *
>
> "[T]he plain and unambiguous words in the written consent that defendant signed authorized a complete or total search of anything within the car, including anything within the car that could contain something illegal. Because a computer can store data in its memory, and thus act as a container, here of illegal child sexually abusive material, it was objectively reasonable for the police to believe that the scope of defendant's consent permitted them to examine the contents of the computer found inside the automobile. Consequently, we conclude that a reasonable person would have understood that defendant's consent was broad enough to encompass a review of the computer's stored data. *Id*. at 344–345 (internal citations omitted).

B. By a Third Person

A warrantless search may be justified by a third party's consent to search premises over which the third party possesses common authority or when the third party's relationship with the premises or items searched is sufficient to authorize a consent search. *Schneckloth v Bustamonte*, 412 US 218, 245-246 (1973).

A warrantless search may be justified by a law enforcement officer's reasonable belief that the person consenting to the search exercised common authority over the premises sufficient to validate his or her consent even when the person did not actually possess such authority. *Illinois v Rodriguez*, 497 US 177, 186-189 (1990) (although a person who retained a key to the apartment she had shared with the defendant one month earlier was not authorized to consent to a search of the premises, the police reasonably believed she had common authority over the premises).

Where a duffel bag was jointly used by two persons, one of the persons may validly consent to a search of the bag's contents—and evidence discovered in the bag may be admitted against the other person using the bag—without regard to whether that other person consented to the search. *Frazier v Cupp*, 394 US 731, 740 (1969) (evidence was admissible against the defendant where his cousin consented to a search of the duffel bag he shared with the defendant when the bag was located in the cousin's house and the defendant was not present at the time).

Where a driver consented to a search of his vehicle during a valid traffic stop, the warrantless search of the defendant-passenger's backpack was permissible based solely on the driver's consent; evidence that the backpack belonged to the driver or that the driver possessed common authority over it was not required to justify the search. *People v LaBelle*, 478 Mich 891, 891-892 (2007).*

*Reversing *People v LaBelle*, 273 Mich App 214 (2006).

Where one occupant of a room consents to a search of a room shared with another person, evidence seized from the warrantless search is admissible against the other occupant of the room. *United States v Matlock*, 415 US 164, 177 (1974). However, a warrantless search of a shared dwelling conducted pursuant to the consent of one co-occupant when a second co-occupant is present and expressly refuses to consent to the search is unreasonable and invalid as to the co-occupant who refused consent. *Georgia v Randolph*, 547 US 103, 114 (2006). In addition, an individual who jointly occupies an apartment with another occupant cannot validly consent to a search of the other occupant's private room. *People v Douglas*, 50 Mich App 372, 379 (1973).

The owner of a computer may validly consent to a search of the computer's contents, including a defendant's password protected files, where although the owner permitted the defendant to use the computer, the defendant did not own the residence in which the computer was located and he exercised no control over others' access to the computer. *People v Brown*, 279 Mich App 116, 131-134 (2008).

C. By Reference to a Search Warrant

An individual's "consent" to search is invalid when obtained by an officer's implicit suggestion or explicit assertion that a search warrant authorizes the search. *People v Farrow*, 461 Mich 202, 203 (1999); *Bumper v North Carolina*, 391 US 543, 548 (1968).

In *Farrow*, the defendant allowed police into his home because an officer "showed" the defendant a search warrant when the officer opened some paperwork to locate a business card with which to identify himself. Although the defendant admitted he did not see his name or address on the warrant, much of the warrant was obscured by a folder. Based on the portion of the warrant he saw, the defendant assumed the officer was authorized to search his home pursuant to the warrant and allowed the officer to enter his home. Permission to enter a defendant's home under these circumstances does not constitute the consent necessary to dispense with the general warrant requirement. *Farrow*, *supra* at 203-205.

12.11 Automobile Searches

*Or a ship, a motorboat, a wagon, etc.

Because an automobile* can quickly be moved from a location so that it is impracticable to seek and obtain a warrant, law enforcement officers may conduct a warrantless search of a car if the officers have probable cause to believe that the car contains contraband. *Carroll v United States*, 267 US 132, 153-154 (1925).

Where probable cause exists to search an automobile, officers are permitted to conduct a warrantless search of all parts of the vehicle, including separate containers within the vehicle, in which the object for which they are searching might be concealed. *United States v Ross*, 456 US 798, 824-825 (1982). In the context of automobile searches, "a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." *Id*. at 809.

An officer's recognition of the odor of burned or unburned marijuana may establish probable cause to search an automobile:

> "[T]he smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle, pursuant to the motor vehicle exception to the warrant requirement." *People v Kazmierczak*, 461 Mich 411, 413 (2000).

A warrantless search may be reasonable where a defendant's vehicle is not searched incident to his or her arrest but is searched without a warrant after the defendant is safely in custody. *Chambers v Maroney*, 399 US 42, 47 (1970). In *Chambers*, the Court noted that where probable cause exists to search a vehicle at the scene of a traffic stop, that probable cause still exists once the vehicle is brought to the police station. Said the Court:

> "On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Id*. at 52 (footnote omitted).

The automobile exception to the warrant requirement applies even when "impoundment may have made it virtually impossible for anyone to drive the car away or to tamper with its contents . . . ." *People v Carter*, 250 Mich App 510, 516 (2002) (evidence of arson discovered during a warrantless search conducted ten hours after the car fire was extinguished was admissible under the automobile exception).

A police officer needs no probable cause or articulable suspicion to conduct a computer check of a vehicle's license plate number; an investigatory traffic stop is justified where a computer check reveals that the vehicle's registered owner is subject to arrest and there exists no visible evidence contradicting the inference that the driver of the vehicle is the registered owner. *People v Jones*, 260 Mich App 424, 427-429 (2004). An officer's subsequent search of the person and the vehicle is lawful if the initial stop was properly executed and the person's arrest was warranted under the circumstances. *Id*. at 430. Under such circumstances, evidence obtained during a warrantless search of the vehicle is admissible. *Id*.

Where an officer had statutory authority to arrest a driver for a traffic violation but did not do so, the officer may not—without probable cause—conduct a warrantless search of the person's automobile as a search incident to arrest. *Knowles v Iowa*, 525 US 113, 117-118 (1998).

A. Containers

Even where officers do not have probable cause to search an entire vehicle, officers may conduct a warrantless search of a container within the vehicle if there is probable cause that contraband or evidence will be found in the container. *California v Acevedo*, 500 US 565, 579-580 (1991). However, probable cause to search a container within a vehicle does not justify a warrantless search of the entire vehicle. *Id*. at 580.

A computer may be considered a container of the data stored in the computer's memory for purposes of searching containers within a motor vehicle. *People v Dagwan*, 269 Mich App 338, 344-345 (2005).

The automobile exception applies to the warrantless search of any container in an automobile as long as there is probable cause to believe contraband will be found in the container, even if the probable cause is limited to the container itself and arose before the container was placed in the automobile. *People v Bullock*, 440 Mich 15, 24 (1991).

B. Passengers

Police officers may conduct a warrantless search of a passenger's possessions if there is probable cause to search the entire automobile in which the passenger was riding. *Wyoming v Houghton*, 526 US 295, 307 (1999).

An officer is permitted to patdown a passenger during a traffic stop when the totality of circumstances supports the officer's conclusion that the passenger might have a weapon. *People v Custer*, 465 Mich 319, 329 (2001). In *Custer*, the defendant was a passenger in a vehicle stopped by police. The driver of the vehicle was arrested and when he reached into his pocket for money with which to cover the cost of towing his vehicle, a bag of marijuana dropped to the ground. The cash the driver pulled from his pocket totaled approximately

$500 and consisted primarily of tens and twenties. The officers asked the defendant to get out of the car and conducted a patdown search for weapons. Because marijuana and a large amount of cash were discovered on the driver, and because drug offenses often involve weapons, the officers concluded that the defendant might possess a weapon. That the officers did not fear for their own safety is largely irrelevant to the propriety of the search as long as there was a reasonable possibility that the defendant might be carrying a weapon. *Custer, supra* at 328-330.

C. Incident to Arrest

A search of any container within the control area of an arrestee is within the permissible scope of a search incident to arrest. *People v Champion*, 452 Mich 92, 115 (1996). As long as an officer has probable cause to arrest a person, searching a container *before* the person's formal arrest qualifies as a search incident to arrest. *Id*. at 116. A search of a container is not justified if the contents of the container are themselves the basis for probable cause to arrest. *Id*. at 116-117.

A police officer may conduct a warrantless search of the passenger compartment of a vehicle, and any containers found within the passenger compartment, as a "contemporaneous incident" of the lawful custodial arrest of any occupant of the vehicle. *New York v Belton*, 453 US 454, 460 (1981) (a search of the defendant's coat was permissible as a search incident to arrest after the defendant and other occupants of a motor vehicle stopped for speeding were arrested for possession of marijuana; evidence discovered in the defendant's coat was admissible).

A police officer may lawfully search an individual's vehicle (passenger compartment and any containers within it) incident to that individual's arrest, even when the officer's first contact with the arrestee occurs after the individual has gotten out of the vehicle. *Thornton v United States*, 541 US 615, 617 (2004). In *Thornton*, the defendant contested the admissibility of evidence obtained from the officer's search of his car when the officer who arrested the defendant did not address him until he was already out of, and away from, his vehicle. *Id*. at 618. The United States Supreme Court explained that a search incident to arrest under *Belton*, *supra*, "was [not] limited to situations where the officer initiated contact with an arrestee while he was still an occupant of the car." *Thornton*, *supra* at 619. According to the Court:

> "In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under *Belton* only if the suspect is arrested. . . . The stress [and the risk of danger to the police officer] is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he

> is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation." *Thornton*, *supra* at 621 (internal citations omitted).

The Court further reasoned:

> "*Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants.' Indeed, the respondent in *Belton* was not inside the car at the time of the arrest and search; he was standing on the highway. In any event, while an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him." *Thornton*, *supra* at 622 (internal citations omitted).

"Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v Gant*, 556 US ___, ___ (2009). "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Id*. at ___. In *Gant*, *supra* at ___, the defendant was arrested for driving with a suspended license. After the police handcuffed the defendant and locked him in the back of a patrol car, they searched his car and found drugs in a jacket on the backseat. *Id*. at ___. The United States Supreme Court held that the search was improper because *New York v Belton*, 453 US 454 (1981), "does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Gant*, *supra* at ___. Further, "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id*. at ___. "Because [the] police could not reasonably have believed either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search [] was unreasonable." *Id*. at ___.

D. Inventory Search

A car may be impounded and subjected to an inventory search as part of law enforcement's community caretaking function. *Cady v Dombrowski*, 413 US 433, 447-448 (1973).

Subject to the reasonableness requirement of the Fourth Amendment, a police department is authorized to develop administrative procedures to be followed when conducting inventory searches. *People v Toohey*, 438 Mich 265, 278 (1991). The propriety of an inventory search requires a determination that law

enforcement did not conduct the search as a pretext for conducting a warrantless search of a defendant's property for investigation purposes. *Id*. at 276. "An inventory search that is conducted pursuant to standardized police procedure is considered reasonable because the resulting intrusion will be limited to the extent it is necessary to fulfill the [community] caretaking function." *Id*. at 275-276.

A police officer may exercise discretion when deciding whether to impound a vehicle pursuant to "reasonable police department regulations. The exercise of discretion within prescribed regulations in determining whether to impound an automobile should not, absent bad faith, necessarily render unconstitutional the decision to impound." *Id*. at 279-280. See also *Colorado v Bertine*, 479 US 367, 374 (1987), where, in the absence of any evidence that police opted to impound the defendant's vehicle (rather than electing to simply park and lock the vehicle) so that they could investigate suspected criminal activity, the warrantless search of the defendant's vehicle and the containers in it was reasonable under the Fourth Amendment because the search was conducted pursuant to "reasonable police regulations relating to inventory procedures administered in good faith[.]"

Part D—Admissibility of Evidence

12.12 Standing and the Expectation of Privacy

A. Standing

In order to challenge the reasonableness of a search or seizure, an individual must have standing to do so. Standing is established by showing that the defendant had an expectation of privacy in the items or premises searched, and that society recognizes that expectation as reasonable. *People v Smith*, 420 Mich 1, 28 (1984). A defendant bears the burden of establishing his or her standing. *People v Lombardo*, 216 Mich App 500, 505 (1996). Whether a defendant has standing to challenge the search or seizure is determined by the totality of circumstances. *Smith, supra* at 28. For example, in *Minnesota v Olson*, 495 US 91, 93-94, 100 (1990), an overnight guest at a dwelling had standing (a subjective expectation of privacy recognized by society as legitimate) to contest a nonconsensual warrantless search of the residence, whereas a visitor to an apartment did not have standing to challenge a search of the apartment conducted pursuant to a warrant.

B. Expectation of Privacy

Whether an individual may challenge a warrantless search or seizure requires that the person have a legitimate, actual subjective expectation of privacy in the area, and society must recognize that expectation of privacy as reasonable. *People v Perlos*, 436 Mich 305, 317 (1990). To establish a reasonable

expectation of privacy, a defendant must "t[ake] normal precautions to maintain his [or her] privacy—that is, precautions normally taken by those seeking privacy." *Rakas v Illinois*, 439 US 128, 152-155 (1978).

A trespasser has no reasonable expectation of privacy in a dwelling even when the trespasser lawfully occupied the premises at an earlier date. *United States v Hunyady*, 409 F3d 297 (CA 6, 2005).

Depending on the circumstances, an individual may not have a reasonable expectation of privacy in an enclosed porch through which a person must pass in order to get to the dwelling's front door. *People v Tierney*, 266 Mich App 687, 703-704 (2005). In *Tierney*, the trial court conducted a fact-intensive inquiry and determined that the defendant did not have a reasonable expectation of privacy in an enclosed porch. The trial court noted that although the porch was enclosed and partially curtained, the porch area was unheated and used as a storage area, not a living area. Additionally, there was not a doorbell adjacent to the exterior porch door; instead, the dwelling's doorbell was located next to the interior door. Furthermore, a "welcome" sign hung, not next to the outer porch door, but next to the interior door. Based on the court's examination of the porch's physical attributes and the uses to which the porch was put, the trial court properly concluded that the defendant had no reasonable expectation of privacy in the porch area.

A person has no reasonable expectation of privacy in abandoned property. Because a person who flees from police is not seized within the meaning of the Fourth Amendment, any evidence discarded by a fleeing suspect is deemed abandoned and is not subject to constitutional protection. *California v Hodari D*, 499 US 621, 626 (1991). See also *United States v Martin*, 399 F3d 750 (CA 6, 2005) (even though the gun resulted from the defendant's conduct *after* the officers' show of authority, the gun did not result from the defendant's seizure—lawful or unlawful—because the defendant discarded the weapon before submitting to the officers' show of authority).

Whether houses or other buildings are abandoned or vacant for Fourth Amendment purposes requires an objective case-by-case assessment of the totality of circumstances. *People v Taylor*, 253 Mich App 399, 407 (2003). "[A] leasehold interest [in real property] alone does not establish a legitimate expectation of privacy entitled to Fourth Amendment protection." *Id*. at 404.

Factors identified by the *Taylor* Court to consider when making a determination of abandonment or vacancy include, but are not limited to, the following:

- outward appearance and overall condition of the property;
- upkeep/neglect of any landscaping or vegetation on the property;
- presence/absence of securely fastened barriers in all openings in the structure;

- gas or electrical service to the structure;
- presence/absence of appliances, furniture, and other items generally found in occupied dwellings;
- time allowance for temporary closures to be replaced with functional doors/windows;
- history of the structure and its previous use; and
- any complaints made of illicit activity occurring on the premises/ in the structure. *Id*. at 407.

A person exhibits an actual expectation of privacy—one that society recognizes as reasonable—in an opaque carry-on bag the person places in the overhead bin directly above his or her seat on a bus. *Bond v United States*, 529 US 334, 338–339 (2000). The extent of an individual's expectation of privacy with regard to a piece of luggage is determined by the specific method of invading that privacy. "Physically invasive inspection is simply more intrusive than purely visual inspection." *Id*. at 337. Therefore, without probable cause to search a person's bag, a law enforcement officer may not "feel the bag in an exploratory manner." *Id*. at 339. Although the bus passenger in *Bond* likely realized that a bag placed in an overhead compartment "would be exposed to certain kinds of touching and handling," the officer's "probing tactile examination of [the defendant's] carry-on luggage" far exceeded the type of casual handling a passenger reasonably expects from others. *Id*. at 337–338.

When lawful police conduct does not affect a defendant's *legitimate* interest in privacy, the conduct cannot be characterized as a search and therefore, the conduct does not merit Fourth Amendment analysis. *Illinois v Caballes*, 543 US 405, 408 (2005), citing *United States v Jacobsen*, 466 US 109, 122–123 (1984). Because a defendant can have no legitimate interest in possessing contraband, no legitimate interest is implicated when proper police conduct reveals only the defendant's possession of contraband. *Caballes*, *supra* at 408, citing *Jacobsen*, *supra* at 123.

An offender's heightened expectation of privacy in his or her own home is irrelevant to the propriety of a canine sniff "as long as the sniffing canine is legally present at its vantage point when its sense is aroused." *People v Jones*, 279 Mich App 86, 93 (2008). In *Jones*, *supra* at 95, the trial court erred in suppressing evidence seized following a canine sniff that alerted police to the presence of a controlled substance inside the defendant's house, where the sniff was conducted from a lawful position on the defendant's porch.

An individual has no standing to contest the search or seizure of a package addressed to another person. *People v Lombardo*, 216 Mich App 500, 505 (1996). Generally, where a package containing an illicit substance is addressed to a defendant using the defendant's alias, the defendant has no standing to challenge the package's search and seizure because society is

unlikely to conclude that use of an alias as part of executing the defendant's criminal conduct confers on that defendant a reasonable expectation of privacy. *Id*. at 509.

C. Privacy Interests and Probationers and Parolees

Michigan law authorizes a police officer to arrest without a warrant any probationer or parolee if the officer has reasonable cause to believe the person has violated a condition of probation or parole. MCL 764.15(1)(g). The propriety of conducting a warrantless search of a probationer or parolee or his or her home is addressed by case law. A defendant may be ordered to submit to warrantless searches of his or her person or premises as a condition of probation. *People v Hellenthal*, 186 Mich App 484, 486 (1990) (the order to submit to a warrantless search was limited to a search for controlled substances). See also *People v Woods*, 211 Mich App 314 (1995), where the warrantless search of a tethered defendant's home was permitted under the "special needs" or administrative/regulatory exception to the warrant requirement.

A suspicionless search or seizure conducted solely on the basis of an individual's status as a probationer or parolee does not violate the Fourth Amendment's protection against unreasonable searches and seizures. *Samson v California*, 547 US 843, 857 (2006). The *Samson* case involved a California statute authorizing law enforcement officers to search a parolee—without a warrant and without suspicion of criminal conduct—solely on the basis of the person's status as a parolee.

The question to be decided by the *Samson* Court was "[w]hether a condition of [a parolee's] release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment." *Samson*, *supra* at 847. The Court concluded that under the totality of the circumstances and in light of the legitimate government interests furthered by monitoring parolee activity, the suspicionless search of a parolee does not impermissibly intrude on the parolee's already diminished expectation of privacy. *Id*. at 846, 848.

12.13 The Exclusionary Rule

The ordinary remedy for evidence obtained in violation of the Fourth Amendment is suppression of the evidence. *People v Cartwright*, 454 Mich 550, 558 (1997).

The purpose of the exclusionary rule is to deter police misconduct by excluding evidence obtained as a direct result of that misconduct. *People v Stevens*, 460 Mich 626, 636 (1999). "The exclusionary rule is not meant to put the prosecution in a worse position than if the police officers' improper conduct had not occurred, but, rather, it is to prevent the prosecutor from being in a better position because of that conduct." *Id*. at 640-641, citing *Nix v Williams*, 467 US 431, 442-443 (1984).

The exclusionary rule prohibits use of evidence obtained directly or indirectly from the violation of a defendant's constitutional rights. *Nix, supra* at 441. Evidence obtained as a result of a constitutional violation is "fruit of the poisonous tree," and absent an exception to the exclusionary rule, such evidence is inadmissible. *Wong Sun v United States*, 371 US 471, 484-485 (1963). However, evidence characterized as "fruit of the poisonous tree" may be admissible if it can be purged of the primary taint. *Id*. at 487-488.

The exclusionary rule applies to evidence obtained from a constitutionally invalid arrest but not to evidence obtained from a statutorily invalid arrest. *People v Lyon*, 227 Mich App 599, 610-613 (1998). Unless the statutory language indicates a contrary legislative intent, the exclusionary rule is inappropriate in situations where a statutory violation does not rise to the level of a constitutional violation. *People v Hawkins*, 468 Mich 488, 507 (2003) (affidavit in support of the warrant failed to satisfy the requirements of MCL 780.653(b) with regard to the affiant's reliance on unnamed sources).

However, the exclusionary rule applies to evidence obtained from an illegal arrest when the illegal arrest was effected as a means of obtaining the evidence. *People v Kelly*, 231 Mich App 627, 633-634 (1998). The prosecution must establish by a preponderance of the evidence that evidence obtained as the result of an illegal arrest is free of the primary taint before that evidence may be admitted against a defendant. *Brown v Illinois*, 422 US 590, 604 (1975).

The exclusionary rule applies to all the evidence discovered during an improper investigatory stop even where officers could have effected a valid arrest based on evidence discovered after the vehicle was stopped. *People v LoCicero (After Remand)*, 453 Mich 496, 508-510 (1996).

> "The discovery of contraband does not validate an illegal search and seizure. A 'search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.'" *LoCicero, supra* at 501, quoting *United States v DiRe*, 332 US 581, 595 (1948).

12.14 Exceptions to the Exclusionary Rule/Situations Where the Exclusionary Rule Does Not Apply

A. Inevitable Discovery Doctrine

In general, the inevitable discovery exception to the exclusionary rule permits the admission of tainted evidence when the evidence would have been discovered had the police misconduct not occurred. *People v Stevens*, 460 Mich 626, 637 (1999). The object of the exclusionary rule—to deter police misconduct—is not furthered when the evidence inevitably would have been discovered by lawful means. *Id*. The Court explained:

> "If the evidence would have been inevitably obtained, then there is no rational basis for excluding the evidence from the jury. In fact, suppression of the evidence would undermine the adversary system by putting the prosecution in a worse position than it would have been in had there been no police misconduct." *Id*., citing *Nix v Williams*, 467 US 431, 447 (1984).

See also *People v Vasquez (After Remand)*, 461 Mich 235 (1999) (evidence was admissible pursuant to the inevitable discovery doctrine because it would have been discovered during the execution of a valid search warrant without regard to whether police violated the knock-and-announce statute).

The inevitable discovery doctrine cannot be used as an exception to the warrant requirement merely because probable cause existed to obtain a search warrant even though one was not obtained before the search took place. *People v Hyde*, 285 Mich App 428, 442, 445 (2009). In *Hyde*, *supra* at 433, the defendant gave a blood sample following a traffic stop, and the blood test revealed that his blood alcohol content exceeded the legal limit. The defendant moved to suppress his blood sample and the blood test results on the basis that his consent was coerced because the police incorrectly informed him that he was required to provide his blood under the informed consent statute, MCL 257.625c (anyone operating a vehicle is considered to have given consent to test his or her blood, breath, or urine to determine the presence of alcohol; however, the defendant fell under an exception and was considered not to have given consent to a blood test because he had diabetes). *Hyde*, *supra* at 435, 440-441. The trial court denied the defendant's motion to suppress, holding that his bodily alcohol content would have been inevitably discovered by the police had they obtained a warrant, or by the defendant had he consented to a breath or urine test. *Id*. at 435, 442. The Court of Appeals rejected the trial court's rationale that the evidence would have been inevitably discovered through a search warrant, holding that "[t]o allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. Even in the context of a good-faith error, we reject the notion that a post hoc probable cause analysis can preclude the constitutional requirement that a neutral and detached magistrate issue the warrant. Such an

approach diminishes the Fourth Amendment and is an incentive for improper or careless police practices." *Id*. at 445-446.

B. Independent Source Doctrine

"The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix v Williams*, 467 US 431, 443 (1984).

> "The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." *Id*. "When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Id*. (Internal citations omitted).

Evidence seized from a dwelling pursuant to a valid search warrant issued after an officer's unlawful entry into that dwelling is admissible when probable cause for the warrant's issuance is based on information independent of the illegal entry. *People v Smith*, 191 Mich App 644, 646 (1991). According to the United States Supreme Court:

> "[A]n illegal entry by police officers upon private premises d[oes] not require suppression of evidence subsequently discovered at those premises pursuant to a search warrant that had been obtained on the basis of information wholly unconnected with the initial entry." *Segura v United States*, 468 US 796, 805 (1984).

C. Good-Faith Doctrine

"When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' [i.e., 'good faith'] on the subsequently invalidated search warrant." *Herring v United States*, 555 US ___, ___ (2009), quoting *United States v Leon*, 468 US 897, 922 n 23 (1984). The "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, *supra* at ___, quoting *Leon*, *supra* at 922 n 23.

Michigan has adopted the good-faith exception to the exclusionary rule. *People v Goldston*, 470 Mich 523, 526 (2004). "The primary benefit [and purpose] of the exclusionary rule is that it deters official misconduct by removing incentives to engage in unreasonable searches and seizures." *Id*. at 529, citing *Leon*, *supra* at 906.

In *Goldston*, *supra* at 526, the police observed the defendant dressed as a fireman collecting money on a street corner, allegedly to donate to firefighters in New York following the September 11, 2001, terrorist attacks. The police confiscated the donations from the defendant and obtained a search warrant for his house that authorized, among other things, the seizure of any police and fire equipment. *Id*. at 526-527. The search yielded additional firefighter paraphernalia, a firearm, and drugs. *Id*. at 527. The trial court granted the defendant's motion to suppress the evidence on the basis that the affidavit did not establish probable cause for the issuance of the warrant because the search warrant affidavit did not connect the place to be searched with the defendant, and did not state the date that the police observed the defendant soliciting money. *Id*. The Supreme Court applied the good-faith exception to the exclusionary rule and concluded that although the warrant was later determined to be deficient, excluding the evidence obtained in good-faith reliance on the warrant would not further the purpose of the exclusionary rule. *Id*. at 542-543.

In *Herring*, *supra*, the United States Supreme Court reviewed several cases in which it held that the exclusionary rule did not apply under the circumstances present in those cases:

"[T]he exclusionary rule did not apply when a warrant was invalid because a judge forgot to make 'clerical corrections' to it." *Herring*, *supra* at ___, quoting *Massachusetts v Sheppard*, 468 US 981, 991 (1984).

The exclusionary rule did not apply "to warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional." *Herring*, *supra* at ___, citing *Illinois v Krull*, 480 US 340, 349-350 (1987).

The exclusionary rule did not apply "to police who reasonably relied on mistaken information in a court's database that an arrest warrant was outstanding." *Herring*, *supra* at ___, citing *Arizona v Evans*, 514 US 1 (1995).

"To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, *supra* at ___. In *Herring*, *supra* at ___, the police arrested the defendant on a warrant listed in the database of a neighboring county. A search incident to arrest yielded drugs and a gun. *Id*. at ___. It was subsequently discovered that the warrant had been recalled but that the recall information was never entered into the database. *Id*. at ___. The defendant moved to suppress the evidence on the basis that his initial arrest was illegal. The United States Supreme Court held that the exclusionary rule was not applicable to bar the admission of the evidence, because the police error arose "from nonrecurring and attenuated negligence . . . far removed from the core concerns that led [the Court] to adopt the [exclusionary] rule in the first place." *Id*. at ___.

D. Attenuation Doctrine

Barring any egregious conduct on the part of the officers making the arrest, "discovery of an outstanding arrest warrant can dissipate or attenuate the taint of an initial illegal stop or arrest." *People v Reese*, 281 Mich App 290, 303, 305 (2008). The proper inquiry is "whether the evidence came to light through exploitation of the illegal conduct or by means sufficiently distinguishable to be purged of the taint from the illegal conduct." *Id*. at 299. Three factors to consider in determining "'whether the causal chain has been sufficiently attenuated to dissipate the taint of illegal conduct [are]: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of the intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.'" *Id*., quoting *United States v Green*, 111 F3d 515, 521 (CA 7, 1997). However, "whether the discovery of a preexisting warrant dissipates or attenuates the illegality of the initial stop or arrest will usually depend on two main points: '(1) what evidence did the police obtain from the initial illegal stop *before* they discovered the outstanding arrest warrant, and (2) whether that initial illegal stop was a manifestation of flagrant police misconduct—i.e., conduct that was obviously illegal, or that was particularly egregious, or that was done for the purpose of abridging the defendant's rights.'" *Reese*, *supra* at 303-304, quoting *McBath v Alaska*, 108 P3d 241, 248 (Alas, 2005).

"Purposeful and flagrant misconduct exists where: '(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his [or her] conduct was likely unconstitutional' but engaged in it anyway, or where '(2) the misconduct was investigatory in design and purpose and executed "in the hope that something might turn up."'" *Reese*, *supra* at 304, quoting *United States v Simpson*, 439 F3d 490, 496 (CA 8, 2006), quoting *Brown*, *supra* at 605. "But where the police only discover the defendant's identity as a result of the initial illegal stop or arrest, and the police misconduct was not particularly egregious or the result of bad faith, the discovery of a preexisting arrest warrant will constitute an intervening circumstance that dissipates the taint of the initial illegal stop or arrest." *Reese*, *supra* at 304. Accordingly, "evidence that is discovered in a subsequent search incident to the lawful arrest[] need not be suppressed." *Id*.

In *Reese*, *supra* at 293, the defendant was illegally arrested for loitering. The police subsequently discovered that the defendant had an outstanding misdemeanor warrant and conducted an inventory search of his car, which yielded drugs. *Id*. The trial court granted the defendant's motion to suppress evidence of the drugs on the basis that the initial arrest was illegal and everything discovered as a result of that arrest had to be suppressed. *Id*. The charges against the defendant were dismissed, and the prosecutor appealed, arguing that because the arrest on the outstanding misdemeanor warrant was proper, a search of the defendant's car incident to that arrest was proper. *Id*. at 294. The Court of Appeals found no evidence that the initial decision of the police to speak to the defendant was motivated by an improper purpose or that the police improperly detained the defendant or that the ultimate decision of

the police to arrest the defendant for loitering was motivated by an investigatory purpose. *Id*. at 304. The Court noted that evidence existed that the police genuinely believed that the defendant was in fact loitering, and the Court emphasized the fact that the police only searched the defendant's car after arresting him on the outstanding misdemeanor warrant. *Id*. at 305. "Because the officers' initial misconduct—the arrest for loitering—was not particularly egregious or motivated by bad faith and only yielded [the defendant's] identity, the subsequent discovery of the preexisting arrest warrant was not tainted by the illegality of that arrest. As such, the discovery of the preexisting warrant constituted an intervening circumstance that broke the causal connection between the illegal arrest and the discovery of the [drug] evidence. Because the search was independently justified as a search incident to the lawful arrest on the warrant, [the defendant] was not entitled to have the [drug] evidence suppressed." *Id*.

E. Statutory Violations

Michigan's Constitution includes an anti-exclusionary provision regarding evidence seized outside the curtilage of a dwelling house. Const 1963, art 1, §11. In part, the provision states: "The provisions of this section shall not be construed to bar from evidence in any criminal proceedings any narcotic drug, firearm, bomb, explosive, or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in the state."

The plain language used in a statute or court rule determines whether the exclusion of evidence is the intended remedy for a violation of that statute or court rule. *People v Hawkins*, 468 Mich 488, 507 (2003). See also *People v Anstey*, 476 Mich 436, 448 (2006), where the Michigan Supreme Court ruled that suppression of the evidence was not the appropriate remedy for a statutory violation (MCL 257.625a(6)(d)) because "there [wa]s no indication in the statute that the Legislature intended such a remedy and no constitutional rights were violated." According to the Court, when suppression of the evidence is not authorized for a statutory violation, "the court may instruct the jury that the defendant's statutory right was violated and [] the jury may decide what significance to attach to th[at] fact."

The exclusionary rule does not apply to violations of Michigan's "knock and announce" statute. *Hudson v Michigan*, 547 US 586, 599-600 (2006). MCL 780.656, Michigan's "knock and announce" statute, provides:

> "The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant."

Because violation of the "knock and announce" statute is unrelated to the seizure of a person's property pursuant to a valid search warrant, the

exclusionary rule is not the proper remedy for the statutory violation. *Hudson*, *supra* at 594. When a statute does not authorize exclusion of the evidence obtained as a result of a statutory violation, a jury instruction regarding the statutory violation may be an appropriate remedy. *Anstey*, *supra* at 448.

Generally, unless there is "a causal relationship between the violation and the seizing of the evidence," suppression of the evidence is not required. *People v Vasquez (After Remand)*, 461 Mich 235, 241 (1999). In *Vasquez*, because the evidence was not discovered as a result of the alleged knock-and-announce violation, the exclusionary rule did not apply. *Id*. at 242. Because there was no causal connection, there was no need to determine whether the knock-and-announce requirement had actually been violated. *Id*. at 241.

Chapter 13: Evidentiary Issues

13

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In this chapter...

This chapter discusses common evidentiary issues that may arise during proceedings under the Controlled Substances Act, including testimonial evidence, physical evidence, and "other acts" evidence.

13.1 Evidence of Other Crimes, Wrongs, or Acts

A. MRE 404(b)

Michigan Rule of Evidence (MRE) 404(b) governs the admissibility of evidence of other crimes, wrongs, or acts. MRE 404(b)(1) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case."

MRE 404(b) codifies the requirements set forth by the Michigan Supreme Court in *People v VanderVliet*, 444 Mich 52 (1993). In *VanderVliet*, *supra* at 74–75, the Court ruled that the following requirements must be met in order for evidence of other crimes, wrongs, or acts to be admissible against a defendant:

1) the evidence must be offered for a purpose other than to show the defendant's propensity to commit a crime;

2) the evidence must be relevant under MRE 402 to an issue or fact of consequence at trial;

3) in accordance with MRE 403, the probative value of the evidence must not be substantially outweighed by the danger of undue

prejudice, in light of the availability of other means of proof and other facts appropriate for determining admissibility; and

4) upon request, the trial court may provide a limiting instruction cautioning the jury to consider the evidence for its proper purpose only, and not to infer, based on the other acts evidence, that the defendant has a bad or criminal character that led him to commit the charged crime.

Note: MRE 105 provides the authority for the trial court to give such a limiting instruction, stating: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." CJI2d 4.11 provides a jury instruction for use in these circumstances.

In *VanderVliet*, *supra* at 65, the Supreme Court expressly stated that the list of "other purposes" for which evidence may be admitted under MRE 404(b) is inclusive, rather than exclusive. "There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). . . . Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. . . . Rule 404(b) permits the judge to admit other acts evidence *whenever* it is relevant on a noncharacter theory." *VanderVliet*, *supra* at 65 (emphasis in original).

There is no presumption that other acts evidence should be excluded. *VanderVliet*, *supra* at 65. Similarly, MRE 404(b) imposes no heightened standard for determining logical relevance or the prejudicial versus probative character of evidence sought to be introduced under the rule. Furthermore, a defendant's general denial of guilt does not bar the prosecutor from introducing other acts evidence at trial. Mechanical recitation of a facially permissible purpose for the introduction of evidence under MRE 404(b), however, without an explanation of how the evidence relates to the stated purpose, is not sufficient to justify admission. *People v Crawford*, 458 Mich 376, 387 (1998).

Admission of other crimes, wrongs, or acts is not a tool limited only to prosecutors. In *People v Rockwell*, 188 Mich App 405, 409–410 (1991), the Court of Appeals held that MRE 404(b), now MRE 404(b)(1), applies to the admissibility of evidence of any person's other acts. Thus, a defendant may introduce evidence under MRE 404(b) of a third party's prior conviction, so long as this evidence meets the standards articulated in *VanderVliet*, *supra*. *People v Catanzarite*, 211 Mich App 573, 578–579 (1995).

Other acts evidence offered to show identity through modus operandi. Where a party seeks to introduce other acts evidence for the purpose of showing identity through modus operandi, a different test applies. *People v Ho*, 231 Mich App 178, 186 (1998). Admissibility of other acts evidence

under this test, set forth in *People v Golochowicz*, 413 Mich 298, 319 (1982), requires that:

1) there is substantial evidence that the defendant committed the similar act;

2) there is some special quality of the act that tends to prove the defendant's identity;

3) the evidence is material to the defendant's guilt; and

4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice.

B. Other Acts Evidence Admissible as Res Gestae Evidence

Evidence of an uncharged act may be admissible independently of MRE 404(b) if that act is "'so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *People v Delgado*, 404 Mich 76, 83 (1978) (citation omitted). In *Delgado*, evidence of an uncharged act was properly admitted as res gestae evidence, where the defendant sold a sample of heroin to an undercover officer as a prerequisite to a larger sale that took place five days later. *Delgado, supra* at 83–84.

Evidence of an uncharged act was not admissible as res gestae evidence in the following circumstances:

- Where the prosecution failed to show any connection between the uncharged act (possession of a controlled substance in the defendant's car) and the charged act (possession of a controlled substance in the defendant's home). *People v Lucas*, 188 Mich App 554, 579 (1991).

- Where the uncharged act and the charged act, both drug transactions, occurred five days apart and the prosecution failed to demonstrate that the two transactions were inextricably related. *People v Rustin*, 406 Mich 527, 532 (1979).

- Where the uncharged act (sale of a controlled substance) occurred prior to the charged act (also sale of a controlled substance), and where the prosecution failed to demonstrate that the uncharged act was a condition precedent to the charged act. *People v Rosen*, 136 Mich App 745, 754 (1984).

C. Test for Admissibility

MRE 404(b)(2) codifies the requirements in *VanderVliet*, *supra* at 89, and sets forth the procedure for the admission of evidence of other crimes, wrongs, or acts. MRE 404(b)(2) provides:

> "The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination."

*MRE 104(c) states that "[h]earings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, and so requests."

The trial court may make its determination of the admissibility of other acts evidence at a hearing conducted in the absence of the jury. See MRE 104(c).* The court is not bound by the Michigan Rules of Evidence at such a hearing, except those rules pertaining to privileges. MRE 104(a); MRE 1101; *People v Barrera*, 451 Mich 261, 274 (1996). However, a trial court is not required to conduct an evidentiary hearing on the admissibility of other acts evidence where neither party makes a motion in limine. *People v Williamson*, 205 Mich App 592, 596 (1994).

The Michigan Supreme Court, in *VanderVliet, supra*, encouraged trial courts to take a flexible approach when ruling on the admissibility of other acts evidence:

> "Where pretrial procedures, including requests for offers of proof, do not furnish a record basis to reliably determine the relevance and admissibility of other acts evidence, the trial court should employ its authority to control the order of proofs, require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. If the court still remains uncertain of an appropriate ruling at the conclusion of the prosecutor's other proofs, it should permit the use of other acts evidence on rebuttal, or allow the prosecution to reopen its proofs after the defense rests, if it is persuaded in light of all the evidence presented at trial, that the other acts evidence is necessary to allow the jury to properly understand the issues[.]" *VanderVliet, supra* at 89–90 (citation omitted).

Evidence that is admissible for one purpose is not made inadmissible because its use for a different purpose is precluded. *City of Westland v Okopski*, 208 Mich App 66, 71 (1994). If evidence is admissible for one purpose, but not for others, the trial court must give a limiting instruction upon request, pursuant to MRE 105. The trial court has no duty, however, to give a limiting instruction sua sponte. *People v Chism*, 390 Mich 104, 120–121 (1973). See CJI2d 4.11 for the limiting instruction to be used in such cases.

13.2 Confessions: The Corpus Delicti Rule

Under the corpus delicti rule, the prosecution may not introduce a defendant's confession into evidence unless independent evidence of the crime has first been introduced. *People v Konrad*, 449 Mich 263, 269–270 (1995). The purpose of the rule is to prevent the use of a defendant's confession to convict him or her of a crime that did not occur. Specifically, the corpus delicti rule prevents admission of a defendant's confession unless there is evidence independent of the confession establishing:

1) the occurrence of the specific injury; and

2) some criminal agency as the source of the injury. *Id*. at 269–270.

The prosecution need not present independent evidence of every element of the offense, however, before a defendant's confession may be admitted. *People v Ish*, 252 Mich App 115, 117 (2002). Rather, "[t]o establish the corpus delicti of any crime, the prosecution must present evidence from which a trier of fact reasonably may find that the acts constituting all the essential elements of the crime have been committed and that someone's criminality was responsible for the commission of those acts." *People v Mumford*, 171 Mich App 514, 517 (1988). The corpus delicti rule does not require evidence of the perpetrator's identity. *Konrad, supra* at 270. "It is sufficient to show that the crime was committed by *someone*." *Id*. (Emphasis in original). Moreover, the prosecutor need not prove the corpus delicti beyond a reasonable doubt before a defendant's confession may be admitted. *Mumford, supra* at 517. Rather, even "slight" evidence is sufficient. *People v Lapidus*, 167 Mich 53, 56 (1911). Further, the prosecution may use either circumstantial or direct evidence to meet its burden of proof. *Konrad, supra* at 269–270.

13.3 Testimonial Evidence

A. *Crawford* Issues: Admissibility, Etc.

Prior to 2004, testimonial hearsay evidence was admissible if it met traditional guarantees of reliability under the Michigan Rules of Evidence. The United States Supreme Court changed this rule in *Crawford v Washington*, 541 US 36, 68 (2004), where the Court held that testimonial hearsay is not admissible against a criminal defendant unless the declarant is unavailable to testify at trial and the defendant had the opportunity to cross-examine the declarant.

The *Crawford* Court declined to specify exactly what hearsay statements are "testimonial." *Crawford, supra* at 68. The Court did state, however, that prior testimony constitutes testimonial hearsay. *Id.* at 52. The Court further explained that pretrial statements are testimonial if the declarant would reasonably expect that the statement would be used in a prosecutorial manner and the statement was made "under circumstances which would lead an

objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 51–52.

Cases heard since *Crawford* have begun to delineate the parameters of "testimonial hearsay." The following statements have been found to be "testimonial," and therefore, inadmissible in the declarant's absence, unless the defendant had a prior opportunity to cross-examine the declarant:

- The transcript of an unavailable witness's guilty plea. *People v Shepherd*, 236 Mich App 665, 671 (2004).
- Testimony from an investigating officer about information from a confidential informant. *People v Jones*, 270 Mich App 208, 214 (2006).
- The notes and lab reports of a nontestifying serologist. *People v Lonsby*, 268 Mich App 375, 378 (2005).
- The affidavits of state laboratory analysts stating that material seized by police and connected to the defendant was a certain quantity of drugs, constituted testimonial hearsay and could not be admitted as evidence unless the analysts who authored the affidavits testify at trial or the defendant has had an opportunity to cross-examine them regarding the affidavits. *Melendez-Diaz v Massachusetts*, 557 US ___, ___ (2009).

In *Davis v Washington*, 547 US 813, 126 S Ct 2266 (2006) (and its companion case, *Hammon v Indiana*), the United States Supreme Court further explained the characteristics of testimonial evidence involving statements made to the police:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*. at 822.

On this basis, the Court held that statements made to a 911 operator were nontestimonial where the primary purpose was to enable police assistance to meet an ongoing emergency. *Id*. at 828 (*Davis v Washington)*. Oral or written statements made in response to police questioning regarding past events, however, were testimonial. *Id*. at 831-832 (*Hammon v Indiana*).

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'").

Exceptions to *Crawford v Washington*. *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133 (2004). Thus, the admission of an unavailable witness's former testimonial statement is not barred by *Crawford* if the statement is admitted to impeach a witness.

See also *People v Chambers*, 277 Mich App 1, 11 (2007), where the trial court properly admitted a police officer's testimony regarding a confidential informant's out-of-court identification of the defendant because the testimony was offered to explain how and why the defendant was arrested, not to prove the truth of the informant's tip.

Crawford does not bar the admission of an unavailable witness's testimonial statements where the defendant "has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." *People v Jones*, 270 Mich App 208, 212-214 (2006). See MRE 804(b)(6). However, the doctrine of forfeiture by wrongdoing does not apply to every case in which a defendant's wrongful act has caused a witness to be unavailable to testify at trial. *Giles v California*, 554 US ___, ___ (2008). The doctrine of forfeiture by wrongdoing applies only when the witness's unavailability to testify at trial results from wrongful conduct designed by the defendant for the purpose of preventing the witness's testimony. *Id*. at ___.

B. Statements of Coconspirator or Codefendant

1. Statements of a Coconspirator

MRE 801(d)(2)(E) sets forth the circumstances under which statements made by a defendant's coconspirator are admissible at the defendant's trial. Under MRE 801(d)(2)(E), a statement made by a defendant's coconspirator is admissible at the defendant's trial if the statement was made during the course of and in furtherance of the conspiracy. The prosecution must introduce proof, independent of the statement sought to be introduced, to establish by a preponderance of the evidence that a conspiracy existed. MRE 801(d)(2)(E); *People v Vega*, 413 Mich 773, 780–782 (1982). The prosecution need not, however, introduce direct proof of the agreement in order to prove the conspiracy. *People v Justice (After Remand)*, 454 Mich 334, 347 (1997). Similarly, the prosecution also need not introduce evidence of a formal agreement in order to prove the conspiracy. *People v Gay*, 149 Mich App 468, 471 (1986). Circumstantial evidence and inference may be used to establish a conspiracy. *People v Martin*, 271 Mich App 280, 317 (2006).

2. Statements of a Codefendant

A codefendant's statement implicating another codefendant generally may not be introduced into evidence at the codefendants' joint trial where the co-defendant who made the statement does not take the witness stand. *Bruton v United States*, 391 US 123, 135-137 (1968). Introduction of such a statement would violate the implicated codefendant's rights under the Confrontation Clause of the Sixth Amendment. Such a statement is admissible only when the statement was subject to cross-examination by the defendant and the person who made the statement is unavailable to testify. A codefendant who exercises his or her Fifth Amendment privileges is unavailable as a witness. *People v Meredith*, 459 Mich 62, 66 (1998).

The Confrontation Clause is not violated by the admission of a nontestifying codefendant's statement where that statement is redacted to eliminate the other codefendant's name and any other reference to the other codefendant's existence. *Richardson v Marsh*, 481 US 200, 211 (1987). In light of *Crawford*, *Davis*, and *Hammon*, however, the continued viability of this exception may be questionable. In any event, merely redacting the other codefendant's name and replacing it with a blank, the term "deleted," or some other symbol, still points too directly at the jointly tried codefendant and violates the Confrontation Clause. *Gray v Maryland*, 523 US 185, 195 (1998). More extensive redaction is required. *Id*.

> **Note:** A court may avoid the problems raised by admission of a nontestifying codefendant's statement by empaneling a separate jury for each codefendant.

The Confrontation Clause is not violated where the nontestifying codefendant's statement is introduced to impeach a testifying defendant's explanation of his or her own statement, and the jury is properly instructed that the nontestifying codefendant's statement is not to be considered for its truth. *Tennessee v Street*, 471 US 409, 413–414 (1985). In *Street*, the defendant asserted that his own confession to the police was coerced. He claimed that the police read him his codefendant's confession and told him to "say the same thing." *Id*. Under these circumstances, the trial court did not err in permitting the prosecution to read the codefendant's statement into evidence to rebut the defendant's coercion claim by showing that the codefendant's statement differed from the defendant's statement.

The admissibility of an unavailable codefendant's *nontestimonial* statement against interest is only governed by MRE 804(b)(3) (hearsay exception for statements against the declarant's penal interest); it is not governed by the Confrontation Clause. *People v Taylor*, 482 Mich 368, 370 (2008), overruling *People v Poole*, 444 Mich 151 (1993), to the extent that *Poole* held that that type of statement is governed by both MRE 804(b)(3) and the Confrontation Clause. However, *Poole*'s MRE 804(b)(3) analysis remains valid and sets out the applicable standard for determining the admissibility of a codefendant's statement under MRE 804(b)(3). *Taylor*, *supra* at 378. "[W]here . . . the

declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3)." *Poole*, *supra* at 161.

13.4 Physical Evidence

A. Foundation

To lay the foundation for the admission of real evidence, the proponent must show that:

1) the object offered is the object which was involved in the incident, and

2) the condition of the object is substantially unchanged.

People v White, 208 Mich App 126, 130 (1995). See also MRE 901.

More elaborate testimony is required, however, to lay the foundation for the admission of real evidence, such as a controlled substance, that is not readily identifiable or is susceptible to alteration by tampering or contamination. *White, supra* at 130. To lay the foundation for admitting such evidence, the prosecution must also introduce testimony tracing the chain of custody of the item. A perfect chain of custody is not required, however. Rather, the prosecution need only show "to a reasonable degree of probability or certainty" that the evidence was not mistakenly exchanged, contaminated, or tampered with. *Id*. at 133.

However, evidence of the results of properly performed drug analysis field testing is admissible in a preliminary examination solely to establish that the substance tested is a controlled substance, and it is sufficient to establish that the substance tested is a controlled substance for purposes of a preliminary examination. MCL 766.11b.*

*2007 PA 89, effective December 29, 2007.

B. Chain of Custody

A break or gap in the chain of custody may be relevant to the trial court's determination of whether the prosecution has met the foundational requirements for introduction of real evidence. *White, supra* at 133. However, a break or gap in the chain of custody does not require automatic exclusion of the evidence. Rather, the threshold question is whether an adequate foundation has been laid under all the facts and circumstances of the case. Once a proper foundation has been established, any deficiencies in the chain

of custody go to the weight afforded to the evidence rather than its admissibility.

In *White*, *supra* at 128, the prosecution introduced four rocks of crack cocaine into evidence. On appeal, the defendant argued that the cocaine was improperly admitted because there was a gap in the chain of custody. Because trial testimony established that reasonable precautions were taken to preserve the original condition of the evidence and prevent its misidentification, and no evidence was presented to contradict the presumption of regularity that existed with respect to the official acts of the police officers, the chain of custody was substantially complete, and the cocaine was properly admitted. *Id*. at 132–134.

13.5 Expert Testimony

A. MRE 702/Admissibility

MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

MRE 702 requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993);* *Gilbert v DaimlerChrysler*, 470 Mich 749, 781 (2004). "In determining the admissibility of scientific evidence, the court, as gatekeeper, must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue." *Daubert*, *supra* at 580. Factors that a court may consider include:

*Michigan moved from being a *Davis-Frye* jurisdiction to being a *Daubert* jurisdiction after MRE 702 was amended. See *Frye v United States*, 54 US App DC 46 (1923), and *People v Davis*, 343 Mich 348 (1955).

1) whether the scientific theory or technique can be tested and has been tested;

2) whether the theory or technique has been subjected to peer review and publication;

3) the known or potential error rate of the theory or technique and the existence and maintenance of standards controlling the theory or technique's operation; and

4) whether the theory or technique has attracted widespread acceptance within a relevant scientific community. *Id*.

This gatekeeper test, known as the *Daubert* Test, was extended to nonscientific expert testimony in *Kumho Tire Co Ltd v Carmichael*, 526 US 137, 147–149 (1999).

It is the trial judge, rather than the jury, who must decide whether a party has provided the proper foundation for admission of expert testimony. MRE 104(a); *People v Whitfield*, 425 Mich 116, 122 (1986).

Drug-sniffing dogs. There are special foundational requirements that must be met in order for a party to introduce evidence from a drug-sniffing dog. In order to show that the dog's "alert" to the presence of drugs is reliable, the prosecution must introduce evidence of the dog's training and current certification. *People v Clark*, 220 Mich App 240, 244 (1996).

B. Expert Must Be Qualified

MRE 702 requires that an expert witness must be qualified as an expert "by knowledge, skill, experience, training, or education" before his or her testimony may be admitted. MRE 702. This requirement, however, is a broad one. *Grow v W A Thomas Co*, 236 Mich App 696, 713 (1999). Accordingly, a proposed expert witness is not required to satisfy an overly narrow test of his or her own qualifications. *People v Christel*, 449 Mich 578, 598 (1995). Whether a witness is qualified to render an expert opinion is a matter that rests within the discretion of the trial court. *Lopez v General Motors Corp*, 224 Mich App 618, 635 (1997).

A person need not have a formal education to be an expert witness, but rather may have acquired special knowledge of a subject by reason of his or her employment. *Evans v Van Kleek*, 110 Mich App 798, 805 (1981). Moreover, a witness need not possess specialized knowledge as a result of experience in addition to possessing specialized knowledge through training and education. *Osner v Boughner*, 180 Mich App 248, 261 (1989). An expert also need not be a licensed professional. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 403 (1989). While a proposed expert's expertise may not be as extensive as the expert's expertise on the opposing side, such consideration goes to the weight of the evidence rather than its admissibility. *People v Whitfield*, 425 Mich 116, 123-124 (1986).

A trial court may properly consider other trial experience in determining whether a proposed expert should be allowed to testify, and the court may consider the fact that the witness has been qualified as an expert in other cases. *People v Lewis*, 160 Mich App 20, 28 (1987).

*For greater detail, see **Section 2.2**(C)(2) and **Section 13.6**(C).

In controlled substances cases, a drug user may testify as an expert witness to establish the identity of a substance.* *People v Boyd*, 65 Mich App 11, 13 (1975).

C. Basis for Expert's Opinion Must Be Established—MRE 703 and 705

MREs 703 and 705 set forth the basis that must be established for an expert witness's opinion. MRE 703 states:

> "The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter."

*Effective September 1, 2003.

The Staff Comment to Administrative Order No. 1999-10, which amended MRE 703 to the form set forth above,* states that the rule was changed in order to correct "a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony."

> **Note:** MRE 703 is a departure from the corresponding Federal Rule of Evidence, FRE 703. FRE 703 permits an expert witness to testify using inadmissible hearsay as long as the evidence meets the requirements of the balancing test set out in FRE 403.

MRE 705 provides:

> "The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

Because the facts or data in the particular case on which an expert bases an opinion or inference must be in evidence, expert testimony may be excluded when the basis of assumptions on which it relies do not comport with the established facts. *Badalamenti v Wm Beaumont Hosp–Troy*, 237 Mich App 278, 286 (1999). An expert witness may, however, give an opinion under MRE 703 on the basis of a hypothetical scenario. *People v Dobben*, 440 Mich 679, 695 (1992). Furthermore, the facts on which an expert bases his or her testimony may be those the expert perceives or learns of at or before trial. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401 (2001).

D. Testimony Must Assist the Trier of Fact

In order to be admissible an expert witness's testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702; *Craig v Oakwood Hosp*, 471 Mich 67, 79 (2004).

See CJI2d 5.10 for a jury instruction regarding expert witnesses.

13.6 Issues Involving Other Witnesses

A. Informant's Identity

Generally, the identity of an informant is protected by an informer's privilege. *People v Underwood*, 447 Mich 695, 703 (1994). "[T]his privilege entitles the government to preserve the anonymity of citizens who have furnished information concerning violations of the law to law enforcement officers, thus encouraging them to communicate such knowledge to the police." *People v Sammons*, 191 Mich App 351, 368 (1992). However, the applicability of this privilege depends on the particular circumstances of each case. *Underwood, supra* at 703. "'Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.'" *Id*. at 704, quoting *Roviaro v United States*, 353 US 53, 59–61 (1957) (emphasis omitted).

In determining whether the identity of an informant must be disclosed, a trial court must consider the crime charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors. *Underwood, supra* at 705, citing *Roviaro, supra* at 62. If a defendant demonstrates a possible need for the informant's testimony, the trial court should conduct a hearing in camera to determine whether the informant's testimony is relevant and helpful to the defendant's defense or essential to a fair determination of the defendant's guilt. *Underwood, supra* at 706. A record should be made of this in camera session and its contents sealed so that only an appellate court can access it.

Entrapment cases. An informant's identity need not be disclosed in an entrapment case if the informant's only activity was to introduce an undercover officer to the defendant. *People v Kage*, 193 Mich App 49, 55 (1992), vacated on other grounds 439 Mich 1022 (1992). However, if the defendant alleges that the informant's activities went beyond mere introduction, the trial court should hold an in camera hearing to decide if the informant has any testimony helpful to the entrapment issue. Moreover, because the protections afforded by the Sixth Amendment's Confrontation Clause are available to a defendant in an entrapment hearing, the informant's privilege must give way, when necessary, to protect these rights. *Sammons, supra* at 361, 364. Further, where the informant may have participated in the

charged crime, the informant's privilege will not protect him from production as a res gestae witness. *People v Cadle*, 204 Mich App 646, 650–651 (1994), modified on other grounds, 209 Mich App 467 (1995).

Challenging the validity of a search warrant. Generally, a trial judge will not be required to disclose the identity of an informant employed to garner probable cause for a search warrant. If a defendant claims that the informant does not exist, however, or that the informant has exculpatory evidence, the trial court, in its discretion, may require production of the informant. *People v Poindexter*, 90 Mich App 599, 608 (1979). In *Poindexter*, *supra* at 608–610, the Court of Appeals set forth the procedure to be followed in resolving such claims:

> "To begin with, there is a presumption of validity with respect to the affidavit supporting the search warrant and this presumption applies throughout the procedure.
>
> "To mandate an evidentiary hearing, defendant's attack must be more than conclusory, if possible, and must be supported by more than a mere desire to determine who the informant was. There must be specific allegations of deliberate falsehood or of reckless disregard for the truth. Those allegations must be accompanied by an offer of proof and should be accompanied by a statement of supporting reasons. Also, the defendant should furnish reliable statements of witnesses to support his claim, or satisfactorily explain their absence. If these requirements are met to the trial court's satisfaction and the statements challenged by the defendant are set aside but sufficient content still remains in the affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient to support a finding of probable cause, the defendant is entitled to an evidentiary hearing.
>
> "At the hearing, the trial judge should question the officer involved and consider any other relevant evidence offered by the prosecutor or the defendant. If the judge is convinced that the officer is being truthful regarding the existence of the informant, he should deny defendant's request for production. However, if the judge determines that there is some doubt as to the officer's credibility, he may require production of the informant.
>
> "Once a trial judge decides to order production of an informant, he should conduct a closed hearing to protect the informant's identity. The trial judge is also free to take any other protective measures deemed necessary.
>
> "If the prosecutor believes the trial judge abused his discretion in ordering production of the informant, the prosecutor should seek immediate appellate review of the court order."

Where a defendant's sole purpose in requesting production of the informant, however, is to challenge the truth of the information supplied to the police, the informant need not be produced. *People v Johnson*, 83 Mich App 1, 11 (1978).

B. Sentence Considerations In Exchange for Testimony

"Where an accomplice or co-conspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor and the trial judge, if the fact comes to the court's attention, to disclose such fact to the jury upon request of defense counsel." *People v Atkins*, 397 Mich 163, 173 (1976). This same requirement of disclosure applies "if reasonable expectations, as opposed to promises, of leniency or other rewards for testifying resulted from contact with the prosecutor." *Id*. The prosecutor, however, need not disclose the future intent to recommend some sort of consideration for a witness whose testimony has been helpful.

The prosecutor has an affirmative duty to correct a prosecution witness's testimony where the witness falsely testifies that he has not been promised any consideration for his testimony. *People v Woods*, 416 Mich 581, 601 (1982). Moreover, the prosecutor may not discharge this duty by informing the jury of a plea agreement in opening or closing statements. Rather, the prosecutor must introduce any corrective disclosure into evidence. In connection with this duty, the prosecutor's office has been treated as an entity, and the promise of one of its attorneys, even if unknown to the particular prosecutor trying the case, has been attributed to the state. *Atkins*, *supra*, at 174, citing *Giglio v United States*, 405 US 150, 154 (1972).

Disclosure of a plea agreement with a prosecution witness must be made even though it may inform the jury of the punishment that might be imposed on the defendant in the event he is convicted. *People v Mumford*, 183 Mich App 149, 153-154 (1990).

CJI2d 5.13 provides a jury instruction for use in cases where evidence has been elicited concerning sentencing consideration received in exchange for testimony.

C. Addict–Informant's Testimony

Because the credibility of an addict-informer is a jury question, the jury may convict a defendant solely on the uncorroborated testimony of an addict-informer. *People v Atkins*, 397 Mich 163, 172 (1976). In such cases, however, the court must give a cautionary instruction, upon the defendant's request, when the uncorroborated testimony of an addict-informer is the only evidence linking the accused with the alleged offense. *People v Griffin*, 235 Mich App 27, 40 (1999). The trial court, however, has no duty, in the absence of a defendant's request, to give a cautionary instruction sua sponte. MCL 768.29.

CJI2d 5.7 sets forth a jury instruction to be used by courts in connection with an addict-informant's testimony.

D. Police Officer Testimony Regarding Drug Dealer Profiles

Drug dealer profiles, as testified to by a police officer, are generally not admissible as substantive evidence of a defendant's guilt of an offense under the Controlled Substances Act. *People v Hubbard*, 209 Mich App 234, 241 (1995), citing *United States v Hernandez-Cuartes*, 717 F2d 552, 555 (CA 11, 1983). Because drug dealer profiles have a great potential for inculpating innocent citizens, particularly when presented as expert opinion by law enforcement officials, a profile's probative value is generally outweighed by the danger of unfair prejudice under MRE 403. Drug dealer profiles may, however, properly be used for the limited purposes of explaining the significance of items seized and the circumstances of the investigation of criminal activity. *People v Murray*, 234 Mich App 46, 53 (1999).

In *Murray*, *supra* at 57, the Court of Appeals set forth a list of factors that might be helpful to a court in distinguishing between the appropriate and inappropriate use of drug profile evidence when determining the admissibility of such evidence. These factors are as follows:

1) the reason given and accepted for the admission of the profile testimony must only be for a proper use, such as to assist the jury as background or modus operandi explanation;

2) the profile, without more, should not normally enable a jury to infer the defendant's guilt;

3) because the focus is primarily on the jury's use of the profile, the court must make clear to the jury, through use of a jury instruction, what is and is not a proper use for the testimony; and

4) the expert witness should not express his or her opinion, based on a profile, that the defendant is guilty, nor should he or she expressly compare the defendant's characteristics to the profile in such a way that guilt is necessarily implied.

E. Information Received by Crime Stopper Organizations

With certain exceptions, MCL 600.2157b(1) prohibits requiring a person to:

> "(a) Disclose, by way of testimony or otherwise, a confidential communication to a crime stoppers organization.
>
> "(b) Produce, under subpoena, any records, documentary evidence, opinions, or decisions relating to a confidential

> communication to a crime stoppers organization by way of any discovery procedure."

Records of confidential communication to a crime stoppers organization may be subject to disclosure under the following circumstances:

> "(2) An individual arrested and charged with a criminal offense . . . may petition the court for an inspection conducted in camera of the records of a confidential communication to a crime stoppers organization concerning that individual. The petition shall allege facts showing that the records would provide evidence favorable to the defendant . . . and relevant to the issue of guilt or punishment. . . . If the court determines that the person is entitled to all or any part of those records, the court may order production and disclosure as it deems appropriate.
>
> "(3) The prosecution in a criminal proceeding may petition the court for an inspection conducted in camera of the records of a confidential communication to a crime stoppers organization that the prosecution contends was made by the defendant, or by another individual acting on behalf of the defendant, for the purpose of providing false or misleading information to the crime stoppers organization. The petition shall allege facts showing that the records would provide evidence supporting the prosecution's contention and would be relevant to the issue of guilt or punishment. If the court determines that the prosecution is entitled to all or any part of those records, the court may order production and disclosure as it deems appropriate.
>
> "(4) As used in this section:
>
>> "(a) 'Confidential communication to a crime stoppers organization' means a statement by any person, in any manner whatsoever, to a crime stoppers organization for the purpose of reporting alleged criminal activity.
>>
>> "(b) 'Crime stoppers organization' means a private, nonprofit organization that distributes rewards to persons who report to the organization information concerning criminal activity and that forwards the information to the appropriate law enforcement agency." MCL 600.2157b(2)-(4).

Chapter 14: Drug Treatment Courts

14

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In this chapter...

This chapter discusses Michigan's drug treatment courts. Specifically, this chapter discusses the following statutes: MCL 333.7411, MCL 600.1060, MCL 600.1062, MCL 600.1064, MCL 600.1066, MCL 600.1068, MCL 600.1070, MCL 600.1072, MCL 600.1074, MCL 600.1076, MCL 712A.18, MCL 750.350a, MCL 750.430, MCL 762.11, and MCL 769.4a.

14.1 Introduction

A. Statutory Authority

MCL 600.1062 provides the statutory basis for the creation of specialized drug treatment courts. The first sentence of MCL 600.1062(1) provides:

> "The circuit court in any judicial circuit or the district court in any judicial district may adopt or institute a drug treatment court, pursuant to statute or court rules."

The first sentence of MCL 600.1062(2) provides:

> "The family division of circuit court in any judicial circuit may adopt or institute a juvenile drug treatment court, pursuant to statute or court rules."

MCL 600.1062(2) further provides that, except as otherwise provided in the statutes governing drug treatment courts, MCL 600.1060, *et seq.*, "juvenile drug treatment court[s] [are] subject to the same procedures and requirements provided . . . for [adult] drug treatment courts . . . ."

B. Definition of "Drug Treatment Court"

MCL 600.1060(c) defines the term "drug treatment court" as follows:

> "'Drug treatment court' means a court supervised treatment program for individuals who abuse or are dependent upon any controlled substance or alcohol. A drug treatment court shall comply with the 10 key components promulgated by the national association of drug court professionals, which include all of the following essential characteristics:
>
> > "(*i*) Integration of alcohol and other drug treatment services with justice system case processing.
> >
> > "(*ii*) Use of a nonadversarial approach by prosecution and defense that promotes public safety while protecting any participant's due process rights.
> >
> > "(*iii*) Identification of eligible participants early with prompt placement in the program.
> >
> > "(*iv*) Access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
> >
> > "(*v*) Monitoring of participants effectively by frequent alcohol and other drug testing to ensure abstinence from drugs or alcohol.
> >
> > "(*vi*) Use of a coordinated strategy with a regimen of graduated sanctions and rewards to govern the court's responses to participants' compliance.
> >
> > "(*vii*) Ongoing close judicial interaction with each participant and supervision of progress for each participant.
> >
> > "(*viii*) Monitoring and evaluation of the achievement of program goals and the program's effectiveness.
> >
> > "(*ix*) Continued interdisciplinary education in order to promote effective drug court planning, implementation, and operation.
> >
> > "(*x*) The forging of partnerships among other drug courts, public agencies, and community-based organizations to generate local support."

14.2 General Admission Requirements

MCL 600.1064 sets forth the general requirements an individual must meet in order to be admitted into a drug treatment court. No individual has a right to be admitted into a drug treatment court. MCL 600.1064(1). Instead, it is up to each individual drug court to determine whether an individual may be admitted. *Id*. Furthermore, an individual is not eligible for admission into a drug treatment court if he or she is a violent offender. *Id*. MCL 600.1060(g) defines the term "violent offender" as follows:

> "'Violent offender' means an individual who meets either of the following criteria:
>
> > "(*i*) Is currently charged with or has pled guilty to, or, if a juvenile, is currently alleged to have committed or has admitted responsibility for, an offense involving the death of or a serious bodily injury to any individual, or the carrying, possessing, or use of a firearm or other dangerous weapon by that individual, whether or not any of these circumstances are an element of the offense, or is criminal sexual conduct of any degree.
> >
> > "(*ii*) Has 1 or more prior convictions for, or, if a juvenile, has 1 or more prior findings of responsibility for, a felony involving the use or attempted use of force against another individual with the intent to cause death or serious bodily harm."

An individual applying for admission into a drug treatment court must cooperate with and complete a preadmissions screening and evaluation assessment, and must agree to cooperate with any future evaluation assessment the drug treatment court may require. MCL 600.1064(3).*

*For discussion of the preadmissions screening and evaluation assessment, see **Section 14.3** below.

If these requirements are met, individuals who have been assigned the status of youthful trainee under MCL 762.11, or who have been placed on probation pursuant to the deferred adjudication provisions of MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (specific domestic violence offenses), MCL 750.430 (impaired healthcare professionals), or MCL 750.350a (parental kidnapping), are eligible for admission into a drug treatment court. MCL 600.1064(2).

A court may order a juvenile to participate in a drug treatment court as a term of his or her probation. MCL 712A.18(1)(b).

14.3 Preadmission Screening and Evaluation Assessment

In order to be admitted to a drug treatment court, an individual "must cooperate with and complete a preadmissions screening and evaluation

assessment and must agree to cooperate with any future evaluation assessment as directed by the drug treatment court." MCL 600.1064(3). The preadmission screening and evaluation assessment must include all of the following:

1) a complete review of the individual's criminal history. MCL 600.1064(3)(a).

2) a review of whether or not the individual has been admitted to and has participated in, or is currently participating in, a drug treatment court, and the results of the individual's participation. MCL 600.1064(3)(a).

3) an assessment of the risk of danger or harm to the individual, others, or the community. MCL 600.1064(3)(b).

4) to the extent possible, a complete review of the individual's history of use or abuse of controlled substances or alcohol, and an assessment of whether the individual abuses alcohol or controlled substances or is dependent on drugs or alcohol.* MCL 600.1064(3)(c).

*With regard to the substance abuse or alcohol abuse history review, "[i]t is the intent of the legislature that this assessment should be a clinical assessment as much as practicable." MCL 600.1064 (3)(c).

5) a review of any special needs or circumstances of the individual that could potentially affect his or her ability to receive substance abuse treatment and follow the court's orders. MCL 600.1064(3)(d).

6) if the individual is a juvenile, an assessment of the family situation and, to the extent practicable, a comparable review of any guardians or parents. MCL 600.1064(3)(e).

A drug treatment court may consider a review of the law enforcement information network sufficient for purposes of conducting the review required by MCL 600.1064(3)(a). In addition, "the [drug treatment court] may accept other verifiable and reliable information from the prosecution or defense to complete its review and may require the individual to submit a statement as to whether or not he or she has previously been admitted to a drug treatment court and the results of his or her participation in the prior program or programs." *Id*.

A drug treatment court may also request that the department of state police provide the court with information contained in the law enforcement information network regarding a drug court applicant's criminal history, including whether the applicant has previously participated in a drug treatment court and the results of that participation. MCL 600.1064(5). Upon request from a drug treatment court, the department of state police must provide the information requested. *Id*.

Confidentiality of information obtained. Except as otherwise permitted by the statutes governing drug treatment courts, MCL 600.1060, *et seq*., information obtained as a result of an applicant's participation in a preadmission screening and evaluation assessment is confidential, is exempt

from disclosure under the freedom of information act, MCL 15.231 to 15.246, and cannot be used in a criminal prosecution unless the information reveals criminal acts other than, or inconsistent with, personal drug use. MCL 600.1064(4).

14.4 Preadmission Findings by the Court

MCL 600.1066 requires that, before an individual is admitted into a drug treatment court, the court must make certain findings on the record, or must place a statement in the court file. This statement, or the court's on-the-record findings, must include all of the following:

1) the individual is dependent upon or abusing drugs or alcohol and is an appropriate candidate for participation in the drug treatment court. MCL 600.1066(a).

2) the individual understands the consequences of entering the drug treatment court and agrees to comply with all court orders and with the requirements of the court's program and of the treatment providers. MCL 600.1066(b).

3) the individual is not an unwarranted or substantial risk to the safety of the public or any individual, based upon the screening and assessment or other information presented to the court. MCL 600.1066(c).

4) the individual is not a violent offender as defined by MCL 600.1060(g).* MCL 600.1066(d).

*See **Section 14.2**, above, for the definition.

5) the individual has completed a preadmission screening and evaluation assessment as required by MCL 600.1064(3)* and has agreed to cooperate with any future evaluation assessment required by the drug treatment court. MCL 600.1066(e).

*See **Section 14.3**, above.

6) where applicable, the individual meets the requirements under MCL 333.7411 (specific controlled substance offenses), MCL 762.11 (youthful trainee status), MCL 769.4a (specific domestic violence offenses), MCL 771.1 (probation conditions), MCL 750.350a (parental kidnapping), or MCL 750.430 (impaired healthcare professionals).* MCL 600.1066(f).

*See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), Sections 8.42 and 8.43.

7) the terms, conditions, and duration of the agreement between the parties, especially as to the outcome for the applicant upon successful completion of the program or upon termination of his or her participation. MCL 600.1066(g).

14.5 Admission to Drug Treatment Court When Candidate is From Another Jurisdiction

*2006 PA 620, effective January 3, 2007.

Subject to the requirements outlined in MCL 600.1062(4),* a drug treatment court may admit adult participants from outside its jurisdiction. MCL 600.1062(4) states:

> "A court that has adopted a drug treatment court pursuant to this section may accept participants from any other jurisdiction in this state based upon either the residence of the participant in the receiving jurisdiction or the unavailability of a drug treatment court in the jurisdiction where the participant is charged. The transfer is not valid unless it is agreed to by all of the following:
>
> > "(a) The defendant or respondent.
> >
> > "(b) The attorney representing the defendant or respondent.
> >
> > "(c) The judge of the transferring court and the prosecutor of the case.
> >
> > "(d) The judge of the receiving drug treatment court and the prosecutor of a court funding unit of the drug treatment court."

14.6 Admission to Drug Treatment Court When Candidate is Charged With a Criminal Offense

MCL 600.1068 governs those cases where the applicant is charged with a crime. If the applicant is charged with a crime, or is a juvenile alleged to have engaged in activity that would constitute a criminal act if committed by an adult, his or her admission is subject to the following conditions:

1) the offense(s) allegedly committed must be related to the abuse, illegal use, or possession of a controlled substance or alcohol. MCL 600.1068(1)(a).

2) the individual, if an adult, must plead guilty to the charge(s) on the record, or if a juvenile, must admit responsibility for the violation(s) that he or she is accused of having committed. MCL 600.1068(1)(b).

3) the individual must waive, in writing, the right to a speedy trial, the right to representation by an attorney at drug treatment court review hearings, and, with the agreement of the prosecutor, the right to a preliminary examination. MCL 600.1068(1)(c).

4) the individual must sign a written agreement to participate in the drug treatment court. MCL 600.1068(1)(d).

An individual's admission into a drug treatment court is subject to the prosecutor's approval. MCL 600.1068(2).

An individual may not be admitted to, or remain in, a drug treatment court if his or her admission and participation would permit a discharge or dismissal of a traffic offense upon successful completion of the drug treatment court program. MCL 600.1068(3).

A drug treatment court is required to permit any victim of an applicant's charged offense(s), any victim of a prior offense for which an applicant was convicted, as well as members of the community in which the offenses were committed or in which the applicant resides, to submit a written statement regarding the advisability of admitting the applicant into the drug treatment court. MCL 600.1068(4).

An individual has the right to withdraw his or her plea or admission and to reassert his or her right to a preliminary examination if the individual is not admitted to a drug treatment court. MCL 600.1068(5).

14.7 Post-Admission Procedures

MCL 600.1070 sets forth the procedures that apply once an applicant has been admitted to a drug treatment court.*

*Local practice may impose additional conditions.

A. Disposition of Case

MCL 600.1070(1) sets forth three separate dispositional rules, depending on the status of the case against the applicant at the time he or she is admitted to drug treatment court.

1. Individuals Against Whom Criminal Charges are Pending at the Time of Admission

When an individual is admitted to drug treatment court based on criminal charges that are still pending against him or her, the drug treatment court must accept the guilty plea or, in the case of a juvenile, the admission of responsibility. MCL 600.1070(1)(a).

2. Individuals Who Have Pleaded Guilty or Admitted Responsibility Before Admission to Drug Treatment Court

When an individual is admitted to drug treatment court based on criminal charges to which the individual has pleaded guilty or, in the case of a juvenile, has admitted responsibility, the drug treatment court has two dispositional options:

1) When the offense was not a traffic offense and the individual may be eligible for discharge and dismissal of the charge upon successful completion of the drug treatment court program, the court must not enter a judgment of guilt or adjudication of responsibility. MCL 600.1070(1)(b)(*i*).

2) When the offense was a traffic offense, or where the individual may not be eligible for discharge and dismissal upon successful completion of the drug treatment court program, the court must enter a judgment of guilt or an adjudication of responsibility. MCL 600.1070(1)(b)(*ii*).

> **Note:** See Section 8.25 for a chart comparing factors involved in delayed sentencing, deferred adjudications, and assignments to drug court.

3. Imposition of Deferred or Immediate Sentence

When an individual is admitted to drug treatment court based on criminal charges for which the individual and the prosecuting attorney have reached an agreement, the court may either defer proceedings until completion of the drug treatment court program, or may proceed to sentencing and place the individual on probation or other court supervision with participation in drug treatment court as a term of the individual's probation or supervision. MCL 600.1070(1)(c).

B. Jurisdiction Over Adult Drug Treatment Court Participants

A drug treatment court has continuing jurisdiction over participants in its program: "[t]he [drug treatment court] shall maintain jurisdiction over the drug treatment court participant . . . until final disposition of the case, but not longer than the probation period [set forth in MCL 771.2]." MCL 600.1070(2).

> **Note:** Except as otherwise provided in MCL 771.2a, the probation period for a felony conviction shall not exceed 5 years, and for misdemeanor or nonfelony convictions, the probation period shall not exceed 2 years. MCL 771.2(1).

C. Jurisdiction Over Juvenile Drug Treatment Court Participants and Others

In the case of a juvenile participant, "the court may obtain jurisdiction over any parents or guardians of the juvenile in order to assist in ensuring the juvenile's continued participation and successful completion of the drug treatment court, and may issue and enforce any appropriate and necessary

order regarding the parent or guardian of a juvenile participant." MCL 600.1070(2).

D. Other Post-Admission Procedures

MCL 600.1070 also governs various other post-admission procedures:

- Drug treatment courts must "cooperate with, and act in a collaborative manner with, the prosecutor, defense counsel, treatment providers, the local substance abuse coordinating agency for that circuit or district, probation departments, and, to the extent possible, local law enforcement, the department of corrections, and community corrections agencies." MCL 600.1070(3).

- Drug treatment courts may require an individual admitted into the court to pay a reasonable drug court fee that is reasonably related to the cost of the program's administration. MCL 600.1070(4).

- Drug treatment courts may request that the department of state police provide them with information contained in the law enforcement information network pertaining to a participant's criminal history for purposes of determining the participant's compliance with all court orders, and requires the department of state police to provide this information upon request from a drug treatment court. MCL 600.1070(5).

14.8 Components of Drug Treatment Court

MCL 600.1072(1) sets forth the required components of a drug court treatment program:

1) **Monitoring—**consistent, continual, and close monitoring of the participant and interaction among the court, treatment providers, probation officers, and the participant. MCL 600.1072(1)(a).

2) **Drug testing—**mandatory periodic and random testing for the presence of any controlled substance or alcohol in a participant's blood, urine, or breath, using to the extent possible the best available, accepted, and scientifically valid methods. MCL 600.1072(1)(b).

3) **Progress evaluations—**periodic evaluation assessments of the participant's circumstances and progress in the program. MCL 600.1072(1)(c).

4) **Sanctions and rewards—**a regimen or strategy of appropriate and graduated but immediate rewards for compliance and sanctions for noncompliance, including, but not limited to, the possibility of incarceration or confinement. MCL 600.1072(1)(d).

5) **Treatment services—**substance abuse treatment services, relapse prevention services, education, and vocational opportunities as appropriate and practicable. MCL 600.1072(1)(e).

Confidentiality of information obtained. Any information obtained as a result of participation in assessment, treatment, or testing while in a drug treatment court is confidential and exempt from disclosure under the freedom of information act, MCL 15.231 to 15.246, and cannot be used in a criminal prosecution unless the information reveals criminal acts other than, or inconsistent with, personal drug use. MCL 600.1072(2).

14.9 "Graduation" Requirements

MCL 600.1074 sets forth the requirements a drug treatment court participant must meet in order to continue participating in and complete the drug court treatment program.

A. Compliance with All Court Orders

A drug court participant must comply with all of the court's orders to successfully complete the drug court treatment program. MCL 600.1074(1)(e). The court has discretion to impose sanctions on a participant for any violation of the court's orders. *Id*.

B. Payment of Fines, Fees, Restitution, Assessments, and Costs

Pursuant to MCL 600.1074(1)(a)–(d), successful completion of a drug court treatment program requires that a participant pay all of the following:

- All court ordered fines and costs, including minimum state costs.
- The drug treatment court fee authorized under MCL 600.1070(4).
- All court ordered restitution.
- All crime victims rights assessments under MCL 780.905.

A participant is also required to "pay all, or make substantial contributions toward payment of, the costs of the treatment and the drug treatment court program services provided to the participant, including, but not limited to, the costs of urinalysis and such testing or any counseling provided." MCL 600.1074(3).

However, if a court determines that the payment of fines, fees, or the costs of treatment would be a substantial hardship for the participant, or would interfere with the participant's substance abuse treatment, the court may waive all or part of the fines, fees, and costs of treatment. MCL 600.1074(3).

Payment of restitution or the crime victims rights assessment may not be waived.

C. Avoidance of New Crimes

A drug treatment court must be notified if a participant is accused of a new crime.* MCL 600.1074(2). Upon such notification, the court must consider whether to terminate the participant's involvement in the drug treatment court. If a participant is convicted of a felony for an offense that occurred after the participant was admitted to the drug treatment court, the court must terminate the participant's involvement in the drug treatment court.

*The statute does not specify who must initiate the notification.

14.10 Successful Completion of the Drug Court Treatment Program

When a participant successfully completes a drug court treatment program, the court must indicate on the record, or in a written statement in the court file, whether the participant completed the program successfully or whether the individual's participation in the program was terminated and, if participation was terminated, the reason for termination. MCL 600.1076(1).

For participants who successfully complete probation or other supervision by the court and whose proceedings were deferred or who were sentenced pursuant to MCL 600.1070,* "the court shall comply with the agreement made with the participant upon admission into the drug treatment court, or the agreement as it was altered after admission by the court with approval of the participant and the prosecutor for that jurisdiction as provided in [MCL 600.1076(3)–(8)]." MCL 600.1076(2).

*See **Section 14.7**(A).

A. Individuals Whose Adjudication Was Deferred*

If an individual who successfully completes drug treatment court is participating pursuant to MCL 762.11 (youthful trainee status), MCL 333.7411 (specific controlled substance offenses), MCL 769.4a (domestic violence offenses), MCL 750.350a (parental kidnapping), or MCL 750.430 (impaired healthcare professionals), the court shall proceed pursuant to the applicable section of law. MCL 600.1076(3). Only one discharge or dismissal is permitted under MCL 600.1076(3).

*See *Criminal Procedure Monograph 8: Felony Sentencing* (MJI, 2005-April 2009), Sections 8.42 and 8.43.

B. Individuals Entitled to Discharge and Dismissal

Subject to the memorandum of understanding under MCL 600.1062, and with the prosecutor's consent, proceedings may be dismissed and discharged against a drug court participant who satisfies the requirements of MCL 600.1076(4)(a)–(e). Additional requirements apply to dismissal and discharge of proceedings against an individual charged with a domestic violence offense. MCL 600.1076(5).*

*See **Section 14.10**(C), below, for a discussion of MCL 600.1076(5).

Under MCL 600.1076(4), proceedings against an individual may be dismissed and discharged if the individual meets all of the following criteria:

> "(a) The individual has participated in a drug treatment court for the first time.
>
> "(b) The individual has successfully completed the terms and conditions of the drug treatment court program.
>
> "(c) The individual is not required by law to be sentenced to a correctional facility for the crimes to which he or she has pled guilty.
>
> "(d) The individual is not currently charged with and has not pled guilty to a traffic offense.
>
> "(e) The individual has not previously been subject to more than 1 of any of the following:
>
> > "(*i*) Assignment to the status of youthful trainee under . . . MCL 762.11.
> >
> > "(*ii*) The dismissal of criminal proceedings against him or her under . . . MCL 333.7411, . . . MCL 769.4a, . . . MCL 750.350a, or . . . MCL 750.430."

A discharge and dismissal under MCL 600.1076(4) is without adjudication of guilt or responsibility, and does not represent a conviction or finding of responsibility for purposes of MCL 600.1076 or for purposes of any disqualifications or disabilities imposed by law for conviction of a crime or a finding of responsibility. MCL 600.1076(6). An individual is only entitled to one discharge and dismissal under MCL 600.1076(4). MCL 600.1076(6).

C. Discharge and Dismissal for Individuals Charged with a Domestic Violence Offense

In addition to the requirements in MCL 600.1076(4)(a)–(e), discussed above, dismissal and discharge of proceedings against a drug treatment court participant charged with a domestic violence offense requires meeting three additional criteria in MCL 600.1076(5)(a)–(c):

- the individual has not previously had proceedings dismissed under MCL 769.4a;
- the domestic violence offense is eligible to be dismissed under MCL 769.4a; and
- the individual fulfills the terms and conditions imposed under MCL 769.4a, and the discharge and dismissal of proceedings are processed and reported under MCL 769.4a.

D. Procedural Requirements Following Dismissal and Discharge

When a discharge and dismissal is entered by the court pursuant to MCL 600.1076(4), the court must send a record of the discharge and dismissal to the criminal justice information center of the department of state police. MCL 600.1076(6). The department of state police must enter that information into the law enforcement information network with an indication that the individual participated in a drug treatment court. All records of the proceedings concerning the individual's participation in the drug treatment court program are to be closed to public inspection and are exempt from disclosure under the freedom of information act, MCL 15.231 to 15.246. Those records are, however, open to inspection under very specific circumstances:

> "[Records of an individual's participation in a drug treatment court] shall be open to the courts of this state, another state, or the United States, the department of corrections, law enforcement personnel, and prosecutors only for use in the performance of their duties or to determine whether an employee of the court, department, law enforcement agency, or prosecutor's office has violated his or her conditions of employment or whether an applicant meets criteria for employment with the court, department, law enforcement agency, or prosecutor's office." MCL 600.1076(6).

In addition, "[t]he records and identification division of the department of state police shall retain a nonpublic record of an arrest and the discharge and dismissal under this subsection." *Id*.

E. Participants Not Entitled to Dismissal and Discharge

Participants who successfully complete a drug treatment court program but are not entitled to dismissal and discharge of the proceedings against them are subject to the provisions of MCL 600.1076(7):

> "Except as provided in subsection (3), (4), or (5), if an individual has successfully completed probation or other court supervision, the court shall do the following:
>
> > "(a) If the court has not already entered an adjudication of guilt or responsibility, enter an adjudication of guilt or, in the case of a juvenile, enter a finding or adjudication of responsibility.
> >
> > "(b) If the court has not already sentenced the individual, proceed to sentencing or, in the case of a juvenile, disposition pursuant to the agreement.

> "(c) Send a record of the conviction and sentence or the finding or adjudication of responsibility and disposition to the criminal justice information center of the department of state police. The department of state police shall enter that information into the law enforcement information network with an indication of successful participation by the individual in a drug treatment court."

14.11 Unsuccessful Participation in Drug Treatment Court

When a participant does not successfully complete the drug court treatment program or is terminated from the program before completion, the court must indicate on the record, or in a written statement in the court file, that the individual's participation in the program was terminated and the reason for termination. MCL 600.1076(1).

The court must enter an adjudication of guilt or a finding of responsibility if adjudication was deferred pursuant to MCL 600.1070. MCL 600.1076(8). After entry of adjudication, the court must proceed to sentencing or disposition of the individual for the charges to which the individual pleaded guilty or admitted responsibility before his or her admission to drug treatment court. *Id*. After sentencing or disposition, the court must send a record of the sentence or disposition and the individual's unsuccessful participation in the drug treatment court to the criminal justice information center of the department of state police. The department of state police must enter that information into the law enforcement information network with an indication that the individual unsuccessfully participated in a drug treatment court. *Id*.

Chapter 15: Forfeiture

15

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In this chapter...

This chapter discusses Michigan's civil drug forfeiture laws. Specifically, this chapter discusses the following statutes: MCL 333.7521, MCL 333.7522, 333.7523, MCL 333.7524, MCL 333.7524a, and MCL 333.7525.

15.1 Introduction

Forfeiture is a procedure by which the government takes property without compensating the owner when the property has been illegally used or obtained. The procedure is *in rem*, against the property, as opposed to *in personam*, against the person. *In re Forfeiture of $655*, 210 Mich App 337, 343 (1995). Therefore, a forfeiture procedure may be initiated regardless of whether the property owner is convicted of a crime. Some of the constitutional protections afforded criminal defendants, however, are also afforded to claimants in forfeiture cases.*

*See **Sections 15.4**, **15.8**(G), and **15.10**(D), below, for further discussion of constitutional protections afforded to claimants in forfeiture cases.

There are three types of forfeiture:

- **Administrative forfeiture**, where the seizing agency attempts to forfeit the seized property without going to court.
- **Judicial forfeiture**, where forfeiture is accomplished through civil proceedings.
- **Summary forfeiture**, used when the item to be seized is a schedule 1 substance or a plant from which a schedule 1 or 2 controlled substance may be derived.

The Controlled Substances Act contains six statutes that govern drug forfeiture:

- **MCL 333.7521**. Describes the types of property subject to forfeiture and under what circumstances forfeiture is permissible.
- **MCL 333.7522**. Explains the methods by which property subject to forfeiture may be seized by the government.
- **MCL 333.7523**. Sets forth the procedures used in administrative forfeiture proceedings.
- **MCL 333.7524**. Provides for the disposition of forfeited property.
- **MCL 333.7524a**. Addresses the record-keeping requirements that must be followed by seizing agencies that have obtained forfeited property or have forfeiture proceedings pending.
- **MCL 333.7525**. Provides for summary forfeiture of schedule 1 controlled substances and plants from which schedule 1 and 2 controlled substances may be derived.

Michigan's drug forfeiture laws are very similar to federal civil drug forfeiture laws. Because Michigan courts have not yet addressed all of the forfeiture-related issues, a number of questions remain unanswered. This chapter will include federal case law to provide guidance where there are gaps in Michigan law.

15.2 Jurisdiction and Venue

A. Subject Matter Jurisdiction

*This case construed MCL 335.355, the predecessor statute to MCL 333.7523.

Circuit courts have subject matter jurisdiction over civil drug forfeiture actions. MCL 600.605 provides that the circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court, or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. Moreover, in *People v One 1973 Pontiac*, 84 Mich App 231, 234 (1978), the Court of Appeals found that the statute required the prompt institution of in rem judicial forfeiture proceedings in the circuit court.* Similarly, in *People v Five Hundred Fifty Eight Dollars*, unpublished opinion per curiam of the Court of Appeals, decided June 24, 2003 (Docket No. 239152), the only case to date that addresses subject matter jurisdiction in the context of the drug forfeiture statutes under the Controlled Substances Act, the Court of Appeals also found that subject matter jurisdiction lies exclusively with the circuit court in drug forfeiture proceedings. In that case, the circuit court dismissed the case for lack of subject matter jurisdiction because the amount in controversy did not exceed $25,000. The Court of Appeals reversed, finding that the Legislature intended for the circuit court to

have exclusive jurisdiction over drug forfeiture proceedings without regard to the value of the property being seized.

B. Appellate Jurisdiction

The Court of Appeals has jurisdiction to hear drug forfeiture cases pursuant to MCR 7.203(A),* and disposition of the assets does not render moot an appeal from an order of forfeiture.

*MCR 7.203(A) provides the Court of Appeals with jurisdiction over appeals of right.

In *In re Forfeiture of United States Currency*, 172 Mich App 200, 203 (1988), the prosecutor argued that the Court of Appeals lacked jurisdiction because the order of forfeiture allegedly had already been executed. The Court of Appeals found, however, that it had jurisdiction to review the case pursuant to MCR 7.203(A). The Court found that the real question raised by the prosecutor was one of mootness. Under the facts in that case the Court declined to dismiss for mootness because there was no indication in the record that the forfeiture had, in fact, already been executed, as claimed by the prosecutor. The Court stated in dicta, however, that if the judgment had been properly executed there would be no property subject to the court's control to return, and that in such circumstances, a dismissal based on mootness would be justified. The Court noted that, because an appeal will not ordinarily stay the effect or enforceability of the judgment, it is incumbent upon a claimant to obtain a stay of the judgment if he or she desires to seek a return of the property on appeal.

Similarly, in *In re Forfeiture of $53*, 178 Mich App 480, 484-485 (1989), the Court of Appeals again found that it had jurisdiction under MCR 7.203(A), and that the question was in actuality one of mootness. In that instance, just as in *In re Forfeiture of United States Currency, supra*, the Court found that the record contained no evidence that the property had actually been disposed of by the state. *In re Forfeiture of $53, supra* at 485. Accordingly, and because the issue raised was one of public significance likely to recur, the Court declined to dismiss the case for mootness.

In *In re Forfeiture of $256*, 445 Mich 279, 282 (1994), although the prosecution conceded to the propriety of the Court's jurisdiction, the prosecution argued that because the assets seized had already been disposed of, appeal of the forfeiture was moot. The Court of Appeals agreed. The Supreme Court reversed, holding that if there is merit to a defendant's challenge to a forfeiture order, the prior disposition of the assets will not bar entry of an order directing the plaintiff to return the assets or the proceeds from disposition of the assets.

C. Jurisdiction Over Out–of–State Property

To date, only one published case has considered the question of a Michigan court's jurisdiction over out-of-state property in forfeiture proceedings. In that case, *In re Forfeiture of $1,159,420*, 194 Mich App 134, 139 (1992), the trial

court ordered property owned by the claimants forfeited, including real property located in Florida. The Court of Appeals reversed this ruling as to the real property in Florida, finding that Michigan courts have jurisdiction only over land situated within the state's territorial borders. In making its ruling, the Court cited MCL 600.751, which provides as follows:

> "The courts of record of this state shall have jurisdiction over land situated within the state whether or not the persons owning or claiming interests therein are subject to the jurisdiction of the courts of this state."

D. Venue

MCL 600.1605 governs venue in forfeiture actions under the Controlled Substances Act. This statute provides that venue is proper in "[t]he county in which the subject of action, or any part thereof, is situated."

In cases where venue is proper in more than one circuit court, the forfeiture action must proceed in the first county in which a forfeiture complaint is filed. *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 85–87 (1992).

15.3 Standing

In order for a claimant to have standing to challenge a forfeiture, he or she must have a recognizable interest in the property. MCL 333.7523(1)(c); *In re Forfeiture of $53*, 178 Mich App 480, 494 (1989).

A. Standing of a Bailee

In *In re Forfeiture of $11,800*, 174 Mich App 727, 731 (1989), the Court of Appeals ruled that a bailee has standing to challenge the forfeiture of property. In that case, police seized cocaine and $11,800 from a car driven by Gerald Sevenski and brought a forfeiture action regarding the seized property. Sevenski's roommate, Joseph Shuler, filed a timely claim to $8,000 of the seized money, testifying that his employer had given him the money to make purchases for the company and that Sevenski had taken the money without his knowledge. Noting that Michigan's forfeiture statute closely parallels the analogous federal statute, the Court of Appeals cited federal case law finding that a bailee of currency had standing to challenge its forfeiture. Finding this case law persuasive, the Court affirmed the trial court's ruling that Shuler, as a bailee, had standing to challenge the forfeiture.

B. Standing of a Personal Representative or Heir

In *In re Forfeiture of $234,200*, 217 Mich App 320, 328 (1996), the Court of Appeals ruled that a personal representative has standing to challenge the forfeiture of property of an estate. In that case, following the death of Michael

Tufnell, police seized various items of personal property and $234,200.00 from Michael's storage garage and instituted forfeiture proceedings alleging that Michael had been a distributor of controlled substances. Michael's parents, Weller and Dorothy Tufnell, challenged the forfeiture of the money. The Tufnells asserted that Weller, as personal representative of Michael's estate, and both Weller and Dorothy, as Michael's sole heirs, had standing to challenge the forfeiture of the money. The trial court concluded that, as a matter of law, neither Weller as personal representative, nor Weller and Dorothy as Michael's heirs, had standing to challenge the forfeiture. Under factually similar circumstances an Illinois court found that personal representatives and beneficiaries of an estate had standing to challenge forfeiture of the estate's property. Finding this case law persuasive, the Court of Appeals reversed the trial court's ruling and held that Weller, as personal representative of Michael's estate, and Weller and Dorothy, as Michael's heirs, had standing to challenge the forfeiture.

C. Standing of Other Individuals

Federal courts have found that the following individuals also have standing to challenge the forfeiture of property:

- A person whose name is on the title of the forfeited property and who exercises dominion and control over the property. *United States v One Lincoln Navigator 1998*, 328 F3d 1011, 1013 (CA 8, 2003); *United States v Nava*, 404 F3d 1119, 1130 n 6 (CA 9, 2005).
- A lienholder with a recorded interest in the forfeited property. *United States v Premises Known as 7725 Unity Ave*, 294 F3d 954 (CA 8, 2002).
- A joint account holder of a bank account. *United States v US Currency, $81,000*, 189 F3d 28 (CA 1, 1999).
- A payee on a forfeited check. *Kadonsky v United States*, 3 Fed Appx 898 (CA 10, 2001).
- A person who has a financial interest in the outcome of the forfeiture or who will suffer injury as a result of the forfeiture. *One Lincoln Navigator 1998, supra*; *United States v 8402 W 132nd St*, 103 F Supp 2d 1040 (ND Ill, 2000); *United States v 5 S 351 Tuthill Rd*, 233 F3d 1017 (CA 7, 2000); *United States v One 1990 Lincoln Town Car*, 817 F Supp 1575 (ND Ga, 1993).
- A beneficiary of an express trust. *United States v Santoro*, 866 F2d 1538 (CA 4, 1989).
- A beneficiary of a land trust. *5 S 351 Tuthill Rd, supra.*
- A beneficiary of an irrevocable trust. *8402 W 132nd St, supra*.

Federal courts have found that the following individuals *do not* have standing to challenge the forfeiture of property:

- A person who has obtained title to the forfeited property via a fraudulent transfer. *United States v Real Property Located at 5208 Los Franciscos Way*, 385 F3d 1187 (CA 9, 2004).
- A child with a future interest in property. *United States v One Parcel of Property Located at RR 2*, 959 F2d 101 (CA 8, 1992).

15.4 Due Process Requirement

The Court of Appeals has held that the forfeiture statutes contained in the Controlled Substances Act do not violate the due process clauses of the state and federal constitutions.

In *One 1973 Pontiac Automobile*, 84 Mich App 231, 232 (1978), the Court considered the constitutionality of MCL 335.355, a predecessor to the current forfeiture statutes. In that case, the trial court found that MCL 335.355 unconstitutionally failed to provide property owners with procedural due process because the statute contained no provision for notice and hearing. The Court of Appeals reversed, expressly stating that MCL 335.355 met the constitutional requirements of procedural due process because seizure under MCL 335.355 required the prompt institution of forfeiture proceedings with service of a copy of the complaint and summons on the property owner. See *Derrick v Detroit*, 168 Mich App 560, 562–563 (1988), where the Court referenced *One 1973 Pontiac Automobile*, *supra*, and noted that because MCL 335.355 and MCL 333.7523 were similarly worded in relevant portions, MCL 333.7523 was also constitutional.

See also *In re Forfeiture of $109,901*, 210 Mich App 191, 197 (1995), where the Court cited *Derrick*, *supra*, and reaffirmed the constitutionality of the forfeiture statutes in the Controlled Substances Act.

15.5 Property Subject to Forfeiture

A. Per Se and Derivative Contraband

Items that are "not merely incidentally connected to a statutory violation, but instead [are] themselves illegal" are considered contraband per se and are subject to forfeiture. *American Eagle Fireworks v City of Lansing*, unpublished opinion per curiam of the Court of Appeals, decided June 18, 1999 (Docket No. 206713) (fireworks were contraband per se because plaintiffs did not have the statutorily required permit to possess them).

Derivative contraband is property that is otherwise lawful but may be subject to forfeiture because of its involvement with the defendant's illegal conduct. *People v Campbell*, 39 Mich App 433, 438 (1972). For example, money earned from an illegal drug sale is derivative contraband. *People v Washington*, 134 Mich App 504, 510 (1984).

B. Prescription Forms, Controlled Substances, Raw Materials, and Equipment Subject to Forfeiture

Property subject to forfeiture under the Controlled Substances Act includes:

> "(a) A prescription form, controlled substance, an imitation controlled substance, a controlled substance analogue, or other drug that has been manufactured, distributed, dispensed, used, possessed, or acquired in violation of this article.
>
> "(b) A raw material, product, or equipment of any kind that is used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance, a controlled substance analogue, or other drug in violation of this article; or a raw material, product, or equipment of any kind that is intended for use in manufacturing, compounding, processing, delivering, importing, or exporting an imitation controlled substance in violation of [MCL 333.7341].
>
> * * *
>
> "(g) Any other drug paraphernalia not described in subdivision (b) or (c)." MCL 333.7521(1)(a)–(b), (g).

C. Items Subject to Forfeiture When Used to Facilitate a Violation of the Controlled Substances Act

Derivative contraband, property subject to forfeiture because of its involvement with a controlled substance offense, is divided into four categories: containers, conveyances, books and records, and any thing of value. According to MCL 333.7521(1), the following property may be forfeited:

> "(c) Property that is used, or intended for use, as a container for property described in subdivision (a) or (b).
>
> "(d) Except as provided in subparagraphs (*i*) to (*iv*),* a conveyance, including an aircraft, vehicle, or vessel used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in subdivision (a) or (b)[.]
>
> * * *

*Exceptions to forfeiture of conveyances under certain circumstances. See **Section 15.10**, below.

> "(e) Books, records, and research products and materials, including formulas, microfilm, tapes, and data used, or intended for use, in violation of this article.
>
> "(f) Any thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article that is traceable to an exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article or that is used or intended to be used to facilitate any violation of this article including, but not limited to, money, negotiable instruments, or securities." MCL 333.7521(1)(c)–(f).

1. Containers

MCL 333.7521(1)(c) authorizes forfeiture of "[p]roperty that is used, or intended for use, as a container" for items described in MCL 333.7521(1)(a)–(b).

Houses as containers. A house may be subject to forfeiture as a container under MCL 333.7521(1)(c). In *In re Forfeiture of $655*, 210 Mich App 337, 340, 343 (1995), the Court adopted the "substantial nexus" test that had already been applied to forfeitures brought under MCL 333.7521(1)(f). The Court held that "upon proof by a preponderance of the evidence that real property subject to forfeiture has a substantial nexus to illegal drug activity, such that the property constitutes a 'container' under [MCL 333.7521(1)(c)] of the controlled substances act, a court may order a forfeiture of that real property." *In re Forfeiture of $655, supra* at 342.

Michigan courts have not defined the meaning of the term "container," as used in MCL 333.7521(1)(c), beyond finding that a house may constitute a container for purposes of that statute.

The statute contains no innocent owner defense* for items seized under MCL 333.7521(1)(c) as containers.

*For a detailed discussion of the innocent owner defense for conveyances, see **Section 15.10**(A)(2), below.

2. Conveyances

MCL 333.7521(1)(d) authorizes forfeiture of "a conveyance, including an aircraft, vehicle, or vessel used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt" of those items described in MCL 333.7521(1)(a)–(b).

In *In re Forfeiture of One 1987 Chevrolet Blazer*, 183 Mich App 182, 183 (1990), the Court approved forfeiture of a vehicle used to transport a customer to where a controlled substance was located. However, according to the Court, forfeiture of the vehicle as a conveyance was not proper under MCL 333.7521(1)(d) where the vehicle only transported *persons* involved in the offense and no evidence showed that the vehicle transported a controlled substance. Instead, the Court noted that forfeiture of the vehicle was proper

under MCL 333.7521(1)(f) as "any thing of value" used to facilitate a violation of the Controlled Substances Act. The Court noted that forfeiture of a vehicle as a conveyance would have been proper if the vehicle had been used to transport the *property* described in MCL 333.7521(a) or (b). *In re Forfeiture of One 1987 Chevrolet Blazer, supra* at 184–185.

MCL 333.7521(1)(d) itself provides four defenses to forfeiture of property as a conveyance. These defenses are discussed in detail in Section 15.10(A), below.

3. Books and Records

MCL 333.7521(1)(e) authorizes the forfeiture of "[b]ooks, records, and research products and materials, including formulas, microfilm, tapes, and data used, or intended for use" in violation of the Controlled Substances Act.

4. Any Thing of Value

MCL 333.7521(1)(f) authorizes the forfeiture of "[a]ny thing of value" that is furnished in exchange for a controlled substance or used to facilitate a violation of the Controlled Substances Act. Property may be forfeited as "a thing of value" under MCL 333.7521(1)(f) under certain circumstances:

- if the thing of value is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of the Controlled Substances Act and the thing of value is traceable to an exchange for a controlled substance, an imitation controlled substance, or other drug in violation of the Controlled Substances Act.
- if the thing of value is used or intended to be used to facilitate any violation of the Controlled Substances Act.

MCL 333.7521(1)(f) also contains an innocent owner defense for items seized pursuant to that subsection. The innocent owner defense under MCL 333.7521(1)(f) is discussed in detail in Section 15.10(B), below.

Property furnished in exchange for a controlled substance. In *In re Forfeiture of $18,000*, 189 Mich App 1, 5 (1991), the Court of Appeals set forth the standard that must be met in order to prove that property sought to be forfeited has been furnished in exchange for a controlled substance. In this case, which focused primarily on the close proximity presumption, the Court held that there must exist a substantial connection between the property subject to forfeiture and the criminal activity in order for forfeiture to be appropriate. See also *In re Forfeiture of $10,780*, 181 Mich App 761, 765 (1989).

Property traceable to an exchange for a substance. In *In re Forfeiture of $1,159,420*, 194 Mich App 134, 146 (1992), the Court of Appeals reaffirmed its holding in *In re Forfeiture of $18,000, supra*, and held that an asset may be

ordered forfeited under the traceable assets theory if the court "find[s] that there is a substantial connection between that asset and the underlying criminal activity." *Id*. The Court further explained that a plaintiff need not show a connection with a specific incident of drug dealing for each asset; rather, a plaintiff need only show that the assets are traceable to drug trafficking in general.

Property used or intended to be used to facilitate a violation of the Controlled Substances Act. As with property furnished in exchange for a controlled substance, real property may be subject to forfeiture under MCL 333.7521(1)(f) as property used to facilitate a violation of the Controlled Substances Act if there is a substantial connection between the real property and the underlying criminal activity. *In re Forfeiture of $5,264*, 432 Mich 242, 244 (1989).

A vehicle that has been used to facilitate the sale or receipt of a controlled substance by transportation of the customer to the controlled substance is subject to forfeiture under MCL 333.7521(1)(f) as property used to facilitate a violation of the Controlled Substances Act. *In re Forfeiture of One 1987 Chevrolet Blazer*, 183 Mich App 182, 185 (1990).

D. Money Found in Close Proximity to Drugs

MCL 333.7521(1)(f) creates a presumption that money found in close proximity to other property subject to forfeiture under MCL 333.7521(1)(a)–(e) is itself subject to forfeiture. MCL 333.7521(1)(f) states:

> "Any money that is found in close proximity to any property that is subject to forfeiture under subdivision (a), (b), (c), (d), or (e) is presumed to be subject to forfeiture under this subdivision. This presumption may be rebutted by clear and convincing evidence."

In *People v United States Currency*, 158 Mich App 126, 128 (1987), the police entered a house pursuant to a search warrant and found that a plastic bag containing cocaine was being flushed down the toilet. Defendant was standing two or three feet from the toilet, but was not observed flushing the toilet. The prosecutor initiated forfeiture proceedings against $4,082 found in defendant's possession at the time of his arrest in the house on the grounds that the money was found in close proximity to property that was subject to forfeiture. The trial court ordered the money forfeited because the defendant had failed to rebut the presumption. The Court of Appeals affirmed and found that a prosecutor need not show probable cause that money seized was connected with illegal drug activity before institution of a forfeiture action under the close proximity provision.

In *In re Forfeiture of $18,000*, 189 Mich App 1, 2 (1991), the claimant posted $18,000 cash as bail for a future in-law. The police, suspecting the money might be connected to drug activity, subjected it to a narcotics detection dog, and the dog alerted to the odor of cocaine. The trial court determined that the

money had been in proximity to cocaine, that the money was presumed to be subject to forfeiture under the close proximity provision of MCL 333.7521(1)(f), and that claimant had failed to successfully rebut this presumption. The Court of Appeals reversed, finding that in the absence of actually finding the money in close proximity to property subject to forfeiture, the mere fact that money may once have been in close proximity to property subject to forfeiture did not justify application of the close proximity presumption.

In *In re Forfeiture of $111,144*, 191 Mich App 524, 526, 531 (1992), the prosecutor brought a petition for forfeiture of a bank account after defendant was lawfully arrested and several checks were found on his person from that account, in close proximity to marijuana. The trial court granted forfeiture of the account and defendant appealed. The Court of Appeals held, in dicta, that checks are to be considered "money" for purposes of the close proximity presumption in MCL 333.7521(1)(f). *In re Forfeiture of $111,144, supra* at 531 n 1. The Court also considered the question of what proof is required in order for the proximity presumption to be invoked. Affirming the Court's prior holding in *US Currency $4,082, supra*, the Court held that "no connection between the money and claimant's alleged illegal drug activity need be established before the proximity presumption [contained in MCL 333.7521(1)(f)] can be invoked." *In re Forfeiture of $111,144, supra* at 533–534. The Court also held, in dicta, that while the money represented by the checks in defendant's possession at the time of his arrest was subject to the close proximity presumption, the other funds in the bank account were not subject to the same presumption, and that the prosecution was required to prove entitlement to those funds by a preponderance of the evidence.

In *In re Forfeiture of $275 (In re Forfeiture of $275 I)*, 272 Mich App 462, 463–466 (1998), rev'd by *In re Forfeiture of $275 (In re Forfeiture of $275 II)*, 457 Mich 864 (1998), the police instituted forfeiture proceedings against $275 found in the claimant's pocket as he stood within three feet of a codefendant who was arrested with crack cocaine in her possession. The trial court found that the money was in close proximity to the drugs and ordered the money forfeited. *In re Forfeiture of $275 I, supra* at 466. The Court of Appeals reversed, finding that proof of close proximity, without proof of a connection between the money and the drugs was insufficient to invoke the close proximity presumption. The Supreme Court then reversed the Court of Appeals and reinstated the forfeiture, implicitly reaffirming that no connection between the money and the claimant's alleged illegal drug activity need be established before the proximity presumption contained in MCL 333.7521(1)(f) can be invoked.

E. Drug Paraphernalia

MCL 333.7521(1)(g) provides a catch-all forfeiture provision for drug paraphernalia not forfeitable pursuant to MCL 333.7521(1)(b) or (c). MCL 333.7521(1)(g) states that "any other drug paraphernalia not described in subdivision (b) or (c)" is subject to forfeiture.

15.6 Seizure of Property Subject to Forfeiture

A. Seizure of Property With Process

MCL 333.7522 provides the statutory basis for seizure of property with process. The first sentence of MCL 333.7522 provides:

> "Property that is subject to forfeiture under this article or pursuant to [MCL 333.7521] may be seized upon process issued by the circuit court having jurisdiction over the property."

MCL 333.7522 does not provide a definition for the term "process." Process, however, generally involves a prosecutor obtaining an ex parte seizure order from a circuit court judge authorizing the seizure of property that is connected with a violation of the Controlled Substances Act.

B. Seizure of Property Without Process

MCL 333.7522 also provides the statutory basis for seizure of property without process:

> "Seizure without process may be made under any of the following circumstances:
>
> > "(a) Incident to a lawful arrest, pursuant to a search warrant, or pursuant to an inspection under an administrative inspection warrant.
> >
> > "(b) The property is the subject of a prior judgment in favor of this state in an injunction or forfeiture proceeding under [the Controlled Substances Act] or pursuant to [MCL 333.17766a].*
> >
> > "(c) There is probable cause to believe that the property is directly or indirectly dangerous to health or safety.
> >
> > "(d) There is probable cause to believe that the property was used or is intended to be used in violation of this article or [MCL 333.17766a]."

*MCL 333.17766a, repealed in 2002, pertained to the use, possession, or delivery of androgenic anabolic steroids.

Probable cause to seize property. In *People v McCullum*, 172 Mich App 30, 35 (1988), the Court of Appeals held that in order to establish the probable cause necessary to justify the seizure of property under MCL 333.7522, the government must show "'a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.'" *McCullum, supra* at 35, quoting *United States v $22,287 United States Currency*, 709 F2d 442, 446-447 (CA 6, 1983). The Court further held that circumstantial evidence

may be sufficient to establish probable cause to support forfeiture even when no actual drug transaction was witnessed.

C. Illegally Seized Property

In *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 697 (1965), the United States Supreme Court held that the Fourth Amendment protection against unreasonable searches and seizures applies to civil forfeiture proceedings. Thus, as Michigan courts have recognized, illegally seized evidence is not admissible in a forfeiture action. *In re Forfeiture of United States Currency*, 166 Mich App 81, 88 (1988). However, evidence that has been illegally seized may be forfeited if a preponderance of the evidence untainted by the illegality supports an order of forfeiture. *In re Forfeiture of $180,975*, 478 Mich 444, 447 (2007). According to the Court:

> "[T]he illegal seizure of property does not immunize it from forfeiture, and . . . illegally seized property that is the subject, or 'res,' of the forfeiture proceeding may be offered into evidence for the limited purpose of establishing its existence and the court's in rem jurisdiction over it. . . . [I]llegally seized property is forfeitable under MCL 333.7521 as long as the forfeiture can be supported by a preponderance of untainted evidence.
>
> "While illegally seized evidence itself is physically excluded, it is not entirely excluded from the forfeiture proceeding. However, questions concerning this excluded evidence should be limited to the circumstances surrounding its existence. For example, in the case of illegally seized cash, the state should not be permitted to exploit the search by asking how the money was packaged, or whether evidence of drugs was detected on the money. In addition, any other legally obtained evidence may be introduced to support the forfeiture." *In re Forfeiture of $180,975*, *supra* at 460.

In *In re Forfeiture of $180,975*, *supra* at 470-471, even though the cash subject to forfeiture was physically inadmissible, evidence established that the claimant's behavior was not "ordinary and innocent" with regard to the cash. The untainted evidence included the claimant's inability to offer a credible explanation for having such a large sum of cash in the rental car she was driving along a corridor known for drug trafficking, her history of repeated car rentals, the absence of any evidence in support of the claimant's intended use of the cash, and the fact that the claimant's negligible taxable earnings made it unlikely that she had the ability to produce such an income. *Id*. at 465-470.

D. Custody of Seized Property

MCL 333.7523(2) governs the custody of seized property before trial:

> "(2) Property taken or detained under this article shall not be subject to an action to recover personal property, but is deemed to be in the custody of the seizing agency subject only to this section or an order and judgment of the court having jurisdiction over the forfeiture proceedings. When property is seized under this article, the seizing agency may do any of the following:
>
> > "(a) Place the property under seal.
> >
> > "(b) Remove the property to a place designated by the court.
> >
> > "(c) Require the administrator to take custody of the property and remove it to an appropriate location for disposition in accordance with law.
> >
> > "(d) Deposit money seized under this article into an interest-bearing account in a financial institution. As used in this subdivision, 'financial institution' means a state or nationally chartered bank or a state or federally chartered savings and loan association, savings bank, or credit union whose deposits are insured by an agency of the United States government and that maintains a principal office or branch office located in this state under the laws of this state or the United States."

MCL 333.7523(2) expressly provides that once property is seized for purposes of a forfeiture action, the owner of the property is barred from filing a civil action to recover the seized property. MCL 333.7523(2); *Derrick v Detroit*, 168 Mich App 560, 562–563 (1988).

Establishing custody over seized property. Forfeiture proceedings are in rem proceedings. *In re Forfeiture of $655*, 210 Mich App 337, 343 (1995). In order to vest the court with jurisdiction to enter an order of forfeiture, a forfeiture proceeding brought under the Controlled Substances Act requires the seizing agency to be in possession or control of the property at issue. *Id*. In *In re Forfeiture of 301 Cass St*, 194 Mich App 381, 387 (1992), the Court of Appeals confirmed that any of the methods set forth in MCL 333.7523(2) are sufficient to establish possession or control of the property, and that no one particular method is required to be used. In that case, the trial court ordered real property forfeited under the Controlled Substances Act. The owner of the property appealed, arguing that the trial court lacked jurisdiction because the police had not placed the property under seal or posted notices and were not in possession of the property. The Court of Appeals held that while MCL 333.7523(2) provides that one method of establishing possession of property is by placing it under seal, the statute does not exclude other methods of exercising possession or control.

E. Return of Seized Property

In *People v Humphrey*, 150 Mich App 806, 814–815 (1986), and *People v Wade*, 157 Mich App 481, 486-488 (1987), the Court of Appeals considered whether a criminal court had jurisdiction to order the return of a claimant's property that was the subject of pending civil forfeiture proceedings in circuit court. In both cases the Court found that the criminal court lacked jurisdiction to order the return of the seized property when a forfeiture action was pending in addition to a criminal action.

In *People v Washington*, 134 Mich App 504, 508 (1984), the Court of Appeals considered whether a criminal court had jurisdiction to order the return of a claimant's property where no forfeiture proceedings had been filed. The Court found that jurisdiction *does* lie with the criminal court to return the seized property when no forfeiture proceedings have been filed.

In *In re 33rd District Court*, 138 Mich App 390, 392–394 (1985), the Court of Appeals considered whether a state district court has jurisdiction to order the return of a claimant's property where the property has been turned over to federal authorities and where the property has been the proper subject of a forfeiture action in the federal district court. The Court found that where the property has been turned over to federal authorities and is properly the subject of a forfeiture action in federal court, the state district court lacks jurisdiction to order the return of the seized property.

In *In re Return of Forfeited Goods*, 452 Mich 659, 661 (1996), the Michigan Supreme Court considered whether a circuit court may order the return of a claimant's property after that property is administratively forfeited. In that case, the property in question was properly seized and the defendant was given notice of the pending forfeiture action. The defendant, however, failed to contest the forfeiture. Accordingly, after the required number of days the property was ordered administratively forfeited. A criminal case against the defendant was subsequently dismissed. At that time, the defendant's attorney moved for the return of the seized property, and the trial court ordered defendant's property returned to him. The Michigan Supreme Court reversed the trial court, finding that when an administrative forfeiture has been declared, the circuit court does not have jurisdiction to review the matter or authority to order the return of the forfeited property.

15.7 Judicial Forfeiture Procedures

A. Introduction

A judicial forfeiture action is instituted by the filing of a summons and complaint in the circuit court.

There are four situations in which judicial forfeiture proceedings must be undertaken:

- When the property subject to forfeiture is worth more than $50,000.
- When the property subject to forfeiture has been seized with process, regardless of value.
- When the property subject to forfeiture has been seized without process and is worth less than $50,000, but the property owner has filed a timely claim and posted bond.
- When the property subject to forfeiture is real property, regardless of value.

The statutory basis for judicial forfeiture proceedings in the first three of these situations is found in MCL 333.7523(1). The statutory basis for judicial forfeiture proceedings in cases where the property subject to forfeiture is real property is found in two separate statutes, MCL 333.7523(3) and MCL 600.2932(1). MCL 333.7523(3) provides in pertinent part:

> "Title to real property forfeited under this article shall be determined by a court of competent jurisdiction."

MCL 600.2932(1) provides:

> "Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not."

B. Applicability of Rules of Evidence

The Michigan Rules of Evidence are applicable to forfeiture actions. *In re Forfeiture of 301 Cass St*, 194 Mich App 381, 385-386 (1992).

C. Admissibility of Illegally Seized Evidence

Illegally seized evidence is not admissible in a civil forfeiture proceeding. *One 1958 Plymouth Sedan v Pennsylvania*, 380 US 693, 700-701 (1965). However, evidence that has been illegally seized may be forfeited if a preponderance of the evidence untainted by the illegality supports an order of forfeiture. *In re Forfeiture of $180,975*, 478 Mich 444, 447 (2007). Questions concerning illegally seized evidence subject to forfeiture are limited to the circumstances surrounding the existence of the property; for example, a claimant's intended use of the property, a claimant's ability to offer a credible

explanation for having the property at the time and place it was seized, a claimant's earning capacity, etc.). *Id*. at 460.

D. Applicability of the Michigan Court Rules

The Michigan Court Rules apply to forfeiture actions under the Controlled Substances Act. *In re Forfeiture of 301 Cass*, *supra* at 384-385; *In re Forfeiture of $1,159,420*, 194 Mich App 134 (1992). As the Court noted in *In re Forfeiture of 301 Cass*, *supra*, "The Michigan Court Rules govern practice and procedure in all courts except where more specific rules are provided. . . . Therefore, we find no support for the contention that the rules of civil procedure do not apply to forfeiture proceedings." *Id*. at 384–385.

E. Standing

In order to challenge a judicial forfeiture action, a claimant must have standing. For a detailed discussion of standing, see Section 15.3, above.

F. Applicability of Discovery Rules

The court rules governing civil procedure apply to forfeiture proceedings. *In re Forfeiture of 301 Cass*, *supra* at 384-385; *In re Forfeiture of $1,159,420*, *supra* at 138. In *In re Forfeiture of $1,159,420*, *supra* at 138, the Court of Appeals specifically found that the discovery rules contained in the Michigan Court Rules are applicable to forfeiture actions.

In *In re Forfeiture of $1,159,420*, *supra* at 142, the prosecutor initiated forfeiture proceedings against real and personal property owned by the claimants. Following a hearing, the trial court ordered the property forfeited. The claimants appealed, arguing in part that the trial court erred in issuing secret subpoenas to witnesses with no notice to the claimants. The Court of Appeals acknowledged that the claimants in a drug forfeiture action are entitled to notice of service of any discovery requests on witnesses, explaining that "[s]uch notice is necessary to any party before discovery may be had in order for the opposing party to assert any objection or move for a protective order to prohibit the production of any materials otherwise not subject to discovery." The Court concluded, however, that the claimants were not prejudiced by their lack of notice and that reversal was not warranted.

G. Discovery of Identity of Confidential Informant

It is not uncommon for the police to obtain information from confidential informants during investigations that result in forfeiture proceedings. In *People v Poindexter*, 90 Mich App 599, 608 (1979), the Court of Appeals considered a defendant's right to disclosure of an informant's identity in a criminal case. Citing the United States Supreme Court's ruling in *Roviaro v United States*, 353 US 53, 60-62 (1957), the Court held that in a criminal case

a defendant is entitled to the disclosure of an informant's identity "where disclosure is 'essential to a fair determination of [the] cause.'" *Poindexter*, *supra* at 608, quoting *Roviaro*, *supra* at 62. To date, however, Michigan courts have not considered a claimant's right to disclosure of an informant's identity in a forfeiture proceeding.

At least one federal circuit has considered this question. In *United States v One 1986 Chevrolet Van*, 927 F2d 39, 43 (CA 1, 1991), the court found that a defendant does have a right to the disclosure of an informant's identity in a civil forfeiture action where disclosure "is essential or vital to a fair determination of the party's claim." In that case, the district court ordered the forfeiture of the claimant's van. The claimant appealed, arguing, among other things, that the district court should have ordered the government to reveal the name of the informant referred to in the affidavit in support of the search warrant for the defendant's vehicle. The United States Court of Appeals subsequently affirmed the district court's order of forfeiture. In so doing, however, the Court explained:

> "The government's privilege to withhold the identity of informants is well-established. This privilege, however, is a qualified one. To determine the privilege's applicability, the Supreme Court has set forth a balancing test [in *Rovario, supra*] whereby the public's interest in protecting the flow of information and the personal safety of the informant is weighed against the individual's need for the informant's identity. The burden is on the claimant to demonstrate the need for disclosure. Thus, the applicability of the privilege will depend on the circumstances of each case.
>
> "The privilege, moreover, applies in criminal as well as civil cases, and therefore applies to the present civil forfeiture action. In a civil case, however, the question is not whether the information is necessary to the accused's defense, but whether it is essential or vital to a fair determination of the party's claim. Although the privilege is of equal weight and importance in both types of cases, the privilege is less likely to yield in a civil case because the informant's identity is not usually essential to the preparation of a civil case." *Id*. at 43.

H. Applicability of Privilege Against Self–Incrimination

The Fifth Amendment of the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

In dicta appearing in a footnote in *Austin v United States*, 509 US 602 (1993), the Court discussed the Fifth Amendment as it has been applied to other types of forfeiture proceedings. According to the *Austin* Court, although the Fifth Amendment's protection against self-incrimination is textually limited to

criminal cases, the privilege may apply to civil forfeiture proceedings but only where the owner faced the possibility of subsequent criminal proceedings, or where the forfeiture statute had made the culpability of the owner an issue. *Id*. at 608 n 4.

The Michigan Court of Appeals too found that the Fifth Amendment applies to civil drug forfeiture proceedings. In *In re Forfeiture of $111,144*, 191 Mich App 524, 526-527 (1992), the prosecutor brought a forfeiture action against money in a bank account belonging to a company co-owned by the claimant, and against two checks drawn on that account that were found in close proximity to controlled substances. During a motion hearing, the prosecutor asked the claimant whether he had engaged in the business of delivering marijuana. The claimant asserted his Fifth Amendment privilege against self-incrimination and refused to answer the question. The prosecution moved for summary disposition and defense counsel stated that he had other witnesses who would testify on the claimant's behalf. The trial court granted the prosecutor's motion for summary disposition, and the claimant appealed this ruling. The Court of Appeals reversed, stating:

> "On remand, claimant shall be allowed the opportunity to present evidence, apart from his own testimony, which is protected by the Fifth Amendment, in his attempt to overcome the burden of rebutting the presumption of forfeiture. The court may also fashion any other remedy, not inconsistent with this opinion, that protects claimant's Fifth Amendment privilege and allows the forfeiture case to proceed." *Id*. at 533.

I. No Right to Jury Trial

A claimant does not have the right to a jury trial in a civil drug forfeiture action. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 154-155 (1992). The Court of Appeals explained the reason for this as follows:

> "The constitutional right to trial by jury under Const 1963, art 1, § 14 applies to civil actions at law that were triable by a jury at the time the constitutional guarantee was adopted. Because there was no right to a jury trial in equitable matters, matters in equity are not entitled to jury trials unless so preserved or created by the Legislature. The forfeiture act does not indicate a right to a jury trial in forfeiture actions. Because a forfeiture action is equitable in nature, we find that the Legislature's failure to grant the right to a jury trial in forfeiture matters makes the right unavailable." *Id*. (Internal citations omitted.)

But see *United States v One 1976 Mercedes Benz 280S*, 618 F2d 453, 456 (CA 7, 1980), where the claimant in a federal civil drug forfeiture action was found to have a constitutional right, under the Seventh Amendment, to a jury trial on any genuine issue of material fact.

J. Burden of Proof

The burden of proof a party must meet in a forfeiture action varies depending on the stage of the proceeding and on whether any presumption applies.

1. To Seize Property

MCL 333.7522 provides the statutory basis for seizure of property without process:

> "Seizure without process may be made under any of the following circumstances:
>
> > "(a) Incident to a lawful arrest, pursuant to a search warrant, or pursuant to an inspection under an administrative inspection warrant.
> >
> > "(b) The property is the subject of a prior judgment in favor of this state in an injunction or forfeiture proceeding under this article or pursuant to [MCL 333.17766a*].
> >
> > "(c) There is probable cause to believe that the property is directly or indirectly dangerous to health or safety.
> >
> > "(d) There is probable cause to believe that the property was used or is intended to be used in violation of this article or [MCL 333.17766a]."

*MCL 333.17766a, repealed in 2002, pertained to the use, possession, or delivery of androgenic anabolic steroids.

In *People v McCullum*, 172 Mich App 30 (1988), the Court of Appeals held that in order to establish the probable cause necessary to justify the seizure of property under MCL 333.7522, the government must show "'a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.'" *McCullum*, *supra* at 35, quoting *United States v $22,287 United States Currency*, 709 F2d 442, 446-447 (CA 6, 1983). The Court further held that circumstantial evidence may be sufficient to establish probable cause to support forfeiture even when no actual drug transaction was witnessed.

2. At Trial

In *In re Forfeiture of $18,000*, 189 Mich App 1, 4 (1991), the Court of Appeals determined that the correct burden of proof in a forfeiture proceeding is a preponderance of the evidence. Proof by a preponderance of the evidence "requires that the factfinder believe that the evidence supporting the existence of the contested fact outweighs the evidence supporting its nonexistence." *In re Forfeiture of United States Currency*, 166 Mich App 81, 87 (1988).

3. When Money Is Found in Close Proximity to Drugs

MCL 333.7521(1)(f) creates a presumption that money is subject to forfeiture when it is found in close proximity to other property that is subject to forfeiture under MCL 333.7521(1)(a)–(e). The relevant portion of MCL 333.7521(1)(f) provides:

> "Any money that is found in close proximity to any property that is subject to forfeiture under subdivision (a), (b), (c), (d), or (e) is presumed to be subject to forfeiture under this subdivision. This presumption may be rebutted by clear and convincing evidence."

In cases where the prosecution establishes that money was found in close proximity to property subject to forfeiture, the party against whom the presumption applies must come forward with evidence to rebut the presumption. As MRE 301 states:

> "In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains through the trial upon the party on whom it was originally cast."

In order for the close proximity presumption* to be invoked, the prosecutor need not establish any connection between the money and the claimant's alleged illegal drug activity. *In re Forfeiture of $275*, 457 Mich 864 (1988). Rather, the prosecutor need only demonstrate that the money was actually found in close proximity to property subject to forfeiture under the Controlled Substances Act. *In re Forfeiture of $18,000*, 189 Mich App 1, 3–4 (1991).

*For more information about the close proximity presumption, see **Section 15.5**(D), above.

K. Attorney Fees, Witness Fees, and Towing and Storage Fees

MCL 333.7523(1)(c) provides, in part, that if property is ordered forfeited by the court the obligor of the surety bond in a forfeiture proceeding must pay all costs and expenses of the forfeiture proceeding.

1. Attorney Fees

Michigan follows the rule that attorney fees are not recoverable as an element of costs unless they are specifically authorized by statute, court rule, or by a recognized exception. *In re Forfeiture of $10,780*, 181 Mich App 761, 763 (1990). MCL 333.7523(1)(c) does not specifically provide for attorney fees. Therefore, when property is ordered forfeited by the court, the court is not authorized to require the obligor to pay attorney fees. *In re Forfeiture of $10,780*, *supra* at 766.

2. Witness Fees

MCL 600.2552(1) provides:

> "A witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day, or may be paid for his or her loss of working time but not more than $15.00 for each day shall be taxable as costs as his or her witness fee."

In *In re Forfeiture of $10,780*, *supra* at 766, the Court of Appeals held that MCL 600.2552(1) applies to civil drug forfeiture actions.

3. Towing and Storage Fees

In *People v 1987 Mercury*, 252 Mich App 533, 548 (2002), the Court of Appeals held that claimants who are successful in avoiding forfeiture of their property may not be required to pay towing and storage fees associated with the forfeiture action.

15.8 Administrative Forfeiture Procedures

A. Introduction

*Prior to April 1, 1991, the maximum value for property subject to administrative forfeiture was $100,000.

Administrative forfeitures may only occur when the property subject to forfeiture is seized without process, i.e., without court involvement, and where the property subject to forfeiture is worth less than $50,000.* MCL 333.7523(1). In an administrative forfeiture, the seizing agency informs the property owner and the prosecutor of his or her intent to forfeit the property. The property owner has 20 days to file a claim and post a bond challenging the forfeiture. If the owner fails to do so, the property is forfeited to the seizing agency. If the owner files a timely claim and posts sufficient bond, however, the case becomes a judicial forfeiture and proceeds to circuit court, where the prosecutor pursues forfeiture by filing a forfeiture complaint.

B. Statute

MCL 333.7523(1)(a)–(d) set forth the circumstances under which administrative forfeiture proceedings may be utilized and the procedures to be followed in those proceedings. MCL 333.7523(1) provides:

*MCL 333.7522 authorizes seizure both with and without process under specified circumstances.

> "(1) If property is seized pursuant to [MCL 333.7522*], forfeiture proceedings shall be instituted promptly. If the property is seized without process as provided under [MCL 333.7522], and the total value of the property seized does not exceed $50,000.00, the following procedure shall be used:

"(a) The local unit of government that seized the property or, if the property was seized by the state, the state shall notify the owner of the property that the property has been seized, and that the local unit of government or, if applicable, the state intends to forfeit and dispose of the property by delivering a written notice to the owner of the property or by sending the notice to the owner by certified mail. If the name and address of the owner are not reasonably ascertainable, or delivery of the notice cannot be reasonably accomplished, the notice shall be published in a newspaper of general circulation in the county in which the property was seized, for 10 successive publishing days.

"(b) Unless all criminal proceedings involving or relating to the property have been completed, the seizing agency shall immediately notify the prosecuting attorney for the county in which the property was seized or, if the attorney general is actively handling a case involving or relating to the property, the attorney general of the seizure of the property and the intention to forfeit and dispose of the property.

"(c) Any person claiming an interest in property that is the subject of a notice under subdivision (a) may, within 20 days after receipt of the notice or of the date of the first publication of the notice, file a written claim signed by the claimant with the local unit of government or the state expressing his or her interest in the property. Upon the filing of the claim and the giving of a bond to the local unit of government or the state in the amount of 10% of the value of the claimed property, but not less than $250.00 or greater than $5,000.00, with sureties approved by the local unit of government or the state containing the condition that if the property is ordered forfeited by the court the obligor shall pay all costs and expenses of the forfeiture proceedings. The local unit of government or, if applicable, the state shall transmit the claim and bond with a list and description of the property seized to the attorney general, the prosecuting attorney for the county, or the city or township attorney for the local unit of government in which the seizure was made. The attorney general, the prosecuting attorney, or the city or township attorney shall promptly institute forfeiture proceedings after the expiration of the 20-day period. However, unless all criminal proceedings involving or relating to the property have been completed, a city or township attorney shall not institute forfeiture proceedings without the consent of the prosecuting attorney or, if the attorney general is actively

handling a case involving or relating to the property, the attorney general.

"(d) If no claim is filed or bond given within the 20-day period as described in subdivision (c), the local unit of government or the state shall declare the property forfeited and shall dispose of the property as provided under [MCL 333.7524]. However, unless all criminal proceedings involving or relating to the property have been completed, the local unit of government or the state shall not dispose of the property under this subdivision without the written consent of the prosecuting attorney or, if the attorney general is actively handling a case involving or relating to the property, the attorney general."

C. Circumstances Under Which Administrative Forfeiture Proceedings May Be Used

According to MCL 333.7523(1), administrative forfeiture proceedings may be utilized only when two conditions are met:

1) The property subject to forfeiture has been seized without process, and

2) The property subject to forfeiture is worth less than $50,000.

In *Derrick v Detroit*, 168 Mich App 560, 562 (1988), the Court of Appeals considered whether MCL 333.7523(1) applied to the forfeitability of property worth more than the statutory limit set forth in MCL 333.7523(1). In that case the plaintiff asserted that MCL 333.7523(1) barred all forfeiture proceedings against property worth more than the limit set forth in that statute (at that time $100,000). The Court of Appeals noted that MCL 333.7523(1) merely sets forth the limits for use of administrative forfeiture proceedings, not all types of forfeiture proceedings, and held that MCL 333.7523(1) does not prohibit forfeiture by other methods when property exceeds the statutory limits.

D. Notice to Claimant

MCL 333.7523(1)(a) requires the government entity that seizes property to give the property owner notice of the seizure and the pending forfeiture action. This notice must be in writing and must ordinarily be delivered by one of two methods: personal delivery or delivery by certified mail. If, however, the name and address of the property owner "are not reasonably ascertainable or delivery of the notice cannot be reasonably accomplished," notice may be given by publication. *Id*. In such cases, notice must be published for 10 successive days "in a newspaper of general circulation" in the county in which the property was seized. *Id*.

To date, only one Michigan case has construed the notice requirement set forth in MCL 333.7523(1)(a). In that case, *Govea v City of Grand Rapids*, unpublished opinion per curiam of the Court of Appeals, decided September 3, 1999 (Docket No. 209874), the plaintiff was presented with proper written notice of the seizure of her property and the pending forfeiture case at the time of her arrest. When the plaintiff was taken to jail shortly thereafter, she failed to bring the notice with her, and the notice remained unavailable to her during her incarceration. The trial court excused the plaintiff's failure to file a claim and bond within 20 days of her receipt of notice because the notice form was removed from the plaintiff when she entered the county jail. The Court of Appeals disagreed, noting that all parties agreed that the plaintiff was served with proper notice and that once the plaintiff was personally served with proper notice, the notice requirements of MCL 333.7523(1)(a) were satisfied and the defendant had no further obligation to the plaintiff.

E. Notice to the Prosecutor

MCL 333.7523(1)(b) requires the government entity that seizes property to immediately give notice of the seizure and pending forfeiture proceeding to the prosecuting attorney for the county in which the property was seized, "unless all criminal proceedings involving or relating to the property have been completed." Alternatively, "if the attorney general is actively handling a case involving or relating to the property," notice must be given to the attorney general. *Id*.

F. Filing a Claim

Any person who claims an interest in property that is the subject of a notice of seizure and pending forfeiture action under MCL 333.7523(1)(a) may file a claim in connection with that property. MCL 333.7523(1)(c). To be valid, the claim must be filed within 20 days after receipt of the notice or within 20 days of the first publication of the notice. *Id*. The claim must be in writing, it must be signed by the claimant, it must be filed with the local unit of government or the state, and it must express the claimant's interest in the seized property. *Id*.

The time limit for filing a claim regarding seized property begins to run the day following receipt of the notice, regardless of the time of day that notice is received. *Cavins v Jackson*, unpublished opinion per curiam of the Court of Appeals, decided August 4, 1998 (Docket No. 202428). In *Cavins*, the plaintiff was served with notice of the seizure of his property on November 1, 1996. According to MCR 1.108(1), the day of the occurrence of an event after which a designated period of time begins to run is not counted in determining the end date of the designated time period. Consequently, the 20-day time limit for the plaintiff to file a claim expired on November 21, 1996. The plaintiff attempted to file a claim in connection with this property on November 22, 1996, but the trial court found the claim to be tardy and precluded the plaintiff from claiming any interest in the property. The plaintiff

unsuccessfully argued on appeal that because he received notice of the seizure of his property after the close of business hours on November 1, 1996, the notice date should have been November 2, 1996, thus starting the 20-day time limit running on November 3, 1996, and making November 22, 1996, the final day for filing a claim concerning the seized property.

G. Posting Bond

In addition to placing a 20-day time limit on filing claims on property seized without process, MCL 333.7523(1)(c) also provides that a claimant wishing to challenge the seizure of property must post a bond with the local unit of government or the state in the amount of 10 percent of the value of the claimed property, but not less than $250.00 or more than $5,000. The bond must have sureties approved by the local unit of government or the state containing the condition that if the property is ordered forfeited by the court, the obligor shall pay all costs and expenses of the forfeiture proceedings. *Id*.

Surety requirement. In *In re Forfeiture of United States Currency*, 172 Mich App 790, 791 (1988), the Court of Appeals considered whether a claimant may act as his or her own surety in forfeiture proceedings. In that case, the prosecutor appealed the trial court's decision that the claimant could act as his own surety in forfeiture proceedings. The Court of Appeals, noting that a suretyship contract requires three parties—the principal, the obligee, and the surety—held that "[b]ecause of the nature of the suretyship relationship, an individual cannot be his own surety." *Id*. at 792–793.

In *In re Forfeiture of 12-Gauge Shotgun*, 204 Mich App 133, 134 (1994), the Court of Appeals considered whether in a forfeiture action a claimant may deposit cash equal to the amount of the bond in lieu of a surety bond. In that case, the trial court held that a cash deposit was not permissible and the defendant appealed. The Court of Appeals noted that MCL 600.2631 provides:

> "'In any civil cause, action, proceeding or matter before any court, . . . where bond or bail of any character is required or permitted for any purpose, it shall be lawful for the party or parties required or permitted to furnish such bail or bond to deposit, in lieu thereof, in the same manner herein provided for, cash . . . equal in amount to the amount of the bond or bail so required and permitted.'" *In re Forfeiture of 12-Gauge Shotgun, supra* at 135.

*Formerly MCR 2.109(C).

Indigent claimants. To date, only one Michigan case has considered the constitutionality of the bond requirement as applied to indigent claimants. In that case, *People v Any and All Monies*, unpublished opinion per curiam of the Court of Appeals, decided November 12, 1996 (Docket No. 185677), the claimants argued that the bond requirement of the forfeiture statute denied due process to indigent parties. The Court, however, noted that the court rules governing civil procedure apply to drug forfeiture proceedings and that MCR

2.109(B),* specifically provides for waiver of security upon a showing of indigence. *Any and All Monies, supra.* According to MCR 2.109(B)(1):

> "The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond."

H. Promptness Requirement

Once the claim and bond filed by the claimant have been forwarded to the prosecuting attorney, the appropriate entity must "promptly institute forfeiture proceedings after the expiration of the 20-day period." MCL 333.7523(1)(c). However, although the statute requires that forfeiture proceedings be promptly instituted, it does not specify a time period in which the forfeiture proceedings must be initiated.

In *In re Forfeiture of One 1983 Cadillac*, 176 Mich App 277, 280–281 (1989), the Court of Appeals set forth factors a court must consider in determining if a forfeiture action has been undertaken promptly. According to the Court, "These factors include, but are not limited to 'the lapse of time between seizure and filing of the complaint, the reason for the delay, the resulting prejudice to the defendant and the nature of the property seized.'" *Id.*, quoting *Dep't of Natural Resources v Parish*, 71 Mich App 745, 750 (1976). Based on these factors, the Court in *In re Forfeiture of One 1983 Cadillac*, *supra*, found that 4 months constituted an unreasonable delay. In other cases the Court of Appeals found that delays of 2-1/2 months and 3 months were not unreasonable. See *People v One 1979 Honda Auto*, 139 Mich App 651, 657 (1984), and *In re Forfeiture of $109,901*, 210 Mich App 191, 196 (1995).

In *Lenawee Pros v One 1981 Buick 2-Door Riviera*, 165 Mich App 762, 766–767 (1988), and *Hollins v Detroit Police Dep't*, 225 Mich App 341, 348 (1997), the Court concluded that delays of 6-1/2 months and 9 months were unreasonable.

I. Disposition of Forfeited Property

MCL 333.7523(1)(d) provides for the disposition of forfeited property if no timely claim is filed concerning seized property. If no timely claim is filed, the local unit of government or the state must declare the property forfeited and dispose of the property according to the provisions of MCL 333.7524.*

*Section 15.11, below.

15.9 Summary Forfeiture Procedures

The third type of forfeiture is summary forfeiture. MCL 333.7525 provides the statutory authority for summary forfeiture:

> "(1) A controlled substance listed in schedule 1 that is possessed, transferred, sold, or offered for sale in violation of this article is contraband and shall be seized and summarily forfeited to this state. A controlled substance listed in schedule 1 which is seized or comes into the possession of this state, the owner of which is unknown, is contraband and shall be summarily forfeited to this state.
>
> "(2) Species of plants from which controlled substances in schedules 1 and 2 may be derived which have been planted or cultivated in violation of this article, or of which the owner or cultivator is unknown, or which are wild growths, may be seized and summarily forfeited to this state.
>
> "(3) The failure, upon demand by the administrator or its authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored to produce an appropriate license or proof that he or she is the holder thereof, constitutes authority for the seizure and forfeiture of the plants."

15.10 Defenses

A. Defenses to Forfeiture of Conveyances

MCL 333.7521(1)(d) authorizes the forfeiture of "a conveyance, including an aircraft, vehicle or vessel used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt" of items described in MCL 333.7521(1)(a)–(b).

MCL 333.7521(1)(d) provides four defenses to the forfeiture of conveyances:

- Innocent common carrier.
- Innocent owner.
- Violations of MCL 333.7403(2)(c), MCL 333.7403(2)(d), MCL 333.7404, or MCL 333.7341(4).*
- Innocent secured party.

*See **Section 15.10**(A)(3), below, for descriptions of these offenses.

1. Innocent Common Carrier

MCL 333.7521(1)(d)(*i*) provides:

> "A conveyance used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture unless it appears that the owner or other person in charge

of the conveyance is a consenting party or privy to a violation of this article."

2. Innocent Owner

MCL 333.7521(1)(d)(*ii*) provides:

> "A conveyance is not subject to forfeiture by reason of any act or omission established by the owner of that conveyance to have been committed or omitted without the owner's knowledge or consent."

There is a split among panels of the Court of Appeals regarding the scope of the innocent owner defense for conveyances. In *People v One 1979 Honda Auto*, 139 Mich App 651, 655-656 (1984), the Court of Appeals found that where property subject to forfeiture as a conveyance under MCL 333.7521(1)(d) is owned by more than one person, "the guilty knowledge of one co-owner that the conveyance or vehicle is involved in a prohibited transaction subject to forfeiture is sufficient to provide a basis for [forfeiture under MCL 333.7521(1)(d)]."

Conversely, in *In re Forfeiture of $53*, 178 Mich App 480, 495–496 (1989), the Court of Appeals found that where property subject to forfeiture as a conveyance under MCL 333.7521(1)(d) is owned by more than one person, "the forfeiture of the [property] is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied. The state may only forfeit the ownership interest of the noninnocent owner."

The Court of Appeals has yet to resolve the conflict. The only case to consider this question after November 1, 1990,* was *People v 1991 Chevrolet Camaro*, unpublished opinion per curiam of the Court of Appeals, decided August 7, 1998 (Docket No. 201854). There, the Court followed the rule set forth in *In re Forfeiture of $53, supra*, and held that the forfeiture of co-owned property is subject to the interest of a co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied.

*Only published decisions issued by the Court of Appeals after November 1, 1990, are binding on other panels of the Court. MCR 7.215(J)(1).

> **Note:** In *In re Forfeiture of $1,159,420*, 194 Mich App 134, 148 (1992), a case involving the innocent owner defense in the context of "any thing of value" rather than "conveyance," the Court of Appeals held that in cases of joint ownership a court may only forfeit the ownership interest of the noninnocent owner. Because the case did not directly address the innocent owner defense in terms of a conveyance, it did not expressly resolve the conflict.

3. Specific Controlled Substance Violations

According to MCL 333.7521(1)(d)(*iii*), a conveyance is not subject to forfeiture for the following misdemeanor violations:

- **MCL 333.7403(2)(c)—**possession of LSD, peyote, mescaline, psilocybin, etc., or a schedule 5 controlled substance.
- **MCL 333.7403(2)(d)—**possession of marijuana.
- **MCL 333.7404—**unauthorized use of a controlled substance or a controlled substance analogue.
- **MCL 333.7341(4)—**unauthorized use or possession with intent to use an imitation controlled substance.

4. Innocent Secured Party

MCL 333.7521(1)(d)(*iv*) provides:

> "A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission."

B. "Any Thing of Value" Innocent Owner Defense

MCL 333.7521(1)(f) authorizes the forfeiture of

> "[a]ny thing of value that is furnished or intended to be furnished in exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article that is traceable to an exchange for a controlled substance, an imitation controlled substance, or other drug in violation of this article or that is used or intended to be used to facilitate any violation of this article including, but not limited to, money, negotiable instruments, or securities."

The innocent owner defense to forfeiture of "a thing of value" states: "To the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent." MCL 333.7521(1)(f).

In *In re Forfeiture of $1,159,420*, 194 Mich App 134, 147–148 (1992), the Court of Appeals found that where property subject to forfeiture as "any thing of value" under MCL 333.7521(1)(f) is owned by more than one person, "the state may forfeit only the ownership interest of the noninnocent owner."

In *United States v A Parcel of Land Known as 92 Buena Vista Ave*, 507 US 111, 129 (1993), a plurality of the United States Supreme Court held that the federal innocent owner provision, which closely resembles the innocent owner provision in MCL 333.7521(1)(f), is not limited to bona fide purchasers for value, but applies to situations where the owner received the money to purchase the property as a gift, so long as the owner did not know that the money for the gift came from drug trafficking.

C. Real Property Defenses

MCL 333.7523(3) authorizes the forfeiture of real property through judicial forfeiture proceedings, and states, in pertinent part, that "[t]itle to real property forfeited under this article shall be determined by a court of competent jurisdiction."

1. Innocent Secured Party

In addition to providing the statutory basis for the forfeiture of real property, MCL 333.7523(3) provides an innocent secured party defense to the forfeiture of real property: "A forfeiture of real property encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission."

2. Tenancy by the Entireties

Michigan courts have not decided a case involving the forfeiture of real property under the ownership of tenants by the entireties. The Sixth Circuit, however, has decided such a case. In that case, *United States v Certain Real Property at 2525 Leroy Lane (Leroy Lane 1)*, 910 F2d 343 (CA 6, 1990), the United States government filed a forfeiture action against real property owned by claimants Mitchell and Leah Marks. As husband and wife, the claimants owned the property as tenants by the entireties. The government stipulated that Leah Marks was an innocent owner. The district court held that Leah's entireties interest constituted an interest in the property as a whole, and that her innocent owner status operated to avoid forfeiture as to the entire property. The district court, therefore, awarded Leah all the proceeds from the sale of the property, and the government appealed.

The Sixth Circuit Court of Appeals vacated the district court's judgment. Applying Michigan real property law, the Court held that under Michigan law the individual interest of a tenant by the entireties is the functional equivalent of a life estate with a right of survivorship and that, therefore, the government could properly acquire only the interest that Mitchell Marks held as a cotenant by the entireties. The Court likened the interest acquired by the government to that held by a judgment creditor. The Court concluded that if the property had not been sold prior to the appeal, Leah Marks would have been entitled to live in the house during the duration of the tenancy, and the government would have had a lien on the property to the extent of the value of Mitchell's interest, which would have prevented Leah from obtaining the entire proceeds upon the sale of the property.

After remand, Mitchell and Leah divorced, and Leah was awarded the entire home. *United States v Certain Real Property Located at 2525 Leroy Lane (Leroy Lane II)*, 972 F2d 136, 137 (CA 6, 1992). The federal district court judge who conducted the forfeiture trial then awarded all the proceeds from the sale of the home to Leah and the government again appealed. The Sixth Circuit Court of Appeals noted that when the tenancy by the entireties was

destroyed by the divorce, the government was entitled to whatever interest Mitchell possessed afterward. In this case, by virtue of the divorce decree, Mitchell was left with no part of the real property.

*See **Chapter 11** for a detailed discussion of double jeopardy.

D. Double Jeopardy*

Civil forfeiture of property resulting from the same criminal transaction for which the defendant was convicted and sentenced does not ordinarily violate a defendant's double jeopardy protection against multiple punishments. *People v Acoff*, 220 Mich App 396, 398 (1997), citing *United States v Ursery*, 518 US 267 (1996). There exists a presumption that a double jeopardy analysis does not apply in cases of civil forfeiture but civil forfeitures are not completely immune from encroaching on a defendant's protection from multiple punishments. *Acoff, supra* at 398. A double jeopardy inquiry is appropriate if the "'clearest proof' indicates that the in rem forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding." *Id*. at 398, quoting *Ursery, supra* at 278.

E. Collateral Estoppel

The doctrine of collateral estoppel does not bar a civil forfeiture proceeding initiated after an acquittal on related criminal charges because of the differing burdens of proof. An acquittal on criminal charges does not establish that the defendant is innocent. It merely indicates that the trier of fact had a reasonable doubt as to the defendant's guilt. *United States v One Assortment of 89 Firearms*, 465 US 354, 361 (1984); *One Lot Emerald Cut Stones v United States*, 409 US 232, 234–235 (1972).

F. Excessive Fines

Both the Eighth Amendment to the United States Constitution and Article 1, § 16 of the Michigan Constitution provide that excessive fines shall not be imposed. The United States Supreme Court, however, has never determined that the federal excessive fines clause in the Eighth Amendment to the United States Constitution is applicable to the states through the Fourteenth Amendment. See *In re Forfeiture of $25,505*, 220 Mich App 572, 583 (1997). Accordingly, the Michigan Court of Appeals has declined to address the question of whether a civil forfeiture case brought in the state courts is subject to the Eighth Amendment protection. *Id*. at 583; *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App 255, 258 (2002). The Michigan Court of Appeals *has* held, however, that civil forfeiture cases brought in Michigan courts are subject to the protection afforded by the excessive fines clause found in Article 1, § 16 of the Michigan Constitution. *In re Forfeiture of $25,505, supra* at 583-584; *In re Forfeiture of 5118 Indian Garden Rd, supra* at 258.

In *In re Forfeiture of $25,505, supra*, the trial court ordered the forfeiture of cash and other items relating to a claimant's drug-dealing activities. The

claimant argued on appeal that forfeiture of the cash constituted a violation of the excessive fines clause. The Court of Appeals held that "a legitimate forfeiture of drug proceeds will by definition be proportional to the amount of drugs sold and the harm inflicted by the drug sale. Accordingly, forfeitures of drug proceeds do not implicate the excessive fines provision of [Article 1, § 16 of the Michigan Constitution]." *In re Forfeiture of $25,505*, *supra* at 584.

In *In re Forfeiture of 5118 Indian Garden Rd*, *supra*, the prosecutor filed a civil forfeiture action against the claimant's property under the dual theories that the property was used as a container for a controlled substance and that the property was a thing of value used to facilitate a drug offense. The trial court found, among other things, that the forfeiture did not constitute an excessive fine. The Court of Appeals noted that the following factors should be considered in determining whether a fine authorized by statute is excessive:

- The object designed to be accomplished.
- The importance and magnitude of the public interest sought to be protected.
- The circumstances and nature of the act for which the fine is imposed.
- The preventive effect upon the commission of the particular kind of crime.
- In some instances, the ability of the accused to pay the fine. *In re Forfeiture of 5118 Indian Garden Rd*, *supra* at 258-259, citing *People v Antolovich*, 207 Mich App 714, 717 (1994).

The Court further noted that these factors dovetailed with the statement of the United States Supreme Court in *United States v Bajakajian*, 524 US 321, 337 (1998), that a punitive forfeiture is unconstitutional if "'the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense . . . .'" *In re Forfeiture of 5118 Indian Garden Rd*, *supra* at 259, quoting *Bajakajian*, *supra* at 337. In light of these factors, the Court concluded that the forfeiture of the claimant's home did not constitute a violation of the excessive fines clause of Article 1, § 16 of the Michigan Constitution. *In re Forfeiture of 5118 Indian Garden Rd*, *supra* at 259.

15.11 Postjudgment Proceedings

A. Definitions

The following definitions are applicable to MCL 333.7524 and MCL 333.7524a:

- "'**Administrator**' means the Michigan board of pharmacy or its designated or established authority." MCL 333.7103(2).
- "'**Bureau**' means the drug enforcement administration, United States department of justice, or its successor agency." MCL 333.7104(1).

B. Disposition of Real Property, Lights For Plant Growth, Scales, and Proceeds from the Sale of Forfeited Property

MCL 333.7524 governs the disposition of property forfeited under the Controlled Substances Act. MCL 333.7524(1) permits the seizing agency or the state to do any of the following with forfeited property:

- Retain it for official use.
- Sell that which is not required by law to be destroyed and that which is not harmful to the public.
- Require the administrator to take custody of the property and remove it for disposition in accordance with law.
- Forward the property to the bureau for disposition. MCL 333.7524(1)(a)–(d).

1. Disposition of Proceeds from the Sale of Forfeited Property

One of the options available to the seizing agency or the state is to sell the forfeited property. MCL 333.7524(1)(b) governs the disposition of the proceeds from such a sale, and provides:

> "(1) When property is forfeited under this article . . . , the local unit of government that seized the property may do any of the following, or if the property is seized by or in the custody of the state, the state may do any of the following, subject to section 7523(1)(d):
>
> * * *
>
> > "(b) Sell that which is not required to be destroyed by law and which is not harmful to the public. The proceeds and any money, negotiable instruments, securities, or any other thing of value as described in [MCL 333.7521(1)(f)] that are forfeited pursuant to this article shall be deposited with the treasurer of the entity having budgetary authority over the seizing agency and applied as follows:
> >
> > > "(*i*) For the payment of proper expenses of the proceedings for forfeiture and sale, including expenses incurred during the seizure process, maintenance of custody, advertising, and court

> costs, except as otherwise provided in subsection (4).
>
> "(*ii*) The balance remaining after the payment of expenses shall be distributed by the court having jurisdiction over the forfeiture proceedings to the treasurer of the entity having budgetary authority over the seizing agency. If more than 1 agency was substantially involved in effecting the forfeiture, the court having jurisdiction over the forfeiture proceeding shall equitably distribute the money among the treasurers of the entities having budgetary authority over the seizing agencies. A seizing agency may direct that the funds or a portion of the funds it would otherwise have received under this subsection be paid to nonprofit organizations whose primary activity is to assist law enforcement agencies with drug-related criminal investigations and obtaining information for solving crimes. The money received by a seizing agency under this subparagraph and all interest and other earnings on money received by the seizing agency under this subparagraph shall be used to enhance law enforcement efforts pertaining to this article, as appropriated by the entity having budgetary authority over the seizing agency. A distribution made under this subparagraph shall serve as a supplement to, and not a replacement for, the funds budgeted on January 1, 1991, for law enforcement efforts pertaining to this article."

Because the statute provides that "[i]f more than 1 agency was substantially involved in effecting the forfeiture, the court having jurisdiction over the forfeiture proceeding shall equitably distribute the money among the treasurers of the entities[,]" the agency that files first does not guarantee itself a greater share of the proceeds simply because it filed first. MCL 333.7524(1)(b)(*ii*). See also *In re Forfeiture of Certain Personal Property*, 441 Mich 77 (1992).

In *People v Chesterfield Charter Twp*,* unpublished opinion per curiam of the Court of Appeals, decided December 9, 1997 (Docket No. 185413), the Court of Appeals construed the meaning of the phrase "substantially involved in effecting the forfeiture." In *Chesterfield*, the cities of Hazel Park and Troy conducted criminal investigations that were the bases for grand jury indictments against the owner of the property at issue in the case. Chesterfield Charter Township police arrested the property owner and seized the property. Subsequently the trial court ordered the property forfeited and awarded 90 percent of the property to the Hazel Park and Troy Police Departments and ten percent of the property to Chesterfield Charter Township. Chesterfield Township argued that the other two entities were not entitled to any of the property because they were not involved in the actual physical seizure of the

*This case concerns the same property that was at issue in *In re Forfeiture of Certain Personal Property*, 441 Mich 77, (1992).

property at issue. The Court of Appeals held that "[t]o substantially effect forfeiture of the property, an entity must materially bring the forfeiture to pass." Noting that the investigations had essentially brought about the forfeiture and that Chesterfield Township's only role was as the seizing agency, the Court found that the Hazel Park and Troy Police Departments were entitled to an equitable distribution of the property.

2. Disposition of Lights for Plant Growth and Scales

MCL 333.7524(2) provides an additional disposition option for lights for plant growth and scales that have been forfeited under the Controlled Substances Act:

> "Notwithstanding subsection (1), this state or local units of government may donate lights for plant growth or scales forfeited under this article to elementary or secondary schools or institutions of higher education that request in writing to receive those lights or scales pursuant to this subsection, for educational purposes. This state or local units of government shall donate lights and scales pursuant to this subsection to elementary or secondary schools or institutions of higher education in the order in which the written requests are received. This state or local units of government may limit the number of lights and scales available to each requestor."

3. Disposition of Real Property

MCL 333.7524(3) provides for the disposition of real property forfeited under the Controlled Substances Act:

> "(3) In the course of selling real property pursuant to subsection (1)(b), the court that has entered an order of forfeiture may, on motion of the agency to whom the property has been forfeited, appoint a receiver to dispose of the real property forfeited. The receiver shall be entitled to reasonable compensation. The receiver shall have authority to do all of the following:
>
> > "(a) List the forfeited real property for sale.
> >
> > "(b) Make whatever arrangements are necessary for the maintenance and preservation of the forfeited real property.
> >
> > "(c) Accept offers to purchase the forfeited real property.
> >
> > "(d) Execute instruments transferring title to the forfeited real property."

C. Recovery of Costs and Expenses by the Prosecutor

MCL 333.7524(4) provides for the recovery of costs and expenses by the prosecutor in forfeiture actions brought under the Controlled Substances Act:

> "If a court enters an order of forfeiture, the court may order a person who claimed an interest in the forfeited property pursuant to [MCL 333.7523(1)(c)] to pay the expenses of the proceedings of forfeiture to the entity having budgetary authority over the seizing agency."

MCL 333.7523(1)(c)* further provides, in relevant part, that "if the property is ordered forfeited by the court the obligor shall pay all costs and expenses of the forfeiture proceedings."

*See **Section 15.7**(K), above, for a detailed discussion of MCL 333.7523 (1)(c).

D. Return of Property to Claimant

Where the seizing agency loses a forfeiture case, the claimant is entitled to the return of the seized property. See *In re Forfeiture of $176,598*, 465 Mich 382, 384-385 (2001); *Hollins v Detroit Police Dep't*, 225 Mich App 341, 347 (1997).

Where the property seized was currency and the seizing agency earned interest on that currency during the time it had control of the currency, a circuit court ordering the return of the currency to the claimant may also order the seizing agency to disgorge any interest earned on the currency even where at the time the money was seized the claimant did not have it in an interest-bearing account. *In re Forfeiture of $30,632.41*, 184 Mich App 677 (1990). A claimant entitled to the return of seized currency is not, however, entitled to statutory interest pursuant to MCL 600.6013,* because money ordered returned under a forfeiture procedure does not constitute a money judgment recovered in a civil action. *In re Forfeiture of $176,598*, *supra* at 383.

*MCL 600.6013 provides that "[i]nterest shall be allowed on a money judgment recovered in a civil action . . . ."

E. Annual Reports by Local Units of Government

MCL 333.7524a requires each local unit of government to file an annual report with the Office of Drug Control Policy summarizing the local unit's activities for the preceding fiscal year.

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