

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, effective January 2016.

## ADOPTED

The Committee has adopted amended instructions for use in cases where the term “mentally retarded” was used in various instructions: M Crim JI 7.10, 16.23, and 20.11. That term was changed to “intellectually disabled,” and definitions were changed. The amended instructions reflect these changes.

### M Crim JI 7.10 Person Under the Influence of Alcohol or Controlled Substances

(1) A person is not legally insane just because [he/she] was voluntarily intoxicated by alcohol or drugs at the time of the crime.

(2) Drug intoxication is not voluntary and may be a defense if the defendant was unexpectedly intoxicated by the use of a prescribed drug. Intoxication was not voluntary where,

(a) the defendant did not know or have reason to know that the prescribed drug was likely to be intoxicating,

(b) the prescribed drug, not another intoxicant, must have caused the defendant's intoxication, and

(c) as a result of the intoxication, the defendant was rendered temporarily insane or lacked the mental ability to form the intent necessary to commit the crime charged.]

[(3) A person can become legally insane by the voluntary, continued use of mind-altering substances like alcohol or drugs if their use results in a settled condition of insanity before, during, and after the alleged offense.]

(4) Of course, a mentally ill [or intellectually disabled] person can also be intoxicated, and both conditions may influence what [he/she] does. You should decide whether the defendant was mentally ill [or intellectually disabled] at the time of the crime. If [he/she] was, you should use the definitions I gave you to decide whether [he/she] was also legally insane.

### M Crim JI 16.23 State of Mind

(1) You have heard evidence concerning the defendant's mental condition at the time of the alleged crime.

(2) It is not enough that the defendant did an act that caused death. In addition, the defendant must have had a certain state of mind when [he/she] did that act. In deciding whether the defendant had the required state of mind you may consider such things as [the defendant's history of mental problems and/the defendant's intellectual disability and] all of the circumstances surrounding the alleged crime.

(3) If you have a reasonable doubt about whether the defendant had the required state of mind at the time of the alleged crime, you must find the defendant not guilty of [state crime(s) to which defense applies].

### M Crim JI 20.11 Sexual Act with Mentally Incapable, Mentally Disabled, Mentally Incapacitated, or Physically Helpless Person

(1) [Second/Third], that [name complainant] was [mentally incapable/mentally disabled/mentally incapacitated/physically helpless] at the time of the alleged act.

[Choose one or more of (2), (3), (4), or (5):]

(2) Mentally incapable means that [name complainant] was suffering from a mental disease or defect that made [him/her] incapable of appraising either the physical or moral nature of [his/her] conduct.

(3) Mentally disabled means that [name complainant] has a mental illness, is intellectually disabled, or has a developmental disability. “Mental illness” is a substantial disorder of thought or mood that significantly impairs judgment, behavior, or the ability to recognize reality and deal with the ordinary demands of life. “Intellectual disability” means significantly subaverage intellectual functioning that appeared before the defendant was 18 years old and impaired two or more of [his/her] adaptive skills.<sup>1</sup> “Developmental disability” means an impairment of general thinking or behavior that originated before the age of 18, has continued since it started or can be expected to continue indefinitely, is a substan-

tial burden to [name complainant]'s ability to function in society, and is caused by [intellectual disability as described/cerebral palsy/epilepsy/autism/an impairing condition requiring treatment and services similar to those required for intellectual disability].

(4) Mentally incapacitated means that [name complainant] was [temporarily] unable to understand or control what [he/she] was doing because of [drugs, alcohol or another substance given to (him/her)/something done to (him/her)] without [his/her] consent.

(5) Physically helpless means that [name complainant] was unconscious, asleep, or physically unable to communicate that [he/she] did not want to take part in the alleged act.

(6) [Third/Fourth], that the defendant knew or should have known that [name complainant] was [mentally incapable/mentally incapacitated/physically helpless] at the time of the alleged act.

[Choose (7) or (8):]

(7) [Fourth/Fifth], that the defendant and [name complainant] were related to each other, either by blood or marriage, as [state relationship, e.g., first cousins].

(8) [Fourth/Fifth], that at the time of the alleged act the defendant was in a position of authority over [name complainant], and used this authority to coerce [name complainant] to submit to the sexual acts alleged. It is for you to decide whether, under the facts and circumstances of this case, the defendant was in a position of authority.

## Use Notes

Use this instruction in conjunction with M Crim JI 20.1, Criminal Sexual Conduct in the First Degree; M Crim JI 20.2, Criminal Sexual Conduct in the Second Degree; or M Crim JI 20.18, Assault with Intent to Commit Criminal Sexual Conduct in the Second Degree (Contact).

1. The court may provide the jury with a definition of *adaptive skills* where appropriate. The phrase is defined in MCL 330.1100a(3), and means skills in one or more of the following areas:

- (a) Communication.
- (b) Self-care.
- (c) Home living.

- (d) Social skills.
- (e) Community use.
- (f) Self-direction.
- (g) Health and safety.
- (h) Functional academics.
- (i) Leisure.
- (j) Work.

The Committee on Model Criminal Jury Instructions has adopted the following amended model criminal jury instructions, effective January 2016.

## ADOPTED

The Committee has adopted amended instructions for use in cases involving felon in possession of a firearm charges, M Crim JI 11.38 and 11.38a, to comport with statutory amendments to MCL 750.224f.

### M Crim JI 11.38 Felon Possessing Firearm: Nonspecified Felony

The defendant is charged with possession of [a firearm/ammunition] after having been convicted of a felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(1) First, that the defendant [possessed/used/transported/sold/distributed/received/carried/shipped/purchased<sup>1</sup>] [a firearm/ammunition<sup>2</sup>] in this state.<sup>3</sup>

(2) Second, that the defendant was convicted of [name felony].<sup>4</sup>

*[Use the following paragraph only if the defendant offers some evidence that more than three years has passed since completion of the sentence on the underlying offense.]*

(3) Third, that less than three years had passed since [all fines were paid/all imprisonment was served/all terms of (probation/parole) were successfully completed].<sup>5</sup>

#### Use Notes

1. "Purchase" of ammunition is not barred under the statute.

2. "Ammunition" is defined in MCL 750.224f(9)(a) as "any projectile that, in its current state, may be propelled from a firearm by an explosive."

3. The prosecutor need not prove that the firearm was "operable." *People v Peals*, 476 Mich 636, 656; 720 NW2d 196 (2006).

4. The judge, not the jury, determines whether the charged prior felony is a "felony" as defined in MCL 750.224f(9)(b), or a more serious "specified felony" as defined in MCL 750.224f(10). The jury determines whether the defendant has in fact been convicted of that charged prior felony. For prosecutions involving a "specified felony" use M Crim JI 11.38a.

5. The judge's determination of the character of the felony as explained in Use Note 4 will determine whether the prohibition extends for three years or five years. Under subsection (1) of the statute, the three-year period applies to crimes defined in subsection (9)(b) as felonies; under subsection (2), the five-year ban applies to crimes defined as "specified" felonies in subsection (10).

#### History

M Crim JI 11.38 (formerly CJId 11.38) was added in October 1993 when MCL 750.224f was enacted. The instruction was amended by the committee in September 2001, in conjunction with the adoption of M Crim JI 11.38a, to separate the "felony" and "specified felony" versions of the offense. The possession of ammunition by felons was barred in a May 2014 statutory amendment. Amended September 2005, March 2014, and \_\_\_\_\_ 2015.

### M Crim JI 11.38a Felon Possessing Firearm: Specified Felony

The defendant is charged with possession of [a firearm/ammunition] after having been convicted of a specified felony. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(1) First, that the defendant [possessed/used/sold/distributed/received/carried/shipped/transported/purchased<sup>1</sup>] [a firearm/ammunition<sup>2</sup>] in this state.<sup>3</sup>

(2) Second, that the defendant was convicted of [name specified felony].<sup>4</sup>

*[Use the following paragraphs only if the defendant offers some evidence that more than five years has passed since completion of the sentence on the underlying offense and that his or her firearm rights have been restored, MCL 28.424.]*

(3) Third, that less than five years had passed since [all fines were paid/all imprisonment was served/all terms of (probation/parole) were successfully completed].<sup>5</sup>

(4) Fourth, that the defendant's right to [possess/use/transport/sell/receive] [a firearm/ammunition] has not been restored pursuant to Michigan law.<sup>6</sup>

#### Use Notes

1. "Purchase" of ammunition is not barred under the statute.

2. "Ammunition" is defined in MCL 750.224f(9)(a) as "any projectile that, in its current state, may be propelled from a firearm by an explosive."

3. The prosecutor need not prove that the firearm was "operable." *People v Peals*, 476 Mich 636, 656; 720 NW2d 196 (2006).

## Claims Against Stockbrokers

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4. The judge, not the jury, determines whether the charged prior felony is a “felony” as defined in MCL 750.224f(9)(b), or a more serious “specified felony” as defined in subsection (6), MCL 750.224f(10). The jury determines whether the defendant has in fact been convicted of that charged prior felony. For prosecutions involving a “non-specified felony” use M Crim JI 11.38.

5. The judge’s determination of the character of the felony as explained in Use Note 4 will determine whether the prohibition extends for three years or five years. Under subsection (1) of the statute, the three-year period applies to crimes defined in subsection (9)(b) as felonies; under subsection (2), the five-year ban applies to crimes defined as “specified” felonies in subsection (10).

6. This paragraph is to be given when the court determines that some evidence relating to restoration was admitted at trial. See *People v Henderson*, 391 Mich 612; 218 NW2d 2 (1974), addressing the burden of going forward and the burden of proof where a defendant submits evidence that he or she was licensed to carry a concealed weapon.

## History

This instruction was adopted by the committee in September 2001 to separate the “specified felony” offense from the “felony” offense and to incorporate prosecutions under the former theory predicated upon the defendant’s failure to secure restoration of his or her firearm rights. The possession of ammunition by felons was barred in a May 2014 statutory amendment. Amended September 2005, March 2014, and \_\_\_\_\_ 2015.

The Committee on Model Criminal Jury Instructions has adopted the following new model criminal jury instructions, effective January 2016.

## ADOPTED

The Committee has adopted instructions for use in cases where the defendant is charged with operating facilities for manufacturing controlled substances under MCL 333.7401c. These new instructions are M Crim JI 12.1a, 12.1b, and 12.1c.

### M Crim JI 12.1a

#### Owning, Possessing, or Using Vehicles, Buildings, Structures, or Areas Used for Manufacturing Controlled Substances

(1) The defendant is charged with the crime of owning, possessing, or using [a vehicle/a building/a structure/an area/a place] as a location for manufacturing [*identify controlled substance*]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [owned/possessed/used] [*describe property*], [a vehicle/a building/a structure/an area/a place].

(3) Second, that the property was used to manufacture [*identify controlled substance*].<sup>1</sup>

(4) Third, that the defendant knew or had reason to know that the [vehicle/building/structure/area/place] was used to manufacture [*identify controlled substance*].

[*Select that which has been charged*].<sup>2</sup>

(5) Fourth, that a person less than 18 years old was present at the time.<sup>3</sup>

(6) Fourth, that hazardous waste<sup>4</sup> was [generated/treated/stored/disposed].<sup>5</sup>

(7) Fourth, that the violation occurred within 500 feet of [a residence/a business/a church<sup>6</sup>/school property<sup>7</sup>].<sup>8</sup>

(8) Fourth, that the alleged violation involved the [possession/placement/use] of a [firearm/device designed or intended to injure a person].<sup>9</sup>

(9) Fourth, that the controlled substance was methamphetamine.<sup>10</sup>

### Use Notes

1. The jury may be instructed on the definition of “manufacture,” which can be found in MCL 333.7401c(7)(c).

2. Knowingly owning, possessing, or using the described property is a 10-year offense. MCL 333.7401c(2)(a). Various aggravating factors increase the maximum term of imprisonment. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) requires that factors that increase a maximum sentence be charged and proved beyond a reasonable doubt. If there are multiple aggravating factors, they will be charged in separate counts. Where applicable, provide the appropriate instruction for the charged offense in each count.

3. MCL 333.7401c(2)(b).

4. If appropriate, the jury should be instructed on the definition of “hazardous waste,” as provided in MCL 333.7401c(7)(a), which incorporates the definition found in MCL 324.11103.

5. MCL 333.7401c(2)(c).

6. The statute references “or other house of worship” in MCL 333.7401c(2)(d); appropriate terminology may be substituted.

7. MCL 333.7401c(7)(f) incorporates MCL 333.7410 for the definition of “school property.”

8. MCL 333.7401c(2)(d).

9. MCL 333.7401c(2)(e).

10. MCL 333.7401c(2)(f).

### M Crim JI 12.1b

#### Owning or Possessing Chemicals or Laboratory Equipment for Manufacturing Controlled Substances

(1) The defendant is charged with the crime of owning or possessing [chemicals/laboratory equipment] for use in manufacturing [*identify controlled substance*]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [owned/possessed] [a chemical/laboratory equipment].

(3) Second, that the defendant knew or had reason to know that the [chemical/laboratory equipment] was going to be used to manufacture [*identify controlled substance*].<sup>2</sup>

[*Select that which has been charged*].<sup>3</sup>

(4) Third, that a person less than 18 years old was present at the time.<sup>4</sup>

(5) Third, that hazardous waste<sup>5</sup> was [generated/treated/stored/disposed].<sup>6</sup>

(6) Third, that the violation occurred within 500 feet of [a residence/a business/a church<sup>7</sup>/school property<sup>8</sup>].<sup>9</sup>

(7) Third, that the alleged violation involved the [possession/placement/use] of a [firearm/device designed or intended to injure a person].<sup>10</sup>

(8) Third, that the controlled substance was methamphetamine.<sup>11</sup>

### Use Notes

1. “Laboratory equipment” is defined in MCL 333.7401c(7)(b).

2. The jury may be instructed on the definition of “manufacture,” which may be found in MCL 333.7401c(7)(c).

3. Knowingly owning or possessing the described chemicals or equipment is a 10-year offense. MCL 333.7401c(2)(a). Various aggravating factors increase the maximum term of imprisonment. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) requires that factors that increase a maximum sentence be charged and proved beyond a reasonable doubt. If there are multiple aggravating factors, they will be charged in separate counts. Where applicable, provide the appropriate instruction for the charged offense in each count.

4. MCL 333.7401c(2)(b).

5. If appropriate, the jury should be instructed on the definition of “hazardous waste,” as provided in MCL 333.7401c(7)(a), which incorporates the definition found in MCL 324.11103.

6. MCL 333.7401c(2)(c).

7. The statute references “or other house of worship” in MCL 333.7401c(2)(d); appropriate terminology may be substituted.

8. MCL 333.7401c(7)(f) incorporates MCL 333.7410 for the definition of “school property.”

9. MCL 333.7401c(2)(d).

10. MCL 333.7401c(2)(e).

11. MCL 333.7401c(2)(f).

### **M Crim JI 12.1c Providing Chemicals or Laboratory Equipment for Manufacturing Controlled Substances**

(1) The defendant is charged with the crime of providing [chemicals/laboratory equipment] to another person for use in manufacturing [*identify controlled substance*]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant provided [a chemical/laboratory equipment<sup>1</sup>] to another person.

(3) Second, that the defendant knew or had reason to know that the [chemical/laboratory equipment] was going to be used to manufacture [*identify controlled substance*].<sup>2</sup>

[*Select that which has been charged.*]<sup>3</sup>

(4) Third, that a person less than 18 years old was present at the time.<sup>4</sup>

(5) Third, that hazardous waste<sup>5</sup> was [generated/treated/stored/disposed].<sup>6</sup>

(6) Third, that the violation occurred within 500 feet of [a residence/a business/a church<sup>7</sup>/school property<sup>8</sup>].<sup>9</sup>

(7) Third, that the alleged violation involved the [possession/placement/use] of a [firearm/device designed or intended to injure a person].<sup>10</sup>

(8) Third, that the controlled substance was methamphetamine.<sup>11</sup>

### **Use Notes**

1. “Laboratory equipment” is defined in MCL 333.7401c(7)(b).

2. The jury may be instructed on the definition of “manufacture,” which may be found in MCL 333.7401c(7)(c).

3. Providing the described chemicals or equipment is a 10-year offense. MCL 333.7401c(2)(a). Various aggravating factors increase the maximum term of imprisonment. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) requires that factors that increase a maximum sentence be charged and proved beyond a reasonable doubt. If there are multiple aggravating factors, they will be charged in separate counts. Where applicable, provide the appropriate instruction for the charged offense in each count.

4. MCL 333.7401c(2)(b).

5. If appropriate, the jury should be instructed on the definition of “hazardous waste,” as provided in MCL 333.7401c(7)(a), which incorporates the definition found in MCL 324.11103.

6. MCL 333.7401c(2)(c).

7. The statute references “or other house of worship” in MCL 333.7401c(2)(d); appropriate terminology may be substituted.

8. MCL 333.7401c(7)(f) incorporates MCL 333.7410 for the definition of “school property.”

9. MCL 333.7401c(2)(d).

10. MCL 333.7401c(2)(e).

11. MCL 333.7401c(2)(f).

The Committee solicits comment on the following proposals by March 1, 2016. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

### **PROPOSED**

The Committee proposes amended instructions where a defendant has been charged with delivery or possession of controlled substances under MCL 333.7401 and MCL 333.7403: M Crim JI 12.2 and 12.5, respectively. Language was eliminated that suggested the prosecutor had to prove the defendant knew that he or she delivered or possessed the specific controlled substance that he or she actually delivered or possessed. Further, the instructions were reformed to eliminate repetitive language. Deletions are in strikethrough; additions are underlined.

### **[AMENDED] M Crim JI 12.2 Unlawful Delivery of a Controlled Substance**

(1) The defendant is charged with the crime of illegally delivering [*state weight*] of a mixture containing<sup>1</sup> a the controlled substance, \_\_\_\_\_. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant delivered a ~~controlled substance~~ [identify controlled substance].

(3) Second, that the ~~substance delivered~~ was \_\_\_\_\_.

~~(4) Third, that the defendant knew that [he/she] was delivering \_\_\_\_\_ delivered a controlled substance.~~

~~(5) Fourth Third,~~ that the controlled substance that the defendant delivered [was in a mixture that] weighed (*state weight*).<sup>1†</sup>

~~[(6) Fifth Fourth,~~ that the defendant was not legally authorized to deliver this substance.<sup>2</sup>

~~(7) “Delivery” means that the defendant transferred or attempted to transfer the substance to another person, knowing that it was [state substance] a controlled substance and intending to transfer it to that person. [An attempt has two elements. First, the defendant must have intended to deliver the substance to someone else. Second, the defendant must have taken some action toward delivering the substance, but failed to complete the delivery. It is not enough to prove that the defendant made preparations for delivering the substance. Things like planning the crime or arranging how~~



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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.]<sup>3</sup>

### Use Notes

Because the statutory definition of delivery includes actual, constructive, or attempted transfer of a substance, attempted delivery is not a lesser included offense. MCL 333.7105(1).

1. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

2. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994).

3. Use bracketed material defining attempt only in cases involving act falling short of completed delivery. Any attempt is a specific intent crime. *People v Joeseype Johnson*, 407 Mich 196, 239; 284 NW2d 718 (1979) (opinion of Levin, J.).

A prosecutor need not prove that the defendant intended to possess any particular controlled substance, only that he or she intended to possess some controlled substance. See *McFadden v United States*, 576 US \_\_\_\_; 135 S Ct 2298; 192 L Ed 2d 260 (2015).

### [AMENDED] M Crim JI 12.5 Unlawful Possession of a Controlled Substance

(1) The defendant is charged with the crime of knowingly or intentionally possessing [(state weight) of a mixture containing]<sup>1</sup> a the controlled substance, \_\_\_\_\_. To prove this charge, the prosecutor must prove each of

the following elements beyond a reasonable doubt:

(2) First, that the defendant possessed<sup>2</sup> a ~~controlled substance~~ [identify controlled substance].

(3) Second, that the ~~substance~~ possessed was \_\_\_\_\_.

~~(4) Third, that the defendant knew that [he/she] was possessing [list substance]~~ possessed a controlled substance.

~~[(54) Fourth Third, that the substance that the defendant possessed was in a mixture that weighed (state weight).]~~<sup>1</sup>

~~[(65) Fifth [Third/Fourth], that the substance was not obtained by a valid prescription given to the defendant.]~~<sup>3</sup>

~~[(76) Sixth [Third/Fourth], that the defendant was not otherwise authorized to possess this substance.]~~<sup>4</sup>

### Use Notes

1. This bracketed material should be given where the controlled substance is a narcotic drug classified in Schedule 1 or 2, or a cocaine-related substance as found in MCL 333.7214(a)(iv).

2. For a definition of possession, see M Crim JI 12.7.

3. This paragraph should be given only if some evidence has been presented that the defendant had a valid prescription for the substance. See *People v Little*, 87 Mich App 50, 54–55; 273 NW2d 583 (1978), and Use Note 4 below.

4. This paragraph should be given only when the defense has presented some competent evidence beyond a mere assertion that the defendant was authorized to possess the substance. If the defense presents such evidence, the prosecution must prove lack of authorization beyond a reasonable doubt. *People v Pegenau*, 447 Mich 278; 523 NW2d 325 (1994).

A prosecutor need not prove that the defendant intended to possess any particular controlled substance, only that he or she intended to possess some controlled substance. See *McFadden v United States*, 576 US \_\_\_\_; 135 S Ct 2298; 192 L Ed 2d 260 (2015).

The Committee on Model Criminal Jury Instructions has adopted the following new

model criminal jury instruction, effective January 2016.

## ADOPTED

The Committee has adopted an instruction for use in cases where the defendant is charged with occupying a dwelling without consent under MCL 750.553. The new instruction is M Crim JI 25.6.

### M Crim JI 25.6 Occupying a Dwelling Without Consent (Squatting)

(1) The defendant is charged with occupying a dwelling without consent. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant occupied a one-family dwelling, or at least one unit of a two-family dwelling. A dwelling is a building designed as a place for people to live.

(3) Second, that the dwelling was owned by [name complainant].

(4) Third, that the defendant did not have [name complainant]'s consent to occupy the dwelling.

(5) Fourth, that the defendant occupied the dwelling without an agreement for payment of money to [name complainant] or for an exchange of something else of value with [name complainant] during the time that the defendant occupied the dwelling.

*[Use the following paragraph where there is evidence that the defendant was a guest or family member under MCL 750.553(2):]*

(6) [The defendant is not guilty if [he/she] is a guest or family member of [name complainant] or of a tenant.]

### Use Note

“[O]wner” means the owner, lessor, or licensor or an agent thereof.” MCL 600.2918(9), which was tie-barred to passage of the statute that applies here, MCL 750.553.

### Reference Guide

#### Statutes

MCL 750.553; 600.2918(9).