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MEMORANDUM

DATE: May 4, 2021

TO: All Judges, Magistrate, and Court Administrators

FROM: Bobbi Morrow and Michele Muscat, Management Analysts

RE: Frequently Asked Questions
Michigan Joint Task Force on Jail and Pretrial Incarceration

Late last year, the legislature signed into law a bipartisan package of 20 criminal justice reform bills based on recommendations from the Michigan Joint Task Force on Jail and Pretrial Incarceration. In February 2021, the State Court Administrative Office (SCAO) presented a Legislative Analysis that provided an overview of these laws and their impact on various court procedures. Since that time, SCAO has received several follow-up questions related to the new legislation.

As a further resource, please find Frequently Asked Questions below.

For more information, please contact your Regional Administrator.

MICHIGAN JOINT TASKFORCE ON JAIL AND PRETRIAL INCARCERATION

Frequently Asked Questions

Appearance Tickets

Q1: MCL 764.9e describes appearance tickets as being "returnable." What does "returnable" mean?

A1: MCL 764.9e(1) states "[i]f after the service of an appearance ticket...the defendant does not appear in the designated local criminal court ***within the time the appearance ticket is returnable***, the court may issue [a summons or bench warrant]" (emphasis added). Some jurisdictions identify a specific date for appearance on the ticket and others give the defendant a time frame in which they must report to court.

Q2: Can the court require the prosecutor to file a complaint in addition to the appearance ticket that has already been filed?

A2: MCL 764.9f defines "appearance ticket" as a complaint or written notice. It may, therefore, be the officer's choice whether to issue an appearance ticket or to refer the matter to the prosecutor for a formal complaint, but it is ultimately a matter of judicial discretion whether the court believes it can require a formal complaint in addition to the appearance ticket.

Q3: How does the prosecutor know that misdemeanor charges are pending when an officer issues an appearance ticket and it is filed with the court?

A3: MCL 764.9c(1) states that upon the issuance of the appearance ticket, the appearance ticket "must be forwarded to the court, appropriate prosecuting authority, or both, for review without delay."

Q4: If an appearance ticket is issued, who is responsible for ensuring that fingerprints are taken?

A4: Fingerprinting is the responsibility of the arresting agency and the new laws did not change this. However, if a defendant's fingerprints have not been taken before arraignment for offenses punishable by more than 92 days, or otherwise provided by law, courts will still need to enter an order for fingerprints pursuant to MCL 764.29.

Q5: Was the interim bond practice impacted by the new appearance ticket requirements, specifically where previously a person could be arrested for OWI, allowed a period of time to sober up, and then released on interim bond?

A5: No, the interim bond statutes were not amended. MCL 764.9c allows a police officer to arrest a person, issue an appearance ticket, and release the person from custody. For example, some law enforcement agencies arrest an individual for an OWI on a Friday night, hold them at the county jail until they have had time to sober up, and release them from custody with an appearance ticket. Law enforcement agencies should determine whether interim bond is necessary in light of the statutory amendments regarding the appearance ticket or whether the person can be release from custody with just the appearance ticket.

Arrested Persons

Q6: If a person is arrested, rather than issued an appearance ticket, must they be *arraigned* before 3 p.m. or *charged* before 3 p.m.?

A6: MCL 764.9c(7) provides that "[a]n arrested person who is taken into custody under subsection (6) instead of being issued an appearance ticket must be ***charged*** by the appropriate prosecuting authority or released from custody not later than 3 p.m. the immediately following day during which arraignments may be performed" (emphasis added).

Q7: If a person is arrested for domestic violence, must they be released before 3 p.m. the following day, if not charged?

A7: No. The requirement to charge or release a defendant before 3 p.m. under MCL 764.9c(7) pertains to situations when an officer exercises discretion to arrest, rather than cite, an individual based on one of the reasons articulated in MCL 764.9c(5). MCL 764.9c(3) *prohibits* officers from issuing an appearance to individuals arrested for domestic violence.

Failure to Appear on Appearance Ticket

Q8: Should courts issue an order to show cause or a summons when a defendant fails to appear on an appearance ticket?

A8: MCL 764.9e(2) states that "[i]n the event that a defendant fails to appear for a court hearing within the time the appearance ticket is returnable there is a rebuttable presumption that the court must issue an **order to show cause** why the defendant failed to appear instead of issuing a warrant." While the statute seems to use the terms "summons" and "show cause" interchangeably, the plain language of MCL 764.9e(2) establishes a rebuttable presumption for a court to issue a *show cause*, not a criminal summons, when a defendant fails to appear on an appearance ticket. If the defendant appears for the show cause and counsel is present, the court should consider proceeding to arraignment.

Q9: If a defendant fails to appear on an appearance ticket, and then fails to appear on an order to show cause, does the court need to wait 48 hours before issuing the bench warrant?

A9: MCL 764.3 states "[i]n the event that a defendant fails to appear for a court hearing and it is the ***defendant's first failure to appear in the case***, there is a rebuttable presumption that the court must wait 48 hours before issuing a bench warrant to allow the defendant to voluntarily appear. If the court interprets the defendant's failure to appear on the appearance ticket as being the "first failure to appear in the case," the court would not need to wait 48 hours before issuing a warrant if the defendant failed to appear for a show cause hearing.

Summons Instead of Arrest Warrant

Q10: Does SCAO have an approved summons form?

A10: SCAO is revising the Criminal Summons (form MC 256) and developing a Complaint and Summons form similar to the Complaint and Warrant (form DC 225) and the Felony Set (form MC 200). There is no expected timeframe for when these forms may be available.

Q11: Should prosecutors use a Complaint and Summons rather than a Complaint and Warrant?

A11: MCL 764.1a(2) states that "[t]he magistrate or clerk must issue a summons rather than a warrant," except in cases in which any of the following circumstances apply:

- The complaint is for an assaultive crime or an offense involving domestic violence.
- The clerk or magistrate has reason to believe from the presentation of the complaint that the person against whom the complaint was made will not appear upon a summons.
- The issuance of summons poses a risk to public safety.
- The prosecutor has requested a warrant.

If the prosecutor is not requesting a warrant, it is appropriate for prosecutors to complete and submit a Complaint and Summons rather than a Complaint and Warrant.

Q12: Is prosecutor authorization necessary for issuing a warrant or summons if the person fails to appear for a traffic citation?

A12: MCL 764.1 requires prosecutor authorization for issuing most warrants and summonses. However, MCL 600.8511(e) authorizes district court magistrates to issue warrants upon the written authorization of the prosecutor, "...except written authorization ***is not required*** for a vehicle law or ordinance violation within the jurisdiction of the magistrate if a police officer issued a traffic citation under section 728 of the Michigan Vehicle Code…and the defendant failed to appear" (emphasis added). MCL 257.728, outlines the process for issuing appearance tickets for traffic violations, but is silent as to whether prosecutor authorization is required before issuing a warrant for failure to appear (FTA). MCR 6.615(B) outlines the process for FTAs on misdemeanor traffic cases. It provides that the court "may issue a warrant for the defendant's arrest" upon an FTA, but also does not specify whether prosecutor authorization is necessary. The court will need to determine whether MCL 764.1 and MCL 600.8511 conflict and, if so, which procedure should prevail.

Expedited Arraignments

Q13: MCL 762.10d(1) establishes an arraignment process for eligible defendants who voluntarily present themselves to the court on outstanding warrants. Does this process also apply when a defendant presents himself or herself to law enforcement or the jail?

A13: The process in MCL 762.10d(1) is only applicable to those defendants who present themselves to the "court" that issued the warrant. Although "court" is not defined in this section, law enforcement and county jails are not expressly mentioned in the statute.

Q14: Are MIDC attorneys required to represent defendants for the expedited arraignment when defendants voluntarily present themselves to the court on a warrant?

A14: MIDC Standard 4 states: "The indigency determination shall be made and counsel appointed to provide assistance to the defendant ***as soon as the defendant's liberty is subject to restriction by a magistrate or judge.***" Courts should work with their MIDC regional managers if there are concerns about representation. As a reminder, courts can schedule an arraignment on a future date if resources do not permit an immediate arraignment. Additionally, MCL 762.10d(2) presumes that defendants who voluntarily present themselves to the court on warrants are not a flight risk.

Nonjail/Nonprobationary Sentence

Q15: MCL 769.5(3) provides that "[t]here is a rebuttable presumption that the court shall sentence an individual convicted of a misdemeanor, other than a serious misdemeanor,

with a fine, community service, or other nonjail or nonprobation sentence." The statue was effective March 24, 2021. Is it retroactive?

A15: MCL 769.5(3) does not expressly indicate that it is retroactive. Therefore, the court will need to determine whether this statute applies to *offenses* committed on or after March 24, 2021, or rather to those *sentenced* on or after March 24, 2021.

Q16: What does a nonprobation sentence look like?

A16: A nonprobation sentence is any lawful sentence that does not include an order of probation. As contemplated in MCL 769.5(3), this may include a fine, community service, other nonjail, etc. If the court orders a defendant to complete certain activities as part of a nonprobation sentence, the court should determine how it will monitor compliance.

Q17: MCL 257.625b(5) states "[i]f the person was convicted under section 625(1)(c) or has 1 or more prior convictions, the court shall order the person to participate in and successfully complete 1 or more appropriate rehabilitative programs as part of the sentence, including, but not limited to, an alcohol treatment program or a self-help program for a period of not less than 1 year." How does this section correspond with the presumption of a nonjail, nonprobation sentence for nonserious misdemeanors?

A17: MCL 769.5(5) requires persons convicted of most misdemeanor OWI offenses, provided they do not involve property damage or physical injury, to be sentenced to a nonjail, nonprobation sentence unless the court finds "reasonable grounds" for departure. However, MCL 257.625b(5) requires that persons convicted of violating MCL 257.625(1)(c), and who have one or more prior convictions, successfully complete one or more rehabilitative programs as part of a sentence. As such, courts will need to determine if there is a conflict between these laws and, if so, use rules of statutory construction to resolve the conflict.

Hearing Protocol

Q18: Will SCAO create a model LAO regarding MCL 764.6f?

A18: MCL 764.6f(1) requires each district court and county jail to establish a communication protocol for processing defendants detained on a warrant that originated in another county. MCL 764.6f(2) also requires each district court to establish a hearing protocol for individuals detained on a warrant from another county. Courts may establish an LAO if desired, but the statute only requires "protocols" to be established. Differing practices and procedures throughout the state makes it difficult to establish a model LAO for every court. Therefore, SCAO is not developing a model LAO at this time.

Probation

Q19: What happens to the "standard" conditions of probation (e.g. no violations of the law, not leave the state, etc.) when a defendant remains on probation with the "sole condition" of continuing restitution payments? MCL 771.2(5).

A19: MCL 771.3(1) requires a sentence of probation to include certain conditions, including not violating the law, not leaving the state without permission, and reporting to a probation officer as directed. However, MCL 771.2(5) clarifies that, in the event a probationer is eligible for early discharge and has made a good-faith effort to pay restitution, the court may retain the probationer on probation *with the sole condition of continuing restitution payments*. It is a matter of judicial interpretation as to what impact the word "sole" has upon the standard conditions of probation.

Q20: What happens with probation oversight fees if a probationer is discharged early?

A20: Courts should consider reducing the line-item probation oversight fee to reflect the number of months a probationer is being discharged early. If the defendant owes any other money on the case, the court should consider voiding the excess oversight payment and re-ringing/reapplying it to another assessment due in that case. If the defendant has paid all assessments in full on the case, but owes money on another case, the court should consider voiding the excess oversight payment and applying it to assessments owed on the other case. MCL 769.1k(6). If the defendant does not owe the court any money on any other cases, the court should consider voiding and refunding the money (some courts void and re-ring as an "overpayment" cash code and then refund). This procedure is based on MCL 771.3(5), which requires costs be limited to "…expenses specifically incurred in...supervision of the probationer."

Q21: MCL 771.3(11) requires the conditions of probation to specifically address the assessed risks and needs of the probationer. Does this mean courts must start using risk/needs assessment tools?

A21: "The conditions of probation...must be individually tailored to the probationer, ***must specifically address the assessed risks and needs of the probationer***, must be designed to reduce recidivism, and must be adjusted if the court determines adjustments are appropriate." MCL 771.3(11) (emphasis added). While the statute requires courts to address assessed risks and needs, it does not specifically contemplate, mention, or require the use of an actual tool.

Q22: MCL 771.4b(5) provides that if more than one technical probation violation arises out of the same transaction, the court shall treat the technical violation as a single violation for the purposes of this section. How is "...arises out of the same transaction" defined?

A22: The phrase "same transaction" is not defined in MCL 771.4b. Courts should consult existing case law and determine how to interpret this particular section.

Q23: How does the rebuttable presumption for a nonprobation sentence apply to those under MCL 771.1 (delayed sentence) or MCL 333.7411 (deferred judgment of guilt)?

A23: MCL 771.1(2) provides that ***"[i]n an action in which the court may place the defendant on probation***, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity ***to prove to the court his or her eligibility for probation…***" (emphasis added). Although the court may impose probation-like conditions during the delay, a delayed sentence is not equivalent to being placed on probation. *People v Hacker*, 127 Mich App 796 (1983). MCL 769.5(3) establishes a rebuttable presumption of a nonprobation sentence for nonserious misdemeanors. If a person may not be placed on probation, courts must determine how this presumption impacts their authority to impose a delayed sentence under MCL 771.1(2). Unlike delayed sentencing under MCL 771.1(2), a deferred judgment of guilt under MCL 333.7411 requires placement on probation. Courts should, therefore, articulate their reasons for doing so on the record as required in MCL 769.5(4).

Q24: When would the Notice Regarding Eligibility for Early Discharge from Probation (MC 512) be used?

A24: MCL 771.2 recently standardized the process for early discharge from probation. It provides that a defendant may be eligible for early discharge after completing half of the original probation period. It provides that the probation department (or the probationer if the probation department fails to do so) may notify the court of the eligibility. The Notice Regarding Eligibility for Early Discharge from Probation (MC 512) was designed to notify the court of this early discharge eligibility. Upon receiving this notification, the sentencing court may review the case and the probationer's conduct while on probation to determine whether the probationer's behavior warrants an early discharge. If so, the court would sign the Order for Discharge from Probation (now MC 245o).

Q25: The Motion and Order for Discharge from Probation (form MC 245) was recently amended and split into two forms, MC 245m and MC 245o. How would these forms be used?

A25: The Motion and Order for Discharge from Probation (MC 245) was the traditional form probation officers used when motioning the court to discharge a defendant from probation. The Motion for Discharge from Probation (form MC 245m) is used to motion the court for discharge. It can be used for early discharge or at the time that the probation term is due to expire. The Order for Discharge from Probation (form MC 245o) can be used to grant an early discharge in situations where the court receives a Motion for Discharge from Probation (form MC 245m) or in situations where the court receives the Notification Regarding Eligibility for Early Discharge from Probation (form MC 512).

Q26: Will SCAO develop a form for probationers to acknowledge technical probation violations in writing pursuant to MCL 771.4b(2)?

A26: SCAO does not plan to develop a form for the acknowledgment outlined in MCL 771.4b(2). Many of the probation amendments, including the written technical probation

violation acknowledgment, require judicial interpretation during implementation to ensure statutory and constitutional compliance.

Q27: How must courts notify defendants of their eligibility for early discharge from probation?

A27: MCL 771.2(2) provides that "[t]he defendant must be notified ***at sentencing*** of his or her eligibility and the requirements for early discharge from probation, and the procedure provided under subsection (3) to notify the court of his or her eligibility" (emphasis added). At the time of sentencing, the court may provide this notice in writing or orally advise on the record.

Q28: How does the court collect outstanding fines, costs, and restitution after a defendant is discharged from probation?

A28: There is no statute of limitations on court-ordered fines, costs, fees, and assessments. Additionally, MCL 771.2(4) provides that "[n]othing in this subsection relieves a probationer from court-ordered financial obligations after discharge from probation." MCL 769.1k(5) states the court may provide for the amounts imposed to be collected at any time. Unless, otherwise provided by law, court-ordered financial obligations imposed in a criminal case may also be recovered in the same manner as a civil judgment for money in the same court. MCL 600.4805.

Warrants

Q29: How does the new requirement that courts wait 48 hours before issuing a warrant impact the LEIN entry timelines?

A29: MCL 764.3(1) should not affect LEIN entry timelines or rules. The statute requires courts to wait 48 hours before ***issuing*** a bench warrant for certain failures to appear in court. The LEIN entry timelines only become applicable ***after*** a court has issued a warrant.

Q30: How does the 48-hour warrant grace period for failure to appear affect the 7-day notice requirement to surety agents?

A30: MCL 764.3(1) requires a court to wait 48 hours before issuing a bench warrant for certain failures to appear. However, MCL 765.28(1) still requires the court to serve each surety notice of a defendant's failure to appear ***within 7 days after the date of the failure to appear***. As such, the court must still provide notice within 7 days of the failure to appear event – ***not*** 7 days from the date the warrant was issued.

License Suspensions

Q31: Are courts authorized to waive the $45 clearance fee currently assessed for FTA/FCJ violations?

A31: The authority requiring a $45 clearance fee is outlined in the chart below.

MCL	Summary	Task Force Legislation Impact
257.321a(5)(b)	FTA/FCJ for violations for which license suspension is authorized under this act.	N/A
257.321a(8)(b)	FTA/FCJ for Parking Violations	**Repealed**
257.321a(9)(b)	FTA/FCJ for State Civil Infractions	**Repealed**

Since subsections 321a(8) and (9) were repealed, courts will no longer have authority to collect a $45 clearance fee for FTA/FCJ suspensions on parking violations and state civil infractions. However, subsection 321a(5) was not amended and still requires a $45 fee before reinstatement if a license was suspended for violating 321a(2) or (3). The legislation reduced the number of offenses eligible for license suspension under 321a(2). That subsection previously authorized FTA/FCJ suspensions on ***"violation[s]...reportable to the SOS under MCL 257.732,"*** whereas the new language limits suspensions to violations ***"for which license suspension is allowed under this act."***

The question then becomes, if a license was previously suspended for a reason no longer eligible under 321a(2), are defendants still required to pay the $45 clearance fee under 321a(5) before reinstatement? When interpreting this section, courts will need to determine whether the language in MCL 257.320e(4) (requiring the SOS to immediately reinstate a license previously suspended for ineligible reasons) conflicts with 321a(5), which requires the $45 clearance fee before reinstatement. Per SCAO's Finance Department, courts will not be flagged for audit violations regarding the $45 clearance fee for cases that fall under the new legislation.