

The Committee solicits comment on the following proposals by January 1, 2017. 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 an amendment to M Crim JI 12.1b, the manufacturing controlled substances violations of MCL 333.7401c. The amendment is intended to clear up possible confusion that methamphetamine must have actually been produced using the chemical or laboratory equipment. Deletions are in strikethrough; new language is underlined.

### [AMENDED] 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<sup>1</sup>].

[Select (3) where methamphetamine is the controlled substance. Select (4) where some other controlled substance is involved.]

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

or

~~(3)~~(4) 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>4</sup>

~~(4)~~(a) Third, that a person less than 18 years old was present at the time.<sup>5</sup>

~~(5)~~(b) Third, that hazardous waste<sup>6</sup> was [generated/treated/stored/disposed].<sup>7</sup>

~~(6)~~(c) Third, that the violation occurred within 500 feet of [a residence/a business/a church<sup>8</sup>/school property<sup>9</sup>].<sup>10</sup>

~~(7)~~(d) Third, that the alleged violation involved the [possession/placement/use] of a [firearm/device designed or intended to injure a person].<sup>11</sup>

~~(8) Third, that the controlled substance was methamphetamine.<sup>12</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. MCL 333.7401c(2)(f).

4. 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.

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

6. 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.

7. MCL 333.7401c(2)(c).

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

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

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

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

## PROPOSED

The Committee proposes an amendment to M Crim JI 23.7, the instruction for violations of MCL 750.175, embezzlement by a public official. The amendment is intended to conform the instruction to the statute and eliminate language directing a jury finding on the fourth element. Deletions are in strikethrough; new language is underlined.

### [AMENDED] M Crim JI 27.3 Embezzlement by a Public Official

(1) The defendant is charged with the crime of embezzlement by a public official. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant either held public office or was the agent or employee<sup>1</sup> of a public official.<sup>2</sup>

(3) Second, that the defendant received [money/property] in [his/her] official position capacity or employment.

(4) Third, that the defendant knew that the [money/property] was public property received by [him/her] in [his/her] official capacity or employment, and was not received for [his/her] personal use.

(5) Fourth, that the defendant used the [money/property] for [himself/herself] or provided it to any other person for [his/her] use an unauthorized purpose. It is charged in this case that the defendant used the [money/property] for [state purpose]. Such use of public [money/property] is unauthorized.

(6) Fifth, that [the property was worth \$50 or more/more than \$50 was involved].

## Use Notes

1. The statute makes reference to a “servant” of a public official. That term is no longer commonly used, so the word “employee” has been substituted.

2. The terms “agent” and “public official” are defined in M Crim JI 22.5 and 22.19, respectively.

## PROPOSED

The Committee proposes new instructions for violations of MCL 750.122, witness bribery or intimidation: M Crim JI 37.3, 37.3a, 37.3b, 37.4, 37.4a, 37.4b, 37.5, 37.5a, 37.5b, 37.6, and 37.7. The set of instructions is entirely new.

### [NEW] M Crim JI 37.3 Bribing Witnesses

(1) The defendant is charged with the crime of witness bribery. To prove this charge, the prosecutor must prove each of

the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant [gave/offered to give/promised to give] anything of value to [*name complainant*].<sup>2</sup>

(4) Third, that when the defendant [gave/offered to give/promised to give] something of value to [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

#### Use Notes

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.”

2. See MCL 750.122(5) for an attorney exemption to this statute.

### **[NEW] M Crim JI 37.3a Bribing Witnesses/Criminal Case, Penalty More Than 10 Years**

(1) The defendant is charged with the crime of witness bribery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to

testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant [gave/offered to give/promised to give] anything of value to [*name complainant*].<sup>2</sup>

(4) Third, that when the defendant [gave/offered to give/promised to give] something of value to [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the official proceeding was a criminal case charging a crime with a maximum punishment of more than 10 years or life in prison.

#### Use Notes

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.”

2. See MCL 750.122(5) for an attorney exemption to this statute.

### **[NEW] M Crim JI 37.3b Bribing Witnesses— Crime/Threat to Kill**

(1) The defendant is charged with the crime of witness bribery. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to

testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant [gave/offered to give/promised to give] anything of value to [*name complainant*].<sup>2</sup>

(4) Third, that when the defendant [gave/offered to give/promised to give] something of value to [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime/a threat to kill or injure a person/a threat to cause property damage].

#### Use Notes

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.”

2. See MCL 750.122(5) for an attorney exemption to this statute.

### **[NEW] M Crim JI 37.4 Intimidating Witnesses**

(1) The defendant is charged with the crime of witness intimidation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an

ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant [threatened/tried to intimidate] [*name complainant*]. A threat is a written or spoken statement that shows an intent to injure another person, or that person's property or family. No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat.

(4) Third, that, when the defendant [threatened/tried to intimidate] [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

#### Use Note

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding."

#### [NEW] M Crim JI 37.4a Intimidating Witnesses—Criminal Case, Penalty More Than 10 Years

(1) The defendant is charged with the crime of witness intimidation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to

testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant [threatened/tried to intimidate] [*name complainant*]. A threat is a written or spoken statement that shows an intent to injure another person, or that person's property or family. No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat.

(4) Third, that the defendant [threatened/tried to intimidate] [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the official proceeding was a criminal case charging a crime with a maximum punishment of more than 10 years or life in prison.

#### Use Note

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding."

#### [NEW] M Crim JI 37.4b Intimidating Witnesses— Crime/Threat to Kill

(1) The defendant is charged with the crime of witness intimidation. To prove this

charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant [threatened/tried to intimidate] [*name complainant*]. A threat is a written or spoken statement that shows an intent to injure another person, or that person's property or family. No particular words are necessary, and it can be said or written in vague terms that do not state exactly what injury will occur. But it must be definite enough so that a person of ordinary intelligence would understand it as a threat.

(4) Third, that when the defendant [threatened/tried to intimidate] [*name complainant*], [he/she] intended to [discourage (*name complainant*) from attending the proceeding, testifying at the proceeding, or giving information at the proceeding/influence (*name complainant*)'s testimony at the proceeding/encourage (*name complainant*) to avoid legal process, withhold testimony, or testify falsely]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness or was going to provide information at the ongoing or future proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime/a threat to kill or injure a person/a threat to cause property damage].

#### Use Note

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as "a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding."

### **[NEW] M Crim JI 37.5 Interfering with Witnesses**

(1) The defendant is charged with the crime of witness interference. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant impeded, interfered with, prevented, or obstructed [*name complainant*] from attending, testifying, or providing information, or tried to impede, interfere with, prevent, or obstruct [*name complainant*]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness at the proceeding.

(4) Third, that the defendant intended to impede, interfere with, prevent, or obstruct [*name complainant*] from attending, testifying at, or providing information at the official proceeding.

#### **Use Note**

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.”

### **[NEW] M Crim JI 37.5a Interfering with Witnesses— Criminal Case**

(1) The defendant is charged with the crime of witness interference. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an

ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant impeded, interfered with, prevented, or obstructed [*name complainant*] from attending, testifying, or providing information, or tried to impede, interfere with, prevent, or obstruct [*name complainant*]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness at the proceeding.

(4) Third, that the defendant intended to impede, interfere with, prevent, or obstruct [*name complainant*] from attending, testifying at, or providing information at the official proceeding.

(5) Fourth, that the official proceeding was a criminal case charging a crime with a maximum punishment of more than 10 years or life.

#### **Use Note**

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.”

### **[NEW] M Crim JI 37.5b Interfering with Witnesses— Crime/Threat to Kill**

(1) The defendant is charged with the crime of witness interference. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was an individual who was testifying, or going to testify, or going to provide information at an ongoing or future official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant impeded, interfered with, prevented, or obstructed [*name complainant*] from attending, testifying, or providing information, or tried to impede, interfere with, prevent, or obstruct [*name complainant*]. It does not matter whether the official proceeding took place, as long as the defendant knew or had reason to know that [*name complainant*] could be a witness at the proceeding.

(4) Third, that the defendant intended to impede, interfere with, prevent, or obstruct [*name complainant*] from attending, testifying at, or providing information at the official proceeding.

(5) Fourth, that the defendant's actions involved [committing or attempting to commit a crime/a threat to kill or injure a person/a threat to cause property damage].

#### **Use Note**

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.”

### **[NEW] M Crim JI 37.6 Retaliating Against Witnesses**

(1) The defendant is charged with the crime of witness retaliation. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that [*name complainant*] was a witness at an official proceeding. An official proceeding is a proceeding heard by a legislative, judicial, administrative, or other governmental agency or official that is authorized to hear evidence under oath.<sup>1</sup>

(3) Second, that the defendant retaliated, attempted to retaliate, or threatened to retaliate against [*name complainant*] for having been a witness. Retaliate means to commit or attempt to commit a crime against the witness, or to threaten to kill or injure any person, or to threaten to cause property damage to the witness.

**Use Note**

1. *Official proceeding* is further defined in MCL 750.122(12)(a) as “a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.”

**[NEW] M Crim JI 37.7  
Bribing or Intimidating  
Witnesses—Defenses**

(1) The defendant says that [he/she] is not guilty because [his/her] conduct was lawful, and [he/she] only intended to encourage or cause [name complainant] to provide truthful testimony or evidence.

(2) In order to establish this defense, the defendant must prove two elements by a preponderance of the evidence. A preponderance of the evidence means that the defendant must prove that it is more likely than not that each of the elements is true.

(3) First, the defendant must prove that [his/her] conduct was otherwise lawful.

(4) Second, the defendant must prove that [his/her] intent was to encourage or cause [name complainant] to give truthful testimony.

(5) You should consider these elements separately. If you find that the defendant has proved both of these elements, then you must find [him/her] not guilty. If the defendant has failed to prove either or both elements, the defense fails and you may find the defendant guilty if the prosecutor has proved the elements of the charge beyond a reasonable doubt.

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