

# MICHIGAN CRIMINAL LAW

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The *Michigan Criminal Law Annual Journal* is the official journal of the Criminal Law Section of the State Bar of Michigan. This *Journal* is the first annual journal of the Section, in keeping with the Section's mission statement, is a significant addition to the Section's extensive program of publications, seminars, conferences, legislative liaison and other activities of the Section for the professional development and education of its members and the Bar.

The Criminal Law Section encourages interested members of the Bar and legal community to contribute articles of interest to criminal law practitioners to further and improve the practice of criminal law in the State of Michigan. Submissions and manuscripts are reviewed by attorneys experienced in the subject matter covered.



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# The Legislative Sentencing Guidelines: Michigan's Transition to a Limited-Discretion Sentencing Scheme

By Anne Yantus, Assistant Defender with the State Appellate Defender Office

Any significant change in the law is likely to cause a period of adjustment. This was true with the judicial sentencing guidelines when they were first introduced in 1983,<sup>1</sup> and so it is true with the legislative sentencing guidelines, effective for all felony offenses committed on or after January 1, 1999.<sup>2</sup> Unlike the judicial sentencing guidelines, where the recommended ranges were advisory and based on past sentencing practices of the state's trial judges,<sup>3</sup> the new legislative guidelines provide mandatory ranges with departures only for substantial and compelling reasons.<sup>4</sup> The new guidelines also reflect policy judgments as to the length of a sentence vis-a-vis the severity of the crime (i.e., crimes of violence are treated more severely), and the new guidelines are supposed to consider prison capacity in reaching the recommended ranges.<sup>5</sup> Moreover, the new guidelines apply to habitual offender sentences.<sup>6</sup>

How has Michigan fared with these new guidelines? Fairly well, it seems. While no official compliance rate exists, both word of mouth, and published and unpublished appellate decisions suggest the state's trial judges are following the recommended ranges in most cases. There are only a handful of judges who publicly disagree with the wisdom of the guidelines,<sup>7</sup> or otherwise act as if they are not bound by the new guidelines.<sup>8</sup>

Are there problems with the new guidelines? But of course. As with any comprehensive set of laws, especially laws written for a wide variety of situations, there are areas of imprecision and uncertainty. The Legislature did not define many of the terms found within the guidelines, and there will be endless litigation over the departure standard of "substantial and compelling reasons." The Legislature also unwittingly confused many trial judges with the departure standard for intermediate sanction cells (i.e., many trial judges do not realize that a prison sentence represents a departure from an intermediate sanction cell).<sup>9</sup> And there was a brief period of debate over the scope of appellate review of departure sentences - this despite statutory language expressly defining it.<sup>10</sup>

What do the new appellate cases say about the guidelines? In general, the decisions focus on three areas: procedure, departure sentences and scoring issues. On the procedural front, it certainly comes as no surprise that the Court of Appeals has spent much time and energy defining this area. The Court first leapt into action with published decisions on the standard of review,<sup>11</sup> and quickly deter-

mined that the guidelines were not to be applied retroactively.<sup>12</sup> The Court also determined that the guidelines are not in violation of due process, equal protection or the separation of powers principle.<sup>13</sup> Moreover, there is no right to a jury determination of the facts leading to a guidelines scoring.<sup>14</sup> The Court is now immersed in the middle of a debate over the requirement of a contemporaneous objection at sentencing to scoring challenges. The Court's first published decision on this topic held that an objection at sentencing is necessary to preserve the issue for appellate review - this despite contrary language in MCL 769.34(10).<sup>15</sup> A more recent published decision would hold that the statute controls on matters of issue preservation.<sup>16</sup> And yet a third published decision avoids the issue entirely by finding plain error where no objection was raised at sentencing.<sup>17</sup> Several cases have also concluded that a defendant can raise a claim of ineffective assistance of counsel for failure to raise a winning guidelines challenge at sentencing.<sup>18</sup>

As for the new departure cases, the Michigan Supreme Court has twice generally addressed the topic,<sup>19</sup> but the Court of Appeals has provided relatively little guidance in published decisions. The Court of Appeals affirmed a significant downward departure in *People v Babcock*,<sup>20</sup> but then affirmed a significant upward departure in *People v Armstrong*.<sup>21</sup> Both were criminal sexual conduct cases. The Court also held that the recommended ranges of the legislative sentencing guidelines would not constitute a substantial and compelling reason to depart from the mandatory minimum terms for certain drug offenses.<sup>22</sup>

The unpublished decisions of the Court of Appeals are more instructive on the issue of sentence departures. Several trends can be observed from these decisions, the first being that the Court of Appeals is generally reversing departure sentences based on reasons already considered within the guidelines range.<sup>23</sup> The Court is also not easily impressed with speculation over what might have occurred had the crime been more serious.<sup>24</sup> In a surprising move, the Court of Appeals seems willing to relax its general policy against resentencing before another judge if the original judge shows a pattern of disregarding the recommended ranges.<sup>25</sup> And finally, if there is any trend in allowing departure sentences, it is for the excessively brutal, violent or "loathsome" crime.<sup>26</sup>

In terms of guideline scoring issues, the Court of Appeals has moved slowly but surely to address this sub-

ject. While there was little published guidance as of mid-April 2002, the Court has issued seven published decisions in the last four months. A comprehensive list of the published and unpublished decisions addressing each offense and prior record variable follows this article.

Perhaps the most important point to be made about the new guidelines, and one not lost on the appellate courts, is the return to a legislatively prescribed sentencing scheme. The Court of Appeals noted in *People v Babcock*<sup>27</sup> (MSC Leave Granted) that the “Legislature has now reasserted its constitutional authority over the sentencing process” with the new guidelines. The Michigan Supreme Court similarly stated in *People v Hegwood*<sup>28</sup> that “the ultimate authority to provide for penalties from criminal offenses is constitutionally vested in the Legislature. . . It is, accordingly, the responsibility of a circuit judge to impose a sentence, but only within the limits set by the Legislature.”<sup>29</sup>

Overall, the sentencing law in Michigan remains in a period of adjustment, although the transition period has been less than difficult. The trial and appellate judges of this state seem willing to follow the recommended ranges of the new guidelines in most cases. The courts also appear willing to recognize the Legislature’s authority to restrict sentencing. Whether the legislature will further restrict sentencing remains to be seen, but it is safe to say that Michigan now functions under a limited-discretion sentencing scheme.

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## Endnotes

- 1 Admin Order 1983-3, 417 Mich cxxi (1983).
- 2 MCL 769.34.
- 3 *People v Milbourn*, 435 Mich 630, 655-656; 461 NW2d 1 (1990).
- 4 MCL 769.34(1)&(3).
- 5 MCL 769.33.
- 6 MCL 777.21(3).
- 7 See e.g., *People v Joshua Keeling*, Grand Traverse Circuit Court No. 00-8158 FC (Sentence transcript pp. 14-15) (“The legislature has some pretty pro-criminal, theft-friendly guidelines.”); *People v Matthew Connor*, Antrim Circuit Court No. 01-3446 FH (Sentence transcript pp. 9-10) (“The legislature has indicated with these guidelines that they aren’t seriously concerned with the ramifications of this kind of behavior [drugs] as it goes through the community.”).
- 8 See e.g., *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001) (reversed where trial judge indicated not bound by new guidelines); *People v Joyce*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2002 (Docket No. 235376) (same); *People v Stutzman*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 222546) (reversed in part for comment that guidelines “utterly unjust” and intrusion on judicial authority).
- 9 *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002); *People v Burrell*, 465 Mich 923 (2001); *People v Sam Smith*, 465 Mich 929 (2001).

- 10 Compare *People v Babcock*, 244 Mich App 64, 77; 624 NW2d 479 (2000) (no review of extent of departure) with *People v Hegwood*, *supra* (extent of departure reviewed for proportionality).
- 11 The standard of review for departure sentences is set forth in *People v Babcock*, 244 Mich App 64; 624 NW2d 479 (2000); and *People v Babcock*, 250 Mich App 463; 648 NW2d 221, lv gtd 651 NW2d 921 (2002). See also *People v Hegwood*, *supra*. For review of guidelines scoring issues, the Court of Appeals has said that a challenged scoring will be upheld if evidence supports it, *People v Leversee*, 243 Mich App 337; 622 NW2d 325 (2000), although application of the statutory sentencing guidelines is a question of law subject to de novo review, *People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002).
- 12 *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).
- 13 *People v Follman*, unpublished opinion per curiam of the Court of Appeals, issued August 2, 2002 (Docket No. 228018); *People v Bradley*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2002 (Docket No. 230567).
- 14 *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued September 6, 2002 (Docket No. 225346).
- 15 *People v McGuffey*, 251 Mich App 155; 649 NW2d 801 (2002).
- 16 *People v Wilson*, 252 Mich App 390; 652 NW2d 488 (2002). See also *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2002 (Docket No. 229665) (citing the statute for issue preservation).
- 17 *People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002).
- 18 *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001); *People v Wilson*, *supra*; *People v Hudson*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2002 (Docket No. 230893).
- 19 *People v Hegwood*, 465 Mich 432; 636 NW2d 127 (2001) (see note 7 *supra*); *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002) (see text accompanying note 8 *supra*).
- 20 250 Mich App 463.
- 21 247 Mich App 423; 636 NW2d 785 (2001).
- 22 *People v Izarraras-Placante*, 246 Mich App 490; 633 NW2d 18 (2001).
- 23 See *People v Hamilton*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2002 (Docket No. 231965) (brutality of crime and seriousness of injuries already scored under OV 3 and OV 7); *People v Range*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2002 (Docket No. 229330) (guidelines already considered touching with weapon under OV 1, lethal potential of the weapon under OV 2, and bodily injury requiring medical treatment under OV 3); *People v Ashbaker*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2001 (Docket No. 232967) (use of weapon considered under OV 1 and OV 2, defendant on probation for prior felony considered under PRV 2 and PRV 6); *People v Gatson*, unpublished opinion per curiam of the Court of Appeals, issued September 28, 2001 (Docket No. 223538) (noting departure reasons all included within guidelines factors).
- 24 *People v Vandeventer*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 230137) (fact that victim almost died not substantial and compelling and considered under OV 1, OV 3 and OV 6); *People v Range*, *supra* (that victim might have died not substantial and compelling, especially where injuries not life threatening).
- 25 See *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2002 (Docket No. 231252); *People v Joyce*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2002 (Docket No. 235376). See also *People v Trammel*, unpublished opinion per curiam of the Court of Appeals, issued May 17, 2002 (Docket No. 229168).
- 26 See e.g., *People v Arnold*, unpublished opinion per curiam of the Court of Appeals, issued April 2, 2002 (Docket No. 223792) (excessive brutality); *People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2002

(Docket No. 227339) (severity of attack); *People v Montes*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2002 (Docket No. 223539) (“particularly loathsome” acts); *People v Williams*, unpublished per curiam opinion of the Court of Appeals, issued May 21, 2002 (Docket No.

232255) (cold-blooded nature of crime); *People v Ross*, unpublished per curiam opinion of the Court of Appeals, issued May 24, 2002 (Docket No. 227964) (violence of act).  
27 244 Mich App at 71-72. (MSC Leave Granted)  
28 465 Mich at 436-437.  
29 *Id* (emphasis in original).

## Guidelines Scoring Cases

### Offense Variable 1

*People v Lange*, 251 Mich App 247; 650 NW2d 691 (2002)(glass mug used as a weapon sufficient for 10 points).

*People v Libbett*, 251 Mich App 353; 650 NW2d 407 (2002) (15 points proper even where co-defendant assessed only 5 points).

*People v Holbrook*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2002 (Docket No. 228693) (bare hands sufficient for 10 points where conviction offense did not require use of deadly weapon).

*People v Jordan*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2002 (Docket No. 232246) (25 points proper where co-defendant shot gun at occupied car).

*People v Fryer*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 232252) (proper to score acts against multiple victims).

*People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2002 (Docket No. 232247) (25 points proper where defendant fired gun at occupied vehicle).

*People v Tullis*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 228041) (sufficient evidence defendant aimed and fired weapon toward victims).

*People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 2001 (Docket No. 226746, 226747) (25 points proper where multiple offender situation and codefendant scored 25 points).

*People v Sutton*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2001 (Docket No. 225189) (properly scored based on unchallenged evidence of uncharged assault).

*People v Nottingham*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2001 (Docket No. 222021) (testimony suggested primary victim was in reasonable apprehension of immediate battery with grease knife).

### Offense Variable 2

*People v Kurzawa*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2001 (Docket

No. 220906, 229264) (properly scored where defendant possessed propane tank).

*People v Nottingham*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2001 (Docket No. 222021) (evidence supported conclusion that grease knife was potentially lethal weapon).

### Offense Variable 3

*People v Britt*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2002 (Docket No. 228017) (100 points improperly scored where sentencing offense is homicide).

*People v Hudson*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2002 (Docket No. 230893) (ineffective assistance for failing to object to 100 points where sentencing offense was homicide).

*People v Mitchell*, unpublished decision of the Court of Appeals, issued September 28, 2001 (Docket No. 224540) (affirming score of 100 points for victim of UDAA).

*People v Hauser*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 239688) (ten points improperly scored where victim died; cannot score points for injury to victim where victim died).

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (error to score for life threatening injury where defendant’s behavior was life threatening, but there was no injury).

*People v Oldham*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2002 (Docket No. 229334) (miscored where court assumed shot to face was per se life threatening).

*People v Banks*, unpublished opinion per curiam of the Court of Appeals, issued August 20, 2002 (Docket No. 232254) (variable properly scored where officer observed apparently recent abrasion to victim’s hand and forearm).

*People v Bradford*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2001 (Docket No. 224790) (properly scored based on medical testimony that injuries life threatening).

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*People v Sutton*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2001 (Docket No. 225189) (properly scored based on unchallenged evidence of uncharged assault).

*People v Sifuentes*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 23286) (defense counsel not ineffective in failing to object to ten points for bodily injury requiring medical attention where victim complained of bite marks and sore jaw and shoulder and treated and examined at hospital).

*People v Sabandith*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2002 (Docket No. 226567, 226568) (evidence sufficient to show permanent incapacitating injury where victim may have nerve damage of foot and possible muscle paralysis and used cane at trial).

### Offense Variable 4

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (no error where victim appeared deeply distraught and in need of psychological help).

*People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2001 (Docket No. 220902) (no error where victim sought counseling).

*People v Vance*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 226826) (10 points proper where victim was crying and trembling after offense, continued to feel afraid and vulnerable and she stated offense would affect the rest of her life).

*People v Pace*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 230888) (properly scored where victim shot and may never walk again; guidelines only require serious psychological injury that “may” require treatment).

### Offense Variable 5

*People v Ales*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 230447) (fact that family had yet to seek treatment not dispositive).

*People v Hauser*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 239688) (properly scored where victim’s daughter had trouble sleeping and sought counseling, even if loss of mother was not a debilitating loss).

### Offense Variable 6

*People v Villarreal*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket

No.228527) (sufficient evidence of premeditation where victim in defensive kicking posture at time of shooting and victim intended to break up with defendant).

*People v Betzer*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2002 (Docket No. 227647) (sufficient evidence of intent to injure based on injuries to child’s skull).

### Offense Variable 7

*People v Hornsby*, 251 Mich App 462; 650 NW2d 700 (2002) (50 points proper where defendant held gun to victim’s head, made threats to kill her and others in store and victim heard gun click).

*People v Villarreal*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No.228527) (sufficient scoring where victim in defensive posture when defendant placed gun in vagina and pulled trigger).

*People v White*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2002 (Docket No. 233926) (sufficient evidence of terrorism where defendant used physical force and threats, threatened to produce knife and showed his display of guns).

*People v Cicero*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No. 229483) (sufficient evidence where defendant repeatedly beat elderly woman in head and elbow with pan).

*People v Bradford*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2001 (Docket No. 224790) (properly scored based on extended nature of domestic attack and manner in which attack achieved).

*People v Farris*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2001 (Docket No. 222175) (properly scored for terrorism where defendant kicked down door at 3 am, threatened bodily injury to prospective male acquaintances of homeowner and defendant racked weapon in front of victim and her children).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (sufficient fear and anxiety for 50 points where defendant held gun to victim’s head and threatened several times to kill her).

### Offense Variable 8

*People v Spanke*, \_\_\_ Mich App \_\_\_ (Docket No. 232089, released January 3, 2003) (movement of victims for purposes of 15 point assessment need not be forcible as long as it is not merely incidental to committing an underlying felony).

*People v Phillips*, 251 Mich App 100; 649 NW2d 407 (2002) (sufficient evidence where 14 year old victim taken in car to two-track road in isolated area near river).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (acquitted conduct showing kidnapping may be considered).

*People v Palmer*, unpublished opinion per curiam of the Court of Appeals, issued April 9, 2002 (Docket No. 228080) (15 points proper where victim moved from sales counter into back room, placing her in situation of greater danger).

*People v Henry*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 233862) (enticing victim into enclosed storage shed sufficient).

### **Offense Variable 9**

*People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002) (10 points proper where victim's fiancé and child were in car with victim when defendant shot victim through windshield).

*People v Hayes*, unpublished opinion per curiam of the Court of Appeals, issued February 22, 2002 (Docket No. 227641) (scoring for multiple victims permissible even where separate convictions for each victim where acts occurred at same time).

*People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2001 (Docket No. 225659) (other persons present in restaurant at time of robbery, although unaware of robbery, can be counted as victims for purposes of OV 9).

*People v Hansen*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224328) (penetrations relating to uncharged victims not to be scored).

### **Offense Variable 10**

*People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002) (15 points proper for predatory conduct where defendant and cohorts drove around looking for car to steal and then following victim home to steal car).

*People v Phillips*, 251 Mich App 100; 649 NW2d 407 (2002) (sufficient evidence where victim 14 and defendant 67, even if no manipulation of victim).

*People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (10 points proper where defendant lured teenaged girls with fame and fortune to pose for lewd and lascivious photographs).

*People v Banks*, unpublished opinion per curiam of the Court of Appeals, issued August 20, 2002 (Docket No. 232254) (domestic relationship shown).

*People v Ledesma*, unpublished opinion per curiam of

the Court of Appeals, issued September 13, 2002 (Docket No. 232328) (sufficient evidence where defendant exploited father-daughter relationship and victim's youth).

*People v Beauford*, unpublished memorandum opinion of the Court of Appeals, issued November 6, 2001 (Docket No. 226733) (fact that vulnerability also reflected in conviction offense not improper; sufficient evidence based on age difference and defendant supplied apartment to 14 year old girl for truancy, drug usage and sex with defendant).

*People v Holbrook*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2002 (Docket No. 228693) (predatory conduct where defendant pretended to be home buyer than violently assaulted pregnant victim).

*People v Betzer*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2002 (Docket No. 227647) (difference in size and strength sufficient).

*People v Ales*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 230447) (youth and familial relationship sufficient, noting that abuse of authority status still requires fear or deference).

*People v Almond*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2002 (Docket No. 228027) (properly scored where victims were children staying in defendant's household).

*People v Villarreal*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No. 228527) (size, strength and sleeping victim).

*People v Vance*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 226826) (10 points proper where victims treated like daughter, lived with defendant at one point and defendant agreed to lend her money).

*People v Sifuentes*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2002 (Docket No. 232286) (no error in scoring predatory conduct where defendant encouraged young women to drink alcohol at his apartment and then sexually assaulted them).

*People v Austin*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2002 (Docket No. 234432) (15 points for predatory conduct appropriate where defendant promoted friendship between two victims so he could drive them to each other's house, defendant drove one victim to video store and defendant chose to live in cramped mobile home of one victim).

*People v Sabandith*, unpublished opinion per curiam of the Court of Appeals, issued October 18, 2002 (Docket No. 226567, 226568) (sufficient evidence of predatory conduct where defendant took gun to apartment complex to check things out, he and co-defendant arrived late at night and began sneaking around, and defendants intended to retaliate against members of different gang).

*Continued on next page*

## Offense Variable 11

*People v Mutchie*, 251 Mich App 273; 650 NW2d 733 (2002), approved for publication May 10, 2002) (interpreting “arising out of the sentencing offense” to include multiple counts of first-degree CSC, even where those counts led to separate convictions, where the acts were perpetrated against the victim in the same place, under the same set of circumstances, and during the same course of conduct).

*People v White*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2002 (Docket No. 233926) (follows *Mutchie*).

*People v Hansen*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224328) (conduct leading to acquittal may be scored).

*People v Harris*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2001 (Docket No. 222177) (sufficient evidence of multiple penetrations although jury acquitted of penetration offenses).

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (no error where defendant and victim engaged in three acts of sex before victim advised of defendant’s HIV status).

## Offense Variable 12

*People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2002 (Docket No. 237349) (two contemporaneous acts of receiving and concealing and possession of firearm by felon - in addition to conviction offense of home invasion).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (acquitted conduct showing additional penetrations beyond charged offense can be considered).

## Offense Variable 13

*People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (defendant’s four concurrent convictions for making child sexually abusive material establishes pattern of three or more crimes against a person).

*People v Ledesma*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 232328) (properly scored where evidence of two prior instances of second-degree criminal sexual conduct).

*People v Hansen*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2001 (Docket No. 224328) (uncharged acts within five years including sentencing offense).

*People v Estrada*, unpublished opinion per curiam of the Court of Appeals, issued December 8, 2000 (Docket No. 225960) (error to consider convictions outside 5 year

period, but harmless where three felony offenses within five years).

*People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2001 (Docket No. 220902) (sentencing offense may be considered in pattern).

*People v Vance*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 226826) (no error where trial court found proof of two prior assaults).

*People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (acquitted conduct showing pattern of felonious activity can be considered).

*People v Hendricks*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2002 (Docket No. 233303) (properly scored based on testimony of pattern of sexual assaults on one victim plus assault on second victim).

*People v Sifuentes*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 2002 (Docket No. 232286) (no error in scoring twenty-five points where defendant convicted of one count of third-degree CSC and other witness testified to three counts of CSC against her).

## Offense Variable 14

*People v Nottingham*, unpublished opinion per curiam of the Court of Appeals, issued February 16, 2001 (Docket No. 222021) (defendant’s own testimony supported scoring as leader).

*People v Walker*, unpublished opinion per curiam of the Court of Appeals, issued July 5, 2002 (Docket No. 230570) (no error in scoring OV 14 where evidence in presentence report supported conclusion that defendant acted as leader of crime).

## Offense Variable 16

*People v Kimble*, 252 Mich App 269; 651 NW2d 798 (2002) (variable inapplicable to second degree murder case).

*People v Leversee*, 243 Mich App 337; 622 NW2d 325 (2000) (variable includes property obtained, damaged, lost or destroyed, even before amendment to correct wording).

## Offense Variable 19

*People v Deline*, \_\_\_ Mich App \_\_\_ (Docket No. 237307, released December 27, 2002) (error to score ten points where defendant attempted to avoid charges by switching seats with passenger in car and also refusing preliminary blood alcohol content test; interference with justice must be construed same as obstruction of justice).

*People v Cook*, \_\_\_ Mich App \_\_\_ (Docket No. 230317, 237510, released January 3, 2003) (no error in scoring 10

points where counsel conceded conduct of fleeing and eluding fell within terms of statute and court concludes same conduct could be scored under guidelines for separate but contemporaneous offense of assault with intent to do great bodily harm).

#### **Prior Record Variable 5**

*People v Bryan*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2002 (Docket No. 227578); (prior misdemeanor conviction for allowing fire to escape could be considered crime against property even if similar felony offense would be classified as public safety crime).

*People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (no error where resisting and obstructing offense was scorable misdemeanor, even if driving with suspended license was not).

#### **Prior Record Variable 7**

*People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001) (20 points proper for 2 or more concurrent convictions).

# Notes