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IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
(FITZGERALD, P.J. AND GAGE AND COOPER, J.J.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

MATTHEW LLOYD MCGRAW,

Defendant-Appellant.

_____/

Supreme Court No. 132876

Court of Appeals No. 264052

Lower Court No. O3-022840-FH

SAGINAW COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____/

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant
_____/

BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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Assistant Defender

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STATEMENT OF JURISDICTION

This Court granted leave to appeal on January 29, 2009 (Order, 76a).

STATEMENT OF QUESTIONS PRESENTED

I. **ARE THE OFFENSE VARIABLES OF THE STATUTORY SENTENCING GUIDEINES TO BE SCORED BASED ON THE CONDUCT OF THE SPECIFIC SENTENCING OFFENSE STANDING ALONE, UNLESS THE INSTRUCTIONS TO AN OFFENSE VARIABLE PERMIT CONSIDERATION OF OTHER CONDUCT?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. **FOR PURPOSES OF SCORING THE OFFENSE VARIABLES, ARE MOST CRIMES COMPLETED WHEN THE ELEMENTS ARE MET, ALTHOUGH A FACTUAL DETERMINATION MAY BE NECESSARY TO DETERMINE THE COMPLETION POINT OF A CONTINUING OFFENSE?**

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

III. **CAN PERPETRATORS OF THE CRIME BE CONSIDERED VICTIMS OF THE CRIME FOR THE PURPOSE OF ASSESSING POINTS UNDER OFFENSE VARIABLE 9?**

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "No".

IV. **WAS MR. MCGRAW SENTENCED USING INACCURATE INFORMATION WHERE THE SENTENCING GUIDELINES WERE SCORED IN ERROR UNDER OFFENSE VARIABLE 9 BECAUSE MR. MCGRAW WAS NOT THE DRIVER OF THE VEHICLE, BECAUSE PERPETRATORS CANNOT BE CONSIDERDED VICTIMS, AND BECAUSE THE OFFENSE VARIABLES ARE NOT TO BE SCORED FOR DISMISSED CHARGES THAT ARE NOT THE SPECIFIC SENTENCING OFFENSE; TO THE EXTENT THAT DEFENSE COUNSEL FAILED TO OBJECT TO THE SCORING OF TEN POINTS UNDER OFFENSE VARIABLE 9 AT SENTENCING, DID HE DEPRIVE MR. MCGRAW OF THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant Matthew McGraw pled guilty to breaking and entering a building, MCL 750.110, on June 3, 2003, in the Saginaw County Circuit Court. On August 14, 2003, the Honorable Leopold P. Borrello sentenced Mr. McGraw as a fourth habitual offender, MCL 769.12, to a term of nine (9) to thirty (30) years imprisonment (Judgment of Sentence, 17a).

The plea bargain provided for dismissal of three additional counts that were charged in connection with the instant breaking and entering offense: fleeing and eluding third degree,[1] conspiracy to commit breaking and entering,[2] and possession of burglar tools[3] (PT[4] 5-6, 20a). In return, Mr. McGraw agreed to waive his trial rights and plead guilty in three separate files to breaking and entering a building and agreed to be sentenced as a fourth habitual offender (PT 5-6; 20a).[5] The trial judge also offered a promise (i.e., a preliminary evaluation pursuant to *People v Cobbs,* 443 Mich 276; 505 NW2d 208 (1993) to sentence within sentencing guidelines range (PT 6, 11; 20a, 22a).

In support of the guilty plea, Mr. McGraw admitted going to the location with two co-defendants, breaking a window and entering with intent to commit a larceny. Once inside, they took property from the building and then drove away:

> THE DEFENDANT: Yes, sir. On January 5 [2003], I, myself, and two co-defendants went to that location and proceeded to break the window out and enter the building with the intent to commit larceny of the building, took property out of the building and put it into the vehicle and proceeded to drive away.

---

[1] MCL 750.479a(3).
[2] MCL 750.157a.
[3] MCL 750.116.
[4] PT refers to plea transcript; ST refers to sentence transcript; PSI refers to presentence investigation report.
[5] Mr. McGraw pled guilty in all three files, but received lesser sentences in two of the files (files 03-022841-FH-5 and 03-022842-FH-5), and did not pursue the appeal in those two files.

> THE COURT: All right. This one occurred on January the 5th of 2003, and did it occur on South Merrill Road in the township of Marion, Saginaw County, Michigan?
>
> THE DEFENDANT: Yes, sir. [PT 14; 22a.]

Mr. McGraw admitted breaking into the same store on June 28, 2002 and doing "the same thing" (PT 14-15; 22a). He also admitted breaking into a store on Gratiot Avenue in Thomas Township on July 20, 2002, with "other parties" and with the intent to take property (PT 13; 22a). Once inside, they took property, loaded it into the vehicle and then left the scene of the crime (PT 13; 22a).

According to the presentence report, after the instant offense was committed Mr. McGraw and his two co-defendants left the scene and shortly thereafter were pursued by the police (PSI 2). The officer observed one male subject in the car (PSI 2). The officer gave chase to the vehicle which then drove through a chain link fence and crashed (PSI 2). The three occupants fled on foot and two were located a short time later (viz. Defendant McGraw and co-defendant John Bowen) (PSI 2). Upon questioning, Mr. McGraw admitted that he and co-defendant Bowen and another male subject known to him as Roger broke into the Marion Springs Store on January 5, 2003 (PSI 3). He and co-defendant Bowen also broke into the same store on a previous occasion (PSI 3). And he and co-defendant Bowen broke into the Other Guys Audio store [on July 20, 2002] (PSI 3).

At sentencing, defense counsel acknowledged the sentencing guidelines range of 19 to 76 months in two of the three files, and the range of 29 to 114 months in the instant file (ST 5; 29a). Counsel stated that the guidelines "appear to be correct" (ST 5; 29a). Counsel recommended a sentence at the low-end of the sentencing guidelines range as the offenses were non-violent (ST 5-6; 29a-30a). The prosecutor suggested the possibility of an upward departure from the range

since "a lot of people" were hurt and this was a crime spree (ST 8; 32a). Mr. McGraw apologized for his behavior, acknowledged his poor judgment and requested placement in a residential treatment program (ST 6-8; 30a-32a).

The trial judge noted that Mr. McGraw had four previous felony convictions, the instant three crimes and five dismissed counts (ST 8; 32a). The judge opined that breaking and entering into a store was a violent offense, although the court would sentence within the sentencing guidelines range (ST 8; 32a). The judge imposed concurrent sentences of 6 to 30 years imprisonment in file 03-022841, 6 to 30 years imprisonment in file 03-022842, and 9 to 30 years imprisonment in file 03-022840 (ST 8-9; 32a-33a)

Mr. McGraw made a timely request for the appointment of appellate counsel, but the request was denied on September 1, 2003. Mr. McGraw resubmitted his request for counsel on or about September 25, 2003, but the request was again denied on September 29, 2003. Mr. McGraw then filed a motion for resentencing on February 27, 2004, challenging the scoring of ten points under Offense Variable 9 for the presence of multiple victims (Motion for Resentencing, 36a). The lower court denied the motion on March 16, 2004 (Order, 43a).

Mr. McGraw filed a delayed application for leave to appeal with the Court of Appeals on June7, 2004, challenging the lower court's denial of appellate counsel, the scoring of Offense Variable 9 and trial court's failure to object to the scoring of Offense Variable 9. The delayed application was denied "for lack of merit in the grounds presented" on September 24, 2004 (Order, 44a).

Mr. McGraw filed an application for leave to appeal with this Court on October 4, 2004, and the Court remanded to the Court of Appeals as on leave granted on July 22, 2005 (Order, 45a). The Court further directed the appointment of appellate counsel by the trial court. *Id.*

Following the appointment of appellate counsel, Defendant McGraw with the assistance of counsel filed a brief on appeal arguing among other things that OV 9 was scored improperly because the variable counts victims of the "conviction offense," and the officer that chased the defendant after the offense "was not placed in danger of injury or loss of life as he was not a bystander nor near the breaking and entering." (Defendant-Appellant's Brief on Appeal p. 7; 56a).

The prosecutor filed a response arguing that there were two individuals who placed in danger of injury as a result of the "continuum of conduct" in this case, both the officer who pursued and apprehended Defendant McGraw, and the store owner who was placed in danger of financial loss or injury (Brief on Appeal for People of the State of Michigan-Appellee pp. 3-6; 367a-70a). The prosecutor conceded that its argument conflicted with the decision in *People v Melton,* 271 Mich App 590; 722 NW2d 698 (2006) (holding that OV 9 applies to individuals placed in danger of physical injury or loss of life only), but argued that *Melton* was wrongly decided and that individuals placed in danger of financial loss could be counted under Offense Variable 9. *Id.* at 4-6; 68a-70a. The prosecutor otherwise conceded that "the only victim subject to danger of physical injury [in the instant case] was the officer who pursued and apprehended Defendant and his companions as they were still fleeing from the scene of the crime" *Id.* at 4-5; 68a-69a.

The Court of Appeals affirmed in an unpublished opinion dated November 16, 2006 (Opinion, 72a). The Court concluded that the scoring of OV 9 was proper because two or more individuals were place in danger of injury by the crash of the defendant's vehicle during the flight from police:

> The presentence report indicates that, in leaving the scene of the crime, defendant was pursued by a police officer for whom he had

> failed to stop. He ultimately crashed his car, and he and the two other occupants ran off. Defendant did not challenge the contents of the presentence report as it relates to the description of the offenses and that description discloses that two or more persons were placed in danger of injury during the criminal transaction. [Opinion at 2-3; 73a-74a.]

Mr. McGraw again filed an application for leave to appeal with this Court (again without counsel), and on October 31, 2008, the Court held the application held in abeyance pending the decision in *People v Sargent (*Docket No. 133474*) (*Order, 75a). The Court later decided the *Sargent* case on June 18, 2008. *People v Sargent,* 481 Mich App 346; 750 NW2d 161 (2008). The Court then granted leave to appeal in the instant matter on January 21, 2009 (Order, 76a).

I. THE OFFENSE VARIABLES OF THE STATUTORY SENTENCING GUIDEINES ARE TO BE SCORED BASED ON THE CONDUCT OF THE SPECIFIC SENTENCING OFFENSE STANDING ALONE, UNLESS THE INSTRUCTIONS TO AN OFFENSE VARIABLE PERMIT CONSIDERATION OF OTHER CONDUCT.

In granting leave to appeal, the Court directed the parties to answer the following question:

> [W]hether, absent an express indication to the contrary, the offense variables of the statutory sentencing guidelines, MCL 771. et seq., are to be scored based on (a) the defendant's conduct in committing the specific offense for which those guidelines are being scored, (b) the defendant's conduct during the entire criminal transaction, or (c) the defendant's conduct during both the specific offense being scored and any offenses resulting in conviction that arise out of the same transaction and that are enumerated in MCL 791.233b (see MCL 769.31(d)).

Issue Preservation:

Defendant McGraw preserved a challenge to the scoring of Offense Variable 9 by means of a post-conviction motion for resentencing. MCR 6.429(B)(3). The trial court denied this motion on March 16, 2004, concluding that the sentence "was valid as proscribed by law." (Order, 43a). The Court of Appeals affirmed on November 16, 2006, applying a "continuum of conduct" test that allowed consideration of the "entirety of defendant's conduct" when calculating the sentencing guidelines range. (Opinion, 72a-74a).

Standard of Review:

This Court applies *de novo* review to questions of the proper interpretation and application of the statutory sentencing guidelines. *People v Morson,* 471 Mich 248, 255; 685 NW2d 203 (2004).

Summary of Argument:

Read as a whole, the statutory sentencing guidelines direct the sentencing court to score the offense variables based on the conduct forming the basis of the sentencing offense alone, unless the instructions to a variable permit consideration of other conduct. This rule is made clear from the Court's earlier decisions in *People v Morson, supra*, and *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008), and it is consistent with the wording and construction of the statutory sentencing guidelines when read as a whole. Further, MCL 769.31(d), which addresses the definition of "offense characteristics" for purposes of drafting the statutory sentencing guidelines, does not apply to the scoring of the offense variables.

The Morson Decision Supports the Conclusion that the Offense Variables Are to Be Scored for the Specific Sentencing Offense:

In *People v Morson, supra*, this Court implicitly addressed and answered the question now posed by the Court. In *Morson*, both defendant Morson and co-defendant Northington were convicted of armed robbery, but only co-defendant Northington was convicted of the assault with intent to kill bystander Bish. Co-defendant Northington was sentenced first, and the probation department prepared sentencing guidelines for both of her convictions. For the assault conviction, Northington received twenty-five points under Offense Variable 1 for the discharge of a weapon toward bystander Bish, and twenty-five points under Offense Variable 3 for the serious injury inflicted upon Bish. For the armed robbery conviction, Northington received fifteen points under Offense Variable1 for the pointing of a weapon at complainant Sevakis, and zero points under Offense Variable 3 for the lack of bodily injury to Sevakis.

Defendant Morson, who was convicted of the armed robbery but not the assault, received the same scores under OV 1 and OV 3 as co-defendant Northington received for the assault

conviction (*i.e.,* twenty-five points under OV 1 and twenty-five points under OV 3). 471 Mich at 254, 280.

The Court of Appeals reversed, concluding that Ms. Morson should have received the same scores under OV 1 and OV 3 as Northington received for her (Northington's) armed robbery conviction. 471 Mich at 254.

The majority of this Court agreed, holding that the multiple offender instructions imbedded in both OV 1 and OV 3[6] require assessment of the same number of points received by co-defendant Northington for her *armed robbery* conviction when scoring the offense variables for Defendant Morson's armed robbery conviction

> On the facts before us, we agree with defendant that the plain language of subsection 2 requires that defendant, when scored on the armed robbery conviction, be assessed the same score on OV 1 and OV 3 that Iesha Northington was previously assessed on those variables when she was scored for armed robbery. [471 Mich at 259.]

This Court also concluded that Morson should have received ten points under Offense Variable 9 (number of victims) because both the robbery victim (Sevakis) and a bystander (Bish) were placed in danger of injury or loss of life "by the armed robbery of Sevakis." 471 Mich at 262.[7] The Court expressly rejected Justice Young's transactional approach to the scoring of the offense variables because "MCL 777.21(2) . . . requires the sentencing court to score each offense . . . " 471 Mich at 260 n. 13.

The Court's decision with respect to the scoring of all three offense variables supports the conclusion that the offense variables are to be scored for the specific sentencing offense.

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[6] MCL 777.31(2)(b) and MCL 777.33(2)(a) both contain a provision for scoring the same number of points for multiple offenders.

[7] There is no multiple offender instruction for the scoring of Offense Variable 9. MCL 777.39.

The Sargent Decision Supports the Conclusion that the Offense Variables Are to Be Scored for the Specific Sentencing Offense:

This Court again employed an offense-specific approach to the scoring of the offense variables in *People v Sargent, supra.*[8] In *Sargent*, the Court rejected a proposed scoring of Offense Variable 9 that would have considered victims of uncharged offenses that occurred prior to the sentencing offense. The Court explained that "the offense variables are generally offense specific. The sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense." The Court noted that "the primary focus of the offense variables is the nature of the offense" and the offense variables generally consider "only conduct 'relating to the offense' . . . ." 481 Mich at 348, 349.[9]

In the *Sargent* decision, the Court relied on the sentencing guidelines statutes, read as a whole, to support the conclusion that the offense variables are to be scored based on the specific sentencing offense:

> That the general rule is that the relevant factors are those relating to the offense being scored is further supported by the fact that the statutes for some offense variables specifically provide otherwise. For instance, MCL 777.44(2)(a) provides that when scoring OV 14 (whether the offender was a leader in a multiple-offender situation), "the entire criminal transaction should be considered . . . ." For other offense variables, the Legislature unambiguously made it known when behavior outside the offense being scored is to be taken into account. OV 12 (contemporaneous

[8] The Court initially held the instant matter in abeyance pending the decision in *Sargent*. (Order, 75a).

[9] The Court expressed some hesitation as to whether there might be a transactional approach to the scoring of the offense variables when looking at the specific sentencing offense: "[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or at most, during the same criminal transaction) should be considered." 481 Mich at 350. As the inclusion of the "same criminal transaction" language was unnecessary to the Court's decision, it reflects *dictum* of the Court. This Court should conclude that a transactional approach to the scoring of the offense variables is impermissible under the statutory sentencing guidelines unless the language of an offense variable permits otherwise. *See* discussion, *infra*, pp. 15-20.

> felonious acts), for example, applies to acts that occurred within 24 hours of the sentencing offense and have not resulted in separate convictions. MCL 777.42(2)(a). OV 13 (continuing pattern of criminal behavior) explicitly permits scoring for "all crimes within a 5-year period, including the sentencing offense," regardless of whether they resulted in convictions. MCL 777.43(2)(a). OV 16 (properly obtained, damaged, lost, or destroyed) provides that in "multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.42(2)(a). Finally, OV 8 (asportation or captivity of victim) specifically focuses on conduct "beyond the time necessary to commit the offense." MCL 777.38(1)(a). *That the Legislature has explicitly stated that conduct not related to the offense being scored can be considered when scoring some offense variables strengthens our conclusion that, unless stated otherwise, only conduct that relates to the offense being scored may be considered.* [481 Mich at 349-350; emphasis added.]

This Court in *Sargent* adopted nearly verbatim the analysis offered by Justice Markman in his concurring and dissenting opinion in *People v Morson, supra*:

> That the general rule is that the relevant factors are those that relate to the offense being scored is further supported by the fact that some offense variables specifically provide otherwise. For instance, MCL 777.44(2)(a) provides that in scoring OV 14 (whether the offender was the leader in a multiple offense situation), "[t]he entire criminal transaction should be considered." In other offense variables, the Legislature unambiguously made it known when behavior outside of the scored offense is to be taken into account. OV 12, for example, applies to acts that occurred within twenty-four hours of the sentencing offense and have not resulted in separate convictions. MCL 777.42(2)(a). OV 13 explicitly permits scoring for "all crimes within a 5-year period, including the sentencing offense" regardless of whether they resulted in conviction. MCL 777.43(2)(a). OV 16 provides that "[i]n multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.46(2)(a). Finally, OV 8 (scoring for victim asportation or captivity) specifically focuses on conduct "beyond the time necessary to commit the offense." MCL 777.38. That the Legislature has explicitly stated in some offense variables that conduct not related to the offense being scored can be considered

> strengthens the conclusion that, unless stated otherwise, only conduct that relates to the offense being scored may be considered. [*People v Morson*, 471 Mich at 274-275 (Markman, J., concurring and dissenting).]

The analysis offered by Justice Markman and subsequently adopted by this Court in *Sargent* is consistent with well-established principles of statutory construction. Courts should read the provisions of a statute in the context of the entire statute so as to produce, if possible, a harmonious and consistent whole. *Michigan ex rel Wayne County Prosecutor v Bennis*, 447 Mich 719, 732; 527 NW2d 483 (1994), *aff'd Beenis v Michigan,* 516 US 442 (1996). What governs is the fair and natural import of the statute's terms, in view of the subject matter of the law. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999).

If the legislature had intended for the offense variables to be scored based on conduct underlying the entire criminal transaction, it could have said this. Instead, the legislature chose to include language in some offense variables, but not others, allowing considering of conduct going beyond the sentencing offense.[10] The legislature's actions imply a default rule that scores the conduct of the sentencing offense standing alone. If the entire criminal transaction were to be considered for every offense variable, the various instructions to the guidelines, and in particular the instruction for OV 14 ("[t]he entire criminal transaction should be considered when scoring this variable") would be meaningless. Courts must avoid construction of a statute that would render any part of the statute surplusage or nugatory. *People v Borchard-Ruhland,* 460 Mich 278, 284-285; 597 NW2d 1 (1999); *People v Warren,* 462 Mich 415, 429 n 24; 615 NW2d

[10] In addition to the five offense variables mentioned by this Court in *Sargent* as examples of the legislature's intent to permit consideration of conduct going beyond the sentencing offense (viz. OV 8, 12, 13, 14, and 16), there are at least two other instances where the offense variables permit consideration of conduct going beyond the basic elements of the sentencing offense. Offense Variable 11 directs the court to consider penetrations "*arising out of*" the sentencing offense." MCL 777.41(2)(a) (emphasis added). Offense Variable 3 directs the court to score 100 points for the death of a victim if homicide is not the sentencing offense. MCL 777.33(2)(b).

691 (2000). "Whenever possible, every word of a statute should be given meaning, and no word should be treated as surplusage or made nugatory by court interpretation." *People v Monaco,* 474 Mich 48, 60; 710 NW2d 46 (2006) (Kelly, J., dissenting).

In sum, the default rule for scoring the offense variables is to score the conduct of the specific sentencing offense standing alone.

The Rule for Scoring the Sentencing Guidelines When There Are Multiple Concurrent Convictions that Will Require Concurrent Sentencing Supports the Conclusion that the Offense Variables Are to be Scored for the Specific Sentencing Offense:

When an offender is convicted of multiple offenses in a single case and the sentences must be served concurrently, there is a provision for scoring the sentencing guidelines for only one of the multiple offenses. MCL 777.21(2); MCL 771.14(2)(e). Included in both statutes is language that refers to the "offense" and the "crime" in the singular. This language further supports the conclusion that the offense variables are to be scored for the single sentencing offense for which the sentencing guidelines are prepared.

This Court in *Sargent*, construing an earlier version of MCL 777.21 that required the calculation of the sentencing guidelines for every offense,[11] relied on the legislature's use of the terms "the offense" and "each offense" in MCL 777.21 as illustrative of the rule that the offense

[11] When the sentencing guidelines were passed in 1998, the sentencing court was directed to score "each offense" under the guidelines: "If the defendant was convicted of multiple offenses, score each offense as provided in this part." MCL 777.21(2) (effective January 1, 1999; 1998 PA 317). In 2000, this provision was amended to provide for the scoring of one Sentencing Information Report (SIR) where there are multiple convictions that will lead to concurrent sentences: "If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part." MCL 777.21(2) (effective October 1, 2000; 2000 PA 279). But because the legislature referred to the wrong corresponding statute in the 2000 amendment (it referred to MCL 769.14, not MCL 771.14), the provision had no impact and did not change the status quo. In 2006, the statute was amended to correct the reference to the corresponding statute, and now correctly refers to MCL 771.14: "If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score each offense as provided in that part." MCL 777.21(2) (effective January 9, 2007, 2006 PA 655).

variables are to be scored for the specific sentencing offense for which the sentencing guidelines are prepared:

> MCL 777.21 instructs on how to score the sentencing guidelines. MCL 777.21(1)(1) instructs us to "[f]ind the offense category for *the offense* . . . [and] determine the offense variables to be scored for that offense category . . . ." (Emphasis added.) MCL 777.21(2) instructs us to "score *each offense*" if "the defendant was convicted of multiple offenses . . . ." (Emphasis added.) MCL 777.21(3), which pertains to habitual offenders, instructs us to "determine the . . . offense variable level . . . based on the *underlying offense*," and then to increase the upper limit of the recommended minimum sentence range as indicated. (Emphasis added.) This language indicates that the offense variables are generally offense specific. [481 Mich at 348; emphasis in original.]

The *Sargent* Court did not address the amended version of MCL 777.21(2), and it did not consider MCL 771.14 (the corresponding presentence report statute), but the language found within both of these statutes refers to an "offense" and the "crime," both in the singular. MCL 777.21(2), as amended, directs the court to score the guidelines as follows: "If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score *each offense* as provided in this part" (emphasis added). In turn MCL 771.14(2)(e) directs the probation department to score the guidelines for the "crime" with the highest crime class when there are multiple convictions that will lead to concurrent sentences:

> **771.14 Presentence investigation report**
>
> * * *
>
> (2) A presentence investigation report prepared under subsection (1) shall include all of the following:
>
> * * *
>
> (e) For a person to be sentenced under the sentencing guidelines set forth in chapter XVII, all of the following:
>
> (i) For each conviction for which a consecutive sentence is authorized or required, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.

> (ii) Unless otherwise provided in paragraph (i), for ***each crime*** having the highest crime class, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.
>
> (iii) Unless otherwise provided in subparagraph (i), the computation that determines the recommended minimum sentence range for ***the crime*** having the highest crime class. [MCL 771.14(e); emphasis added.]

Read together, use of the language "the offense" in MCL 777.21(2), use of the term "the crime" in MCL 771.14(2)(e), and the absence of language directing the courts to consider conduct relating to lesser concurrent convictions when scoring the guidelines for the sentencing offense with the highest crime class all speak loudly of the legislature's intention to score the guidelines for the single, specific sentencing offense for which the guidelines must be prepared. Had the legislature intended the offense variables to be scored for all convictions that are connected with the crime carrying the highest crime class, it could have included language directing the sentencing court to score the offense variables based on the conviction with the highest crime class and "all convictions arising out of the same transaction." Yet this language is missing from MCL 771.14 and MCL 777.21.

Sometimes, the language that is missing from a statute is instructive of legislative intent. "[T]he legislature is presumed to be aware of the consequences of the use, or omission, of language when it enacts the laws that govern our behavior." *People v Ramsdell,* 230 Mich App 386, 392; 585 NW2d 1 (1998). In the related context of the restitution statutes, the legislature explicitly stated that restitution should be ordered "to any victim of the defendant's course of conduct that gives rise to the conviction . . . ." MCL 780.766(2); MCL 769.1a(2).

Accordingly, this Court should conclude that when scoring the offense variables for the offense with the highest crime class when there are multiple convictions that will lead to concurrent sentencing, the variables are scored for the single, specific sentencing offense with the highest crime class. The offense variables do no consider conduct from multiple concurrent convictions unless a variable directs the court to include this conduct.

MCL 769.31 Does Not Apply to the Scoring of the Offense Variables:

In various opinions, members of this Court have suggested without holding that MCL 769.31 expands the scope of the conduct to be considered when scoring the offense variables. *People v Morson, supra* at 273-274 (Markman, J., concurring and dissenting); *People v Morson, supra* at 278-279 (Young, J., dissenting).

The *Sargent* Court also made reference to the provisions of MCL 769.31(d) in reaching the conclusion that the offense variables consider conduct "relating to" the sentencing offense:

> The appropriate minimum sentence range is determined in part by scoring the offense variables. From this context, it seems clear that the term "offense characteristics" [in MCL 769.31(d)] includes the characteristics that are taken into consideration under the offense variables. Therefore, if anything, MCL 769.31(d) suggests that, generally, only conduct "relating to the offense" may be taken into consideration when scoring the offense variables. [481 Mich at 349.]

Nevertheless, the *Sargent* Court took no firm position on whether "same transaction" conduct may be scored within the offense variables, and articulated a rule with hesitation attached to it: "[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or at most, during the same criminal transaction) should be considered." 481 Mich at 350.

The scoring of the offense variables is *not* controlled by MCL 769.31. This statute does not broaden the scope of the conduct to be considered and scored within the offense variables. The provisions of MCL 769.31 do not apply to the scoring of the offense variables at all.

MCL 769.31, by its terms, applies to sections 31 and 34 only (*viz.*, MCL 769.31 and MCL 769.34). The first sentence of the statute explains this:

> **769.31. Sentencing guidelines; definitions**
>
> Sec 31. As used in this section and sections 34 of this chapter:

In other words, the language of MCL 769.31 does not apply to any other statute except MCL 769.34.

Both MCL 769.31 and MCL 769.34 are not part of the application and scoring sections of the sentencing guidelines (i.e., the statutes addressing the classification of crimes, scoring and recommended ranges, *see* MCL 777.1. *et seq*), but rather address the broader questions of when a sentence must fall within the sentencing guidelines range and when a departure is permitted. Both MCL 769.31 and MCL 769.34, and their earlier counterparts of MCL 769.32 and MCL 769.33, represent the original four enabling/directional statutes of the statutory sentencing guidelines. These four statutes were designed to set the basic framework of the guidelines. MCL 769.31 provided the basic definitional terms for the drafting of the legislative sentencing guidelines. MCL 769.32 set forth the composition and selection of the guidelines commission. MCL 769.33 set for the duties of the guidelines commission. And MCL 769.34 directed application of the guidelines to all felony offenses and set forth the appropriate departure standard.

The definitional terms of MCL 769.31 were relevant only for these four enabling/directional statutes. The definitional terms were not meant to control the guidelines statutes as later passed by the legislature (i.e., the classification and scoring sections of MCL 771. *et seq.*). There is nothing within MCL 769.31 that extends its terms and definitions to the guidelines as later enacted under MCL 777.1. *et seq.* To the contrary, there are separate definitional sections found within the guidelines statutes themselves, beginning at MCL 777.1 *et seq.*, and only some of these sections carry over the same definitional terms found within MCL 769.31. *Compare* MCL 769.31(c) ("defining intermediate sanction") and MCL 777.1(d) (defining "intermediate sanction"); MCL 769.31(b) (defining "departure") and MCL 777.1(b) (same); and MCL 769.31(f) (defining "prior criminal record") and MCL 777.50(4)(a) (defining "conviction" in a similar manner). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210; 501 NW2d 76 (1993).

In addition, the legislative history of MCL 769.31 makes clear that this statute was meant to provide guidance to the Guidelines Commission, not the sentencing court. This can be seen from the changes made in the statute after the guidelines statutes were passed by the legislature. The first change to the statute was the substitution of the word "legislature" for "commission" in MCL 769.31(e) (now MCL 769.31(d)). The second change deleted the definition of the term "commission" under MCL 769.31(a). And the third change contains two aspects: the repeal of MCL 769.32 and MCL 769.33, and the corresponding removal of the reference to these two

statute in the first sentence of MCL 769.31[12] Below is the original version of MCL 769.31, compared with the current version:

Original Version:

MCL 769.31. Definitions

Sec. 31. As used in this section and sections 32 to 34 of this chapter:

(a) "Commission' means the sentencing commission created in section 32 of this chapter.

(b) "Departure' means . . .

(c) "Intermediate sanction' means . . . .

(d) "Offender characteristics' means only the prior criminal record of an offender.

(e) "Offense characteristics' means the elements of the crime and the aggravating and mitigating factors relating to the offense that the commission determines are appropriate and consistent with the criteria described in section 33(1)(e) of this chapter. For purposes of this subdivision, an offense described in section 33b of Act No. 232 of the Public Acts of 1953, being section 791.233b of the Michigan Compiled Laws, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered an aggravating factor.

(f) 'Prior criminal record' means . . .

(g) 'Total capacity of state correctional facilities' means . . . [MCL 769.31 prior to amendment by 1998 PA 317.]

Current Version:

MCL 769.31. Definitions

Sec. 31. As used in this section and section 34 of this chapter:

(a) "Departure' means . . .

[12] These changes were effectuated by 2002 PA 31.

> (b) "Intermediate sanction' means . . . .
>
> (c) "Offender characteristics' means only the prior criminal record of an offender.
>
> (d) "Offense characteristics' means the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate. For purposes of this subdivision, an offense described in section 33b of Act No. 232 of the Public Acts of 1953, 1953 PA 232, MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered an aggravating factor.
>
> (e) 'Prior criminal record' means all of the following. . . [MCL 769.31 after amendment by 1998 PA 317.][13]

Read together, the legislature's use of the word "commission" in the original statute, its definition of the term "commission" in that same statute, and its references to MCL 769.32 and MCL 769.33 in the original statute, reflect the legislature's intention to provide guidance and direction to the Guidelines Commission in drafting the statutory sentencing guidelines. When the guidelines were then passed in 1998, the directive nature of MCL 769.31 became unnecessary. The legislature corrected this in 2002, and at the same time abandoned the notion of a continuing guidelines commission by repealing both MCL 769.32 and MCL 769.33. 2002 PA 31. Now, MCL 769.31 is a definitional section that applies, by its own terms, to MCL 769.34 alone.[14]

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[13] There was a subsequent amendment to MCL 769.31 which added drug courts to the definition of intermediate sanction. 2004 PA 220.

[14] There are terms found within MCL 769.31 and MCL 769.34 ("offense characteristics" and "offender characteristics") that are never repeated within the guidelines statutes as later passed in 1998. *See* MCL 777.1 *et seq.* This Court assumed in *People v Sargent, supra* at 349, that "the term 'offense characteristics' includes the characteristics that are taken into consideration under the offense variables." Defendant does not agree or disagree with this conclusion, but notes that the definitional terms found within MCL 769.31 do not control the scoring of the offense variables found within MCL 777.1 *et seq.*

In other words, MCL 769.31 was a precursor to the final guidelines statutes and was a directive to the Commission, but it was never meant to define the terms or the proper scoring of the statutory sentencing guidelines as they are now found in MCL 777.1 *et seq*.

The Guidelines Commission, incidentally, did not ignore the directive of the legislature to consider the enumerated offenses of Proposal B of 1978 (MCL 791.233b) [15] as aggravating factors to be considered within the scoring of the guidelines. The Commission took a broader approach than directed, proposing that *all* concurrent felony offenses be scored as an aggravating factor under Prior Record Variable 7. The legislature adopted this proposal when it passed the guidelines statutes in 1998.[16] See MCL 777.57.

In sum, the legislature intended that all of Proposal B offenses of 1978 should be considered as aggravating factors in the scoring of the sentencing guidelines when the conduct results in a conviction arising from the same transaction as the sentencing offense. This was accomplished with the creation of PRV 7. That the legislature initially envisioned this same conduct as an aggravating *offense* characteristic did not preclude the legislature, in the final guidelines statutes, from moving this conduct to a prior record variable. *See* Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 Crime & Just. 131, 157 (noting that as a result of the decision in *State v Hernandez,* 311 NW2d 478 (Minn, 1981), the Minnesota sentencing guidelines consider concurrent criminal convictions under the offender's criminal history).

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[15] In 1978, the voters eliminated good-time credits for many serious offenses, and these offenses are enumerated in MCL 791.233b. *People v Johnson,* 421 Mich 494, 496-497; 364 NW2d 654 (1984).

[16] The Commission Report proposed the same language for PRV 7 as adopted by the legislature. *See Report of the Michigan Sentencing Guidelines Commission* (December 2, 1997) p.44.

The Problems Inherent in a Transactional Approach:

A transactional approach would introduce needless complexity and uncertainty into the scoring of the offense variables. A transactional approach, particularly one considering only the enumerated offenses of MCL 791.233b, would preclude a simple, practical approach to the scoring of the sentencing guidelines. If the sentencing court were to consider as aggravating factors some but not all concurrent convictions (*i.e.*, only the violent or serious offenses listed in MCL 791.233b), such a rule would present a nightmare in the scoring process. Judges would need to keep a list of Proposal B offenses at their side, and would need to parse enumerated offenses from non-enumerated offenses when considering multiple crimes. Such a rule is close to unworkable. As a more sensible approach, the Guidelines Commission proposed, and the Legislature adopted, a rule that scores *all* concurrent felony convictions under PRV 7.

A transactional approach would also invite uncertainty as to the extent of the criminal transaction that is being scored by the offense variables. In *People v Cook,* 254 Mich App 635; 658 NW2d 184 (2003), the Court of Appeals approved the scoring of ten points under Offense Variable 19 (interference with the administration of justice) for the defendant's act of fleeing the police after committing an assault. The assault (assault with intent to do great bodily harm) was the sentencing offense. Reasoning that nothing within the guidelines statutes precluded considering the "entirety of defendant's conduct" when scoring the offense variables, the Court adopted a "continuum of conduct" test that encompassed conduct that occurs immediately after the sentencing offense. 254 Mich App at 641.

The problem with the *Cook* opinion is that it adds language to the guideline statutes that is not there,[17] and it raises yet another question: how far do we look beyond the sentencing offense? In *People v Gullet,* 277 Mich App 214; 744 NW2d 200 (2007), the Court of Appeals reversed the scoring of ten points under Offense Variable 9 where the court considered a charged but dismissed act of sexual misconduct between the defendant and the complainant that involved another girl. While the prosecutor apparently thought both charged offenses (the convicted conduct of CSC first-degree and the dismissed conduct of gross indecency) were related, the Court of Appeals found the incidents unrelated for purposes of scoring Offense Variable 9.

The *Cook* and *Gullet* case cases demonstrate the uncertainty of a "continuum of conduct" test or any other transactional approach.[18] In *Cook*, the conduct was considered part of the sentencing offense, while the *Gullet* Court rejected the prosecutor's position that similar conduct committed by the defendant during another incident was part of the sentencing offense. This Court knows full well the difficulty of applying a "same transaction" to multiple offenses that occur at the same time or in a continuing course of conduct. *See People v White,* 390 Mich 245; 212 NW2d 222 (1973), overruled by *People v Nutt,* 469 Mich 565; 677 NW2d 1 (2004). As the Court noted in *People v Nutt, supra*, "The tripartite split among the Court of Appeals judges in the case before us exemplifies the difficulty that inheres in the application of the same transaction test, particularly as that test has been muddled by *Crampton* [*Crampton v 54-A*

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[17] This Court rejected a similar attempt to read words into the guidelines legislation in *People v Houston,* 473 Mich 399, 702 NW2d 503 (2005) (the guidelines do not implicitly allow a life sentence where sentencing occurs under the habitual offender grids and the upper limit of the range is 300 months or more).

[18] The statutory sentencing guidelines were designed to reduce sentencing disparity, *People v Garza,* 469 Mich 431, 435, 670 NW2d 662 (2003), but inconsistent scoring of the offense variables using a transactional approach will likely create greater sentencing disparity.

District Judge, 397 Mich 489; 245 NW2d 28 (1976)] and the Court of Appeals 'specific intent' jurisprudence." *Nutt*, 469 Mich at 587 n. 22.

The better approach, and the one consistent with the language and construction of the legislative sentencing guidelines, is to score the conduct of the sentencing offense within the offense variables, and consider conduct going beyond the sentencing offense only as provided by the instructions to a specific offense variable. If the offense variables do not consider relevant conduct that occurs before or after the sentencing offense, nothing precludes the sentencing court from considering transactional conduct when deciding whether and to what extent to depart. As Justice Young noted in his dissent in *Morson*, "[I]f factors arising before or after the offense cannot be calculated in the guidelines, they are certainly relevant sentencing factors not adequately contemplated by the guidelines. If these factors are substantial and compelling, a sentencing court may utilize those factors in imposing an upwardly departing sentence [citation omitted]." 471 Mich at 281 n. 4.[19]

In sum, the offense variables are to be scored based on the sentencing offense alone, unless the instructions to an offense variable permit consideration of other conduct. This rule is consistent with the plain language of the guidelines statutes, it is consistent with the construction and application of the sentencing guidelines statutes when read as a whole, and it does not inject unnecessary complexity and uncertainty into the sentencing process.

For the above reasons, and as explained in Issue IV, Mr. McGraw was sentenced using inaccurately scored sentencing guidelines and he is entitled to resentencing.

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[19] And the parties may bargain for a departure from the recommended range if important factors are not considered within the guidelines recommendation. *People v Wiley,* 472 Mich 153, 693 NW2d 800 (2005).

II. FOR PURPOSES OF SCORING THE OFFENSE VARIABLES, MOST CRIMES ARE COMPLETED WHEN THE ELEMENTS ARE MET, ALTHOUGH A FACTUAL DETERMINATION MAY BE NECESSARY TO DETERMINE THE COMPLETION POINT OF A CONTINUING OFFENSE.

In its order granting leave to appeal, the Court asked the parties to address the following question: *When is an offense completed for purposes of scoring the offense variables?*

Issue Preservation:

The question posed by the Court was not answered below, although Defendant preserved his challenge to the scoring of Offense Variable 9 by means of a timely post-conviction motion for resentencing. MCR 6.429(B)(3). The motion was denied on March 16, 2004 (Order, 43a).

Standard of Review:

This Court applies *de novo* review to questions of the proper interpretation and application of the statutory sentencing guidelines. *People v Morson,* 471 Mich 248, 255; 685 NW2d 203 (2004).

Summary of Argument:

For most offenses, the crime is complete when the elements are met. This is true, as well, for offenses that allow a transactional view of the incident in determining when the elements are met (*e.g.,* carjacking, robbery). For offenses that are considered on-going or continuing in nature (*e.g.*, conspiracy), the sentencing court may need to make a factual determination as to when the offense was completed. As applied to the case at bar, the offense of breaking and entering a building is not a continuing offense, and the offense was completed upon entry into the building with the requisite intent.

The Morson Decision Does Not Answer the Question Posed By this Court:

When this Court granted leave to appeal in this matter, it asked two connected questions: whether the offense variables are scored for the specific sentencing offense or the entire criminal transaction, and when is the offense completed for purposes of scoring the offense variables? As indicated in Issue I, the offense variables are not scored for the entire transaction unless the language of a specific offense variable permits this. The default rule is to score the offense variables based on the specific sentencing offense. Accordingly, this Court may need to decide *when* the specific sentencing offense is completed.

In *People v Morson, supra*, the Court made no attempt to resolve definitively the question of when the sentencing offense is completed. The majority found it "unnecessary" to determine whether armed robbery is a continuing offense (or what the majority called "a transactional offense"), and whether the armed robbery had been completed by defendant Morson and co-defendant Northington before Mr. Bish, a bystander, was placed in danger of injury of loss of life. 471 Mich at 259. Instead, the Court concluded that Defendant Morson should have received ten points under Offense Variable 9 because Mr. Bish, "who was standing nearby and responded to [the victim's] call for help," was also placed in danger of injury or loss of life "by the armed robbery." 471 Mich at 262.[20]

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[20]In other words, the majority concluded that while the armed robbery was in the process of completion, Mr. Bish was standing nearby and was placed in danger of injury or loss of life due to his proximity to the crime. The majority also relied on Mr. Bish's response to what may have been a contemporaneous call for help from the victim (as the purse was being taken or perhaps before it was taken?) and concluded accordingly that Bish was placed in danger of injury or loss of life by the armed robbery itself.

For Most Offenses, the Crime is Completed When the Elements Are Met and Justice Markman's Opinion in Morson Applies the Correct Test for Offenses That Are Not Considered On-Going :

Justice Markman's analysis of the completion point of the armed robbery in *People v Morson, supra*, is the correct analysis for offenses that are not considered continuing in nature. In his concurring and dissenting opinion in *Morson*, Justice Markman would have drawn lines between the armed robbery offense for which Ms. Morson and co-defendant Northington were both held responsible, and the assault offense for which Northington, alone, was convicted. Justice Markman believed that "Northington did not shoot Bish until after the robbery" and "[t]he robbery was complete by the time Bish intervened." 471 Mich at 273 and 275. Justice Markman would have concluded that the armed robbery offense was completed *before* the assault offense because all of the elements of the armed robbery offense had been met before the shooting:

> Here, however, [a review of the entire transaction using a transactional approach] is not necessary because all the elements were, in fact, completed before she reached a place of temporary safety. Because the assault occurred after the armed robbery and because defendant was never convicted of the assault, it cannot be considered when scoring OV 1, OV 3, and OV 9. [471 Mich at 276 n. 4.

Justice Markman suggested that a crime may be completed prior to the conclusion of the transaction even where a "transactional view" of the offense is permitted by statute

> Under a transactional view, a person can be found guilty of armed robbery if, before reaching a place of temporary safety, all the elements of armed robbery are completed. However, that does not mean that an armed robbery can *never* be completed until a person has reached a place of temporary safety, it is also possible that the crime will be completed before then. Here, all the elements of the armed robbery were completed before defendant reached a place of temporary safety. There cannot be two endings to a crime. In other

> words, it cannot be that the crime of armed robbery was completed once defendant stole the purse and it was also completed once she reached a place of temporary safety. The crime had to have been completed at either the latter or the former time. If all the elements had not been completed, we could look, under a transactional view, to defendant's conduct until she reached a place of temporary safety to establish all the elements of the armed robbery. Here, however, that is not necessary because all the elements were, in fact, completed before she reached a place of temporary safety. Because the assault occurred after the armed robbery, and because defendant was never convicted of the assault, it cannot be considered when scoring OV 1, OV 3 and OV 9. [*People v Morson*, 471 Mich at 276 n. 4.]

Justice Markman was correct. While there are no Michigan cases addressing the completion point of an offense for purposes of scoring the offense variables,[21] there is a wealth of information from both the Michigan and federal courts as to when an offense is completed for purposes of a statute of limitations defense. The general rule is that "an offense is committed when it is completed, that is, when each element has occurred." *United States v Are*, 498 F3d 460, 463 (CA 7, 2007). *See also, United States v Yashar,* 166 F3d 873, 875 (CA 7, 1999) (same).

In Michigan, the elements of the crime (or at least the main acts) are generally set forth in the penal statute. Most statutes provide plenty of guidance as to when the offense is completed. *See e.g.,* MCL 750.520b ("A person is guilty of criminal sexual conduct in the first degree if he or she engaged in sexual penetration with another person and if any of the following circumstances exists . . . ."); MCL 750.83 ("Any person who shall assault another with intent to

[21] The Court of Appeals decision in *People v Cook,* 254 Mich App 635, 658 NW2d 184 (2003), applies a "continuum of conduct" test to the scoring of the offense variables, but does not decide when the sentencing offense (there, assault with intent to do great bodily harm) was completed. Rather, the Court concluded that "where the crimes involved constitute one continuum of conduct, as here, it is logical and reasonable to consider the entirety of defendant's conduct." 254 Mich App at 641.

commit the crime of murder, shall be guilty of a felony . . . ."); and MCL 750.413 ("Any person who shall, willfully and without authority, take possession of and drive or take away . . . .").

This Court and the Court of Appeals have also provided guidance on the completion point of an offense. In *People v Monaco,* 474 Mich 48, 56; 710 NW2d 46 (2006), the Court held that failure to pay child support is not a continuing offense and "the crime of felony non-support is complete when an individual fails to pay support in the amount ordered at the time ordered." In *People v Mendoza,* 108 Mich App 733, 863; 310 NW2d 860 (1981), the Court of Appeals held that prison escape is not continuing offense and "the offense is complete at the time the escape from prison is made." And in *People v Schneider,* 309 Mich 158, 166; 14 NW2d 819 (1944), this Court held that once the agreement (the offer and acceptance) of bribery is made, the offense is completed.

This test, that the offense is completed when the elements are met, should apply likewise to offenses for which the legislature has allowed a transactional view of the incident. As Justice Markman correctly noted, "[i]f all the elements have not been completed, we could look, under a transactional view, to defendant's conduct until she reached a place of temporary safety . . ." 471 Mich at 276 n. 4. But such analysis is "not necessary [when] all the elements were, in fact, completed before [the offender] reached a place of temporary safety." *Id.*

There are several examples of Michigan statutes that allow a transactional view of the offense, but do not necessarily tell the courts when the crime has been completed. The crime of carjacking is defined as the taking of a motor vehicle through the use or threat of use of force or violence, with the use or threats occurring during "the course of committing a larceny of a motor vehicle." MCL 750.529a. The legislature defined the phrase "in the course of committing a larceny of a motor vehicle" to include "acts that occur in an attempt to commit the larceny, or

during commission of a larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle." MCL 750.529a(2). In other words, the crime of carjacking may not be complete until the flight or attempted flight, although it may be completed beforehand.

The robbery statutes (both armed and unarmed) contain similar provisions. Robbery is defined as a larceny of money or other property, with some type of force, threat, assault or putting in fear, with the requirement that the latter element (force, violence, threats or assault) occur during the "course of committing a larceny." MCL 750.530. The legislature defined "in the course of committing a larceny" as including "acts that occur in an attempt to commit the larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." MCL 750.530(2). The armed robbery statute contains similar language. *See* MCL 750.530(2) ("A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct . . . ."). Again, the robbery may or may not be completed before the defendant's flight because the completion point will depend on when the force or violence occurred and whether there is force or violence used to retain the property.

For Continuing or On-Going Offenses, the Sentencing Court May Be Required to Make a Finding of Fact as to When the Offense Was Completed:

Defendant McGraw could find no decision in Michigan setting forth a simple test to determine the completion point of an on-going crime. There is recognition, however, that some offenses are continuing in nature.

The United States Supreme Court set forth the following guidelines for determining when an offense is a continuing offense. The courts must first look to the language of the penal statute.

Toussie v United States, 397 US 112, 115; 90 S Ct 858; 25 L Ed 2d 156 (1970). *See also, People v Owen,* 251 Mich App 76, 80; 649 NW2d 777 (2002) (same). When the language of the statute is unclear, the courts look to the nature of the crime and whether the legislature "must assuredly have intended" that the crime be considered a continuing offense. *Toussie v United States, supra*; *People v Owen*, *supra*. There is a presumption against continuing offenses. *Toussie v United States, supra; People v Owen*, 251 Mich App at 779.

There are some Michigan statutes that, by their very terms, reflect the on-going nature of the offense. The crime of desertion or abandonment is considered a "continuing offense" per the words of the penal statute. *See* MCL 750.161(6) ("Desertion, abandonment, or refusal or neglect to provide necessary and property shelter, food, care, and clothing . . . shall be considered to be a continuing offense . . . .")

Case law also forms a backdrop for determining whether an offense is a continuing offense. This Court has held that conspiracy is a continuing offense, *People v Denio*, 454 Mich 691, 710; 564 NW2d 13 (1997), and acknowledged the continuing nature of the crime of possession of intoxicating liquor, *People v Beverly,* 247 Mich 353; 225 NW2W 481 (1929). Likewise, the Court of Appeals has concluded that the crime of concealing or storing a stolen firearm continues throughout the act of concealment or storage. *People v Owen,* 251 Mich App 76; 649 NW2d 777 (2002).

Once the sentencing court determines that an offense is a continuing offense, it may need to make a factual determination as to the completion point. In *United States v Kissel,* 218 US 601; 31 S Ct 124; 54 L Ed 1168 (1910), the Court concluded that conspiracy is a continuing offense, but noted the unresolved factual question of when the offense was completed. This Court likewise stated in *People v Denio,* 454 Mich at 710, that conspiracy is a continuing offense

and is "'presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or defeat of the object of the conspiracy [quoting *United States v Castro*, 972 F2d 1107, 1112 (CA 9, 1992].'" *See also*, *People v Artman*, 218 Mich App 236, 240; 553 NW2d 673 (1996) (question as to when the embezzlement was completed was a factual determination for the jury).

Breaking and Entering a Building is Not a Continuing Offense and Is Completed upon Entry into the Building With the Requisite Intent:

In the instant matter, there is no need for a factual determination as to the completion point of the offense because Mr. McGraw completed the offense upon his entry into the building with the intent to commit a larceny. According to the penal statute, the crime of breaking and entering a building is completed upon entry into the building with the requisite intent:

> **MCL 750.110. Breaking and entering**
>
> Sec. 110. (1) A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car is guilty of a felony punishable by imprisonment for not more than 10 years. [MCL 750.110.][22]

As numerous courts have held, the crime of breaking and entering is completed upon entry into the building with the requisite intent:

> Burglary is complete upon entry of the structure with the requisite intent to commit a felony or petit larceny, even if the larceny is not subsequently fulfilled. * * * It is the intent which exists in the mind of the perpetrator at the moment of entry which defines burglary. [*People v Davenport,* 122 Mich App at 164,

[22] Subsection 2 of the statute contains a definition of "shipping container" that is not relevant to the question raised in this matter.

quoting *People v Markus*, 82 Cal App 3d 477, 481-482; 147 Cal Rptr 151 (1978).][23]

"[A] breaking and entering is completed once the defendant is inside the building." *People v Petrella,* 124 Mich App 745, 765; 336 NW2d 761 (1983). *See also*, *People v Squires,* 240 Mich App 454; 613 NW2d 361 (2000) (breaking and entering is complete upon entry, and the subsequent receiving and concealing of property is separate offense); *People v Barrows,* 73 Mich App 51, 55; 250 NW2d 789 (1976) (Anderson, J., dissenting) (the crime of burglary is completed upon entry with intent, and consummation or execution of the intent is unnecessary; what the defendant does once inside the building is merely evidence of the initial unlawful intent).[24]

Case law makes clear that breaking and entering is not a continuing offense. "Even though robbery is a continuing offense, breaking and entering is not." *People v Davenport,* 122 Mich App 159, 165; 332 NW2d 443 (1982). "Breaking and entering is not a continuous offense. It is

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[23] Breaking and entering a building is considered a statutory form of burglary in that the statute may fail to include one or more elements of the common law offense. Perkins and Boyce, *Criminal Law* (3d ed), p. 272. *See also, People v Davenport*, 122 Mich App at 163 n. 1 (Michigan courts may look to burglary statutes of other states for guidance as to Michigan's breaking and entering statutes, although "burglary" and "breaking and entering" have different meanings in Michigan.)

[24] A slightly different rule may apply to the crime of home invasion as that statute includes language that refers to the entering or *exiting* of the building. *See* MCL 750.110a ("at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists . . . "). *See also, People v Shipley*, 256 Mich App 367, 377; 662 NW2d 856 (2003) ("[F]irst-degree home invasion is not necessarily completed at the time of entry into a dwelling, but rather can be completed by commission of the final element of the crime while the person is present in (or leaving) the dwelling.").

There may be reason to differentiate between the crimes of breaking and entering a building and home invasion as there is a habitation element to the latter that serves to increase the statutory maximum penalty. Compare MCL 750.110a and MCL 750.110. The statutory sentencing guidelines likewise differentiate between the crimes by assigning home invasion to the "Person" crime group, while breaking and entering is a crime against "Property." See MCL 777.16f. *See also*, *People v Winhoven,* 65 Mich App 522, 237 NW2d 540 (1975) (discussing the differences among the old breaking and entering statutes - prior to the enactment of the home invasion statute and the corresponding amendment of MCL 750.110, and noting that arson of dwelling protects habitation, while arson of other structures and objects is treated less severely by statute).

completed once the burglar is inside the building." *People v Wise,* 134 Mich App 82, 93; 351 NW2d 255 (1984). *See also*, *People v Patterson,* 212 Mich App 393, 395; 538 NW2d 29 (1995) (breaking and entering is not continuing offense and once the actor has entered the building the crime is completed; any crime committed once inside the building is a separate act).

This Court must acknowledge, however, the different rule of completion applied to felony murder crimes arising from an underlying burglary offense. The Court of Appeals explained in *People v Davenport, supra*, that the traditional analysis of when the burglary is completed (*viz*. upon entry with the requisite intent) was not relevant to a charge of felony murder based on commission of a burglary due to the special nature of the felony-murder rule:

> This analysis does not necessarily imply that a defendant cannot be convicted of felony murder in the perpetration of a breaking and entering unless he kills his victim while actually entering the building. The cases have affirmed convictions where the killing was incidental to the felony and associated with it as one of its hazards. *State v Conner, 241 NW2d 447 (Iowa, 1976)*; *United States v Naples, 192 F Supp 23 (D DC, 1961), rev'd on other grounds 113 U.S. App DC 281; 307 F2d 618 (1962).* [*People v Davenport,* 122 Mich App at 166 n. 2.]

The Iowa Supreme Court likewise concluded that while a burglary is completed upon entry with intent, the crime of felony murder includes a killing committed "in the perpetration of" the offense and therefore includes acts taken after the crime was completed, but associated with the crime and its hazards:

> We do not overlook in this connection that it is contended by the defendant that, at the time of the killing, the defendant was not engaged in the perpetration of the burglary, and that the larceny was, at best, a mere misdemeanor. If this contention were conceded, still it would not meet the provision of Section 12922, which would permit the deceased to resist by force the taking of his property. But the contention cannot be conceded. In legal contemplation, the burglary, though complete, was a present, and not a past, event. True, it was fully accomplished. So far as the commission of the offense was concerned, it was complete when the lock was broken

> and the door was opened for the entry. If the defendant had been then and there apprehended, while in the building, then, according to defendant's contention, he would not have been taken in the burglary, because the crime was fully committed. In defining murder in the first degree, Section 12911 provides that murder perpetrated in the perpetration of burglar is murder in the first degree. If an offender should break and enter a house and should therein murder its occupant, would he be guilty of murder in the perpetration of a burglary? According to the contention of the defendant, he would not, because the burglary would necessarily be complete before the burglar could find his victim within. What is meant by *murder in the perpetration of a burglar*y is a murder resulting as an incident to the burglary, and associated with the burglary, as one of its hazards. [*State v Burzette*, 208 Iowa 818, 828; 222 NW 394 (Iowa, 1929).]

This Court's decision in *People v Gillis,* 474 Mich 105; 712 NW2d 419 (2006), is consistent with the above analysis. In *Gillis*, the Court explained that the felony murder statute required a homicide that was committed "in the perpetration of, or attempt to perpetrate" an enumerated felony. In defining the language "in the perpetration of," the Court noted the broader reach of those words beyond the ordinary definitional elements of the enumerated felony:

> In summary, "perpetration" as used in the felony-murder statute contemplates something beyond the definitional elements of the predicate felony. Michigan courts have recognized this broader common-law meaning through the adoption of the "res gestae" principle, which holds that a murder committed during the unbroken chain of events surrounding the predicate felony is committed "in the perpetration of" that felony. [474 Mich at 125.]

The Court explained that prior Michigan cases had interpreted the word "perpetration" as extending the scope of the crime "beyond those elements required to prove the predicate felony

has been committed or attempted." 474 Mich at 121.[25]

Once the Sentencing Offense Has Been Completed, Conduct Going Beyond the Sentencing Offense May Not Be Considered Within the Scoring of the Offense Variables Unless the Language of the Variable Permits Otherwise:

As previously stated in Issue I, the Court should conclude that the offense variables are to be scored based on the sentencing offense alone, unless the language of a variable permits consideration of other conduct. For Mr. McGraw, the sentencing offense of breaking and entering a building was completed once he entered the building with the intent to commit a larceny. No further conduct may be scored under the offense variables unless the language of a variable directs the court to look beyond the sentencing offense.

Mr. McGraw recognizes that a sentencing judge may wish to consider conduct occurring once inside the building when it seeks to fashion an appropriate sentence. The Court might note that the offense variables do allow consideration of conduct not leading to a conviction that occurs within 24 hours of the sentencing offense (Offense Variable 12). MCL 777.42. And the guidelines allow consideration of conduct resulting in a concurrent felony conviction under Prior Record Variable 7. MCL 777.57. If conduct that occurs after the sentencing offense has been completed cannot be considered anywhere within the scoring of the sentencing guidelines, it may form the basis of a departure from the guidelines. *See People v Price,* 477 Mich 1; 723 NW2d

[25] While the Court began its analysis with reference to case law holding that escape is "'as important to the execution of the [felony]' as the elements of the crime itself," 474 Mich at 116, and the Court concluded that "a felon has not 'carried out' or 'completed' the felony for felony-murder purposes until the felon has escaped," 474 Mich at 116, it is clear from the context and wording of the Court's statements that the Court was speaking with reference to the felony-murder statute alone. *See People v Davenport, supra* (distinguishing the ordinary completion point of burglary from the completion of a burglary that serves as the predicate offense for felony murder). Defendant would add that if all offenses included an element of escape, all or the majority of the case law defining when the crime is completed and when it is a continuing offense would be invalid.

201 (2006) (Canadian convictions that cannot be scored under PRV 1 or PRV 2 may constitute a valid departure reasons); *People v Morson, supra* at 276 n. 3, 281(Opinions of Markman, J., and Young, J., suggesting possible departure if conduct may not be scored within the guidelines).

The rules proposed today by Mr. McGraw, that the offense variables are to be scored based on the sentencing offense, and the offense is generally completed upon satisfaction of the elements, are simple to apply. They may require some forethought on the part of prosecutors when choosing the offense of conviction for purposes of the plea bargain, but there is nothing new in this type of consideration. The parties and the court should be able to determine in advance of sentencing what conduct will be considered within the sentencing guidelines range, and the rules advanced today add greatly to that determination.

III. PERPETRATORS OF THE CRIME CANNOT BE CONSIDERED VICTIMS OF THE CRIME FOR THE PURPOSE OF ASSESSING POINTS UNDER OFFENSE VARIABLE 9.

In granting leave to appeal, the Court directed the parties to address "*whether an accomplice to the underlying crime can be considered a 'victim' under MCL 777.39 (OV 9).*"

Issue Preservation:

Defendant McGraw preserved a challenge to the scoring of Offense Variable 9 by means of a post-conviction motion for resentencing. MCR 6.429(B)(3). The trial court denied the motion on March 16, 2004, concluding that the sentence "was valid as proscribed by law." (Order, 43a). The Court of Appeals affirmed on November 16, 2006, concluding that the offense involved two or more persons who were placed in danger of injury or loss of life because "in leaving the scene of the crime, defendant was pursued by a police officer for whom he had failed to stop. He ultimately crashed his car, and he and two other occupants ran off." (Opinion, 73a-74a).

Standard of Review:

This Court applies *de novo* review to questions of the proper interpretation and application of the statutory sentencing guidelines. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

Summary of Argument:

The statutory sentencing guidelines do not permit an assessment of points under Offense Variable 9 when the perpetrators of the crime are placed in danger of injury as a result of the crime. Perpetrators are not victims for purposes of the statutory sentencing guidelines.

The Language of MCL 777.39 (Offense Variable 9):

At the time of Mr. McGraw's offense in 2003, MCL 777.39(2)(a) instructed the court to "Count each person who was placed in danger of injury or loss of life as a victim"[26] Offense Variable 9 is the variable that looks to the "number of victims" of the offense. MCL 777.39(1). Ten points are permitted where "there are 2 to 9 victims." MCL 777.39(1)(c). If only one victim was endangered, the defendant receives zero points. MCL 777.39(1)(d). Mr. McGraw was assessed ten points under OV 9 for placing two to nine victims in danger of injury or loss of life. *Sentencing Information Report,* 16a.

The central object of Offense Variable 9 is to assess points for the number of victims of the sentencing offense. *People v Sargent,* 481 Mich 346; 750 NW2d 161 (2008).

The Criminal Justice System Contemplates Distinct Roles for the Victim and Perpetrator:

The criminal justice system provides separate and distinct roles for the victim and perpetrator. The defendant has procedural and substantive rights guaranteed by the constitution, statutes and case law, while the victim has more limited rights that are defined within MCL 780.750 *et seq* and Const 1963, art 1, § 24. The roles of the two parties are not interchangeable.

On numerous occasions, this Court, the Court of Appeals and the legislature have demonstrated awareness of the different roles played by the victim and the defendant/perpetrator/accomplice during the criminal justice process. According to MCL 780.752, the defendant is excluded from stepping into the shoes of the victim and exercising the rights of the victim under the Crime Victims Rights Act if the victim is deceased:

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[26] The court is to use the version of the sentencing guidelines in effect on the date of the offense when scoring the sentencing guidelines. MCL 769.34(2). Effective March 30, 2007, MCL 777.39(2)(a) was amended to provide: "Count each person who was placed in danger of physical injury or loss of life or property as a victim." 2006 PA 548.

> **780.752. Definitions.**
>
> * * *
>
> (j) "Victim" means any of the following:
>
> * * *
>
> (ii) The following individuals *other than the defendant* if the victim is deceased: [MCL 780.751(j)(ii); emphasis added.]

According to MCL 780.752(3), accomplices may not exercise the rights of the victim under the Crime Victims Rights Act:

> An individual who is charged with a crime arising out of the same transaction from which the charge against the defendant arose is not eligible to exercise the privileges and rights established for victims under this article. [MCL 780.752(3).]

According to MCR 6.425(E)(1)(c), there is a separate right of allocution at sentencing for the "defendant, the defendant's lawyer, the prosecutor, and the victim . . . ."

And according to *People v Smith,* 180 Mich App 622; 447 NW2d 847 (1989), the defendant is not entitled to resentencing if the victim is not offered the right of allocution. But according to this Court, the defendant is entitled to resentencing when he or she is not offered an opportunity to allocute at sentencing. *People v Petit,* 466 Mich 624; 648 NW2d 193 (2002).

All of the above reflect a clear understanding of the different roles played by the defendant/perpetrator/accomplice and the victim in the criminal justice system.

The Defendant May Not Be Counted as a Victim in Scoring the Sentencing Guidelines:

In *People v Love,* 144 Mich App 374, 377; 375 NW2d 752 (1985), the Court of Appeals addressed the scoring of Offense Variable 18 (Injury or Threat to Life) under the judicial sentencing guidelines and concluded that points could not be assessed against the defendant for the injuries he caused to himself during the crime. The Court rejected a literal reading of the

offense variable, although the variable allowed an assessment of 15 points when "acts resulted in injury to person":

> The scoring of OV 18 presents a more unusual problem. That variable provides as follows:
>
> O.V. 18 INJURY OR THREAT TO LIFE
>
> "5= acts resulted in loss of human life
> "4= acts resulted in injury to person
> "3= acts created threat to human life
> "0= [no] loss, injury or threat"
>
> Defendant was discovered unconscious in the burning building by members of the fire department who had responded to the fire. He was hospitalized, suffering from smoke inhalation. Based on his own injuries, four points were awarded. There is nothing in the record or the presentence report which indicates that any other individual was actually injured as a result of the arson.
>
> While the prosecutor argues for a literal interpretation of this variable, we agree with defendant that under a common sense approach, the injuries sustained by the criminal actor himself should not be considered in the point assessment. Inasmuch as criminal responsibility generally attaches to injury to other persons or for damage to their property, assessment of four points and augmentation of the recommended minimum penalty is unwarranted. [*People v Love,* 144 Mich App at 377.]

Similarly, in *People v Latzman,* 153 Mich App 270, 274; 395 NW2d (1986), *vacated on other grounds* 429 Mich 866; 413 NW2d 428 (1987), the Court of Appeals recognized that the defendant could not be included within the definition of "victim" under Offense Variable 6 (Multiple Victims) of the judicial sentencing guidelines, even though the definition of victim referred to "a person who was placed in danger of injury or loss of life":

> The definition of OV 6 is a "person who was placed in danger of injury or loss of life." While this definition cannot be construed so as to include defendant as a victim of his own crime, see *People v Love,* 144 Mich App 374, 377; 375 NW2d 752 (1985), we believe that it could properly be applied so as to include the passengers in defendant's automobile.

Notably, there was no claim that the passengers in the defendant's automobile were accomplices to his act of driving drunk and causing the death of an individual in another vehicle (*i.e.*, vehicular manslaughter).

This Court Has Recognized Certain Inherent Limitations in the Scoring of the Statutory Sentencing Guidelines:

That there are well-recognized limitations inherent in the scoring of the statutory sentencing guidelines is supported by two recent decisions of this Court.

In *People v Sargent, supra*, the Court held that the victims to be scored under Offense Variable 9 are the victims of the sentencing offense only. The Court rejected the prosecutor's theory that a victim of an uncharged, separate incident could be counted. The Court noted the implausibility of considering all of the victims of the defendant's lifetime conduct:

> Finally, aside from having no basis in the language of the relevant statutes, the prosecutor's interpretation simply does not make sense. If, as the prosecutor contends, we are not limited to conduct relating to the sentencing offense, every single person that the defendant had ever placed in danger of injury or loss of life would properly be considered for purposes of OV 9. [481 Mich at 350.]

In other words, this Court limited the scoring of Offense Variable 9 to the victims *of the sentencing offense.* While this language is found nowhere within the provisions of MCL 777.39, the Court felt bound to add this limitation to the application of the variable.

In *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008), the Court applied a contextual reading to Offense Variable 10 and concluded that a vulnerable victim is required for all point assessments under this variable. The case makes clear that there are limitations to a plain-language reading of the statutory sentencing guideline. Although various subsections of Offense Variable 10 do not refer to the requirement of a vulnerable victim, the Court concluded

that the language was part of the entire variable. The Court held that fifteen points may not be assessed for predatory conduct unless a vulnerable victim is exploited:

> Reading this statute [Offense Variable 10] as a whole, we conclude that the central subject is the assessment of points for the exploitation of vulnerable victims. The statute applies when exploitive conduct, including predatory conduct, is at issue. The statute does not use the word "vulnerable" in the subsections directing the assessment of points for particular circumstances. Nor does the subsection specifically directing the assessment of 15 points for predatory conduct refer to exploitation.
>
> However, the Legislature's focus is clearly stated by subsection 1, which provides that "[o]ffense variable 10 is exploitation of a vulnerable victim." The intent to assess points for the exploitation of vulnerable victims is also demonstrated by the fact that the statute assigns zero points when the "offender did not exploit a victim's vulnerability. [481 Mich at 157-158.]

Thus, despite the plain language in the various subsections of MCL 777.40, the Court read the requirement of a "vulnerable" victim into the definition of predatory conduct.

Perpetrators Cannot Be Likened to Bystanders of a Crime:

This Court held in *People v Morson, supra*, that bystanders to the crime may be counted as victims under Offense Variable 9 if they are placed in danger of injury or loss of life. Perpetrators are not bystanders to the crime. The definition of "bystander" refers to a person who has not taken part in the event: "One present but not taking part in a situation or event: a chance spectator." *Websters's Ninth New Collegiate Dictionary* (1987) p. 192.[27] Perpetrators are not innocent individuals present at the scene of the crime. They have participated in the crime, and they have placed themselves at the scene, presumptively voluntarily. In other words, they have assumed the risk of injury.

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[27] The same definition is found on-line at the Merriam-Webster website. http://merriam-webster.com/dictionary/bystander.

For all the above reasons, this Court should not broadly interpret the term 'victim" under Offense Variable 9 to encompass all defendants, accomplices and perpetrators. To hold otherwise allows the assessment of points under OV 9 in nearly every criminal transaction, as there will always be a victim and one or more defendants. This was not the intent of the legislature, and it is not a fair reading of the statute addressing the scoring of Offense Variable 9.

IV. MR. MCGRAW WAS SENTENCED USING INACCURATE INFORMATION WHERE THE SENTENCING GUIDELINES WERE SCORED IN ERROR UNDER OFFENSE VARIABLE 9 BECAUSE MR. MCGRAW WAS NOT THE DRIVER OF THE VEHICLE, BECAUSE PERPETRATORS CANNOT BE CONSIDERDED VICTIMS, AND BECAUSE THE OFFENSE VARIABLES ARE NOT TO BE SCORED FOR DISMISSED CHARGES THAT ARE NOT THE SPECIFIC SENTENCING OFFENSE; TO THE EXTENT THAT DEFENSE COUNSEL FAILED TO OBJECT TO THE SCORING OF TEN POINTS UNDER OFFENSE VARIABLE 9 AT SENTENCING, HE DEPRIVED MR. MCGRAW OF THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In granting leave to appeal, the Court directed the parties to address whether "*the defendant in this case was properly assessed 10 points for '2 to 9 victims' under MCL 777.39 (OV 9) where he broke into an unoccupied store but, in the course of driving away with two accomplices, led police on a car chase ending in a collision.*"

Issue Preservation:

Defendant McGraw preserved a challenge to the scoring of Offense Variable 9 by means of a post-conviction motion for resentencing. MCR 6.429(B)(3). The trial court denied the motion on March 16, 2004, concluding that the sentence "was valid as proscribed by law." (Order, 43a). The Court of Appeals affirmed on November 16, 2006, concluding that the offense involved two

or more persons who were placed in danger of injury or loss of life because "in leaving the scene of the crime, defendant was pursued by a police officer for whom he had failed to stop. He ultimately crashed his car, and he and two other occupants ran off." (Opinion, 73a-74a).

Standard of Review:

This Court applies *de novo* review to questions of the proper interpretation and application of the statutory sentencing guidelines. *People v Morson,* 471 Mich 248, 255; 685 NW2d 203 (2004).

Mr. McGraw was improperly assessed 10 points under Offense Variable 9 for several reasons, including the fact that he was not the driver of the vehicle, perpetrators cannot be counted as victims, and the offense variables of the statutory sentencing guidelines are not to be scored for dismissed charges (unless an instruction specifies to the contrary).

Nothing in the record supports the assumption made by the Court of Appeals that Mr. McGraw endangered his accomplices or anyone else by driving the car when he fled from the police. The Court of Appeals apparently assumed that Mr. McGraw was the driver of the vehicle:

> Only those persons involved in the criminal transaction itself may be counted as victims, *People v Chesebro,* 206 Mich App 468, 471; 522 NW2d 677 (1994), but they need not be the complainant. Bystanders and persons who intervene after the fact may be considered victims if placed in danger of injury [citations omitted]. In other words, "where the crimes involved constitute one continuum of conduct as here, it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense." *People v Cook,* 254 Mich App 635, 641; 658 NW2d 184 (2003).
>
> * * * The presentence report indicates that, in leaving the scene of the crime, defendant was pursued by a police officer for whom he had failed to stop. He ultimately crashed his car, and he and the two other occupants ran off. Defendant did not challenge the contents of the presentence report as it relates to the description of

> the offenses and that description discloses that two or more persons were placed in danger of injury during the criminal transaction.1 Thus, the record supports the trial court's scoring of OV 9.
>
> 1 Although defendant did not plead guilty to fleeing and eluding, the scoring of the guidelines need not be consistent with the ultimate verdict. *People v Perez,* 255 Mich App 703, 712; 662 NW2d 446, vacated in part on other grounds 469 Mich 415 (2003).
>
> [Opinion of Court of Appeals, slip op at 2-3; 73a-74a.]

The record does not support the conclusion that the car belonged to Mr. McGraw or that he was driving it. According to Mr. McGraw's plea colloquy with the court, he and two other individuals broke into a store, loaded property into a vehicle and drove away:

> The Court: Mr. McGraw, you want to tell me what [you did] that makes you guilty of these crimes? Let's start with File No. 03-022841, which allegedly involves breaking and entering a store at 9790 Gratiot.
>
> Mr. McGraw: Yes, sir.
>
> The Court: Okay. You want to tell me what [you did] that makes you guilty of that?
>
> Mr. McGraw: I took and went to that location with other parties, and we proceeded to smash out the window and go inside and take property that was not our property. We took and loaded it into the vehicle and left the scene.
>
> The Court: Okay. At the time you broke into the store, you intended to take property from that store, is that correct?
>
> Mr. McGraw: Yes, sir.
>
> The Court: And did this occur on July 20 of last year?
>
> Mr. McGraw: Yes, sir.
>
> The Court: And this particular one occurred on Gratiot Road in the Township of Thomas, Saginaw County, state of Michigan?
>
> Mr. McGraw: Yes, sir.

The Court: All right. Let's do the one on File No. 03-022840, which allegedly deals with the store on South Merrill Road.

Mr. McGraw: Yes, sir. That would be on June—the date of June something?

The Prosecutor: Your Honor, if I may. These last two cases were the same store, on two different occasions.

The Court: Okay. There's one on January the 5th. Let's do that one.

Mr. McGraw: Yes, sir. On January 5, I, myself, and two co-defendants went to that location and proceeded to break the window out and enter the building with the intent to commit larceny of the building, took property out of the building and put it into the vehicle and proceeded to drive away.

The Court: All right. This one occurred on January the 5th of 2003, and did it occur on South Merrill Road in the township of Marion, Saginaw County, Michigan?

Mr. McGraw: Yes, sir.

The Court: Okay. Let's do the same store, only this one on June 28th. Do the same thing?

Mr. McGraw: Yes, sir.

The Court: What store is it, do you know?

Mr. McGraw: Um, no, sir, I don't know the name of it, but I do believe it's Marion Springs General Store.

The Court: General Store?

Mr. McGraw: I do believe.

The Court: All right. Again, you broke a window to get in?

Mr. McGraw: Yes, sir.

The Court: And at the time you did that, you intended to take stuff out of the store?

Mr. McGraw: Yes, sir.

> The Court: Then this one occurred on June 28 of 2002, is that correct?
>
> Mr. McGraw: Yes, sir.
>
> The Court: And again, on South Merrill Road in the township of Marion, Saginaw County, Michigan, is that correct?
>
> Mr. McGraw: Yes, sir. [PT 12-15; 22a-23a; emphasis added.]

Nothing in the presentence report indicates that the car belonged to Mr. McGraw or that he was driving it:

> On 1-5-03 at approximately 1:00, officers were dispatched to the Marion Springs General Store, 12025 S. Merrill Road in Brant in reference to an audible breaking and entering alarm. The complainant, Floyd Brown, reported to Central Dispatch that there was on older large brown car backed up to the door, with the trunk open, and that there were three unknown male subjects near the vehicle. While en route to the alarm, Officer Henige observed a vehicle matching the description, traveling east on Brant Road near Brennan. Officer Henige turned around to stop the vehicle, at which time he noticed that the registration plate was covered with what appeared to be black plastic. Officer Henige activated his overhead lights to stop the vehicle, at which time the vehicle stopped. Officer Henige could observe a male subject with light hair, who then put a black hood over his head. There were no other occupants visible in the car. When Officer Henige exited his patrol vehicle, the vehicle then sped off. Officer Henige then chased the vehicle with flashing lights east on Brant, to 16355 Brant Road, where the vehicle drove into the yard through a chain link fence, where it then crashed. The three occupants of the vehicle then fled on foot in a southwest direction. After a search of the area was conducted with the assistance of several outside agencies, officer located Matthew McGraw and John Bowen. The third unknown subject was not apprehended.
>
> * * *
>
> Sergeant Yancer interviewed Matthew McGraw at the Saginaw County Jail on 1-5-03. McGraw advised that he had been with Bowen and another male only known to him as Roger. McGraw advised that he and Bowen had broken into the Marion Springs Store. McGraw advised that he and Bowen had broken into the store on one previous occasion. He reported that he and Bowen had also

> broken into the Other Guys Audio Store, located in Thomas Township. [PSIR, 2-3.]

Circuit Court docket entries for the case against co-defendant John Bowen show that he too was charged with the fleeing and eluding offense (Bowen Docket Entries, Attachment A).

Because the record does not support the conclusion that Mr. McGraw was the owner or driver of the vehicle, he cannot be assessed 10 points for endangering the lives of the other two perpetrators during the course of the chase with the police. Mr. McGraw may have been the occupant of the vehicle, not the driver.[28] If this Court were to consider assessing points for the injury to accomplices, it should first ascertain who caused the injury.

Moreover, as explained in Issue III, co-defendants, accomplices and perpetrators in general cannot be considered victims for purposes of scoring Offense Variable 9.[29]

Finally, it was error to score Offense Variable 9 based on the dismissed fleeing and eluding charge. As explained in Issue I, the offense variables are scored based on the specific sentencing offense, and they do not consider other conduct unless the variable or an instruction to the variable states otherwise. Here, Offense Variable 9 has no instruction to look outside the sentencing offense. Accordingly, it was error to assess ten points under this variable.

Mr. McGraw would note that the prosecutor, when responding to the defendant's appeal in the Court of Appeals, took the position that "the only victim subject to danger of physical

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[28] The Court of Appeals decision does not specify the persons that it considered to be victims in this case, although the logical inference is that the accomplices were counted. This Court's order granting leave to appeal appears to draw the same inference. Even if the Court of Appeals meant to count the state trooper who was chasing the getaway vehicle, zero points are scored for one victim. Mr. McGraw would also note that there was no evidence that the state trooper was placed in danger of injury or loss of life during the chase, and there was no reference to other vehicles on the road at the time.

[29] While it is certainly possible that an accomplice could manifest a complete withdrawal from the criminal offense and warrant consideration as a victim at a later point in the crime, no such facts are present in the instant case.

injury was the officer who pursued and apprehended Defendant and his companions as they were still fleeing from the scene of the crime." *Plaintiff-Appellee's Brief on Appeal* p. 4; 68a. The prosecutor argued that victims of property loss should also be counted under OV 9, but recognized that the decision in *People v Melton,* 271 Mich App 590, 595-596; 722 NW2d 698 (2006), did not allow this. *Id.* at 5-6; 69a-70a.

For all the above reasons, this Court should find error in the scoring of Offense Variable 9. Without the improper assessment of ten points under OV 9, the proper recommended range will be **19 to 76 months**, not 29 to 114 months. MCL 777.65 (Class D grid). *See Sentencing Information Report*, 16a. Mr. McGraw has a due process right to be sentenced using accurate information. *Townsend v Burke,* 334 US 736; 68 S Ct 1252; 92 L Ed 1690 (1948); *People v Malkowski,* 385 Mich 244; 188 NW2d 559 (1971); US Const Amends V & XIV; Const 1963, art 1, § 17. Because the sentence now exceeds the proper recommended range of the guidelines, Mr. McGraw is entitled to resentencing. *People v Kimble,* 470 Mich 305; 684 NW2d 669 (2004); *People v Francisco,* 474 Mich 82; 711 NW2d 44 (2006).

To the extent that defense counsel did not object to the scoring of the sentencing guidelines at the time of sentencing, he provided ineffective assistance of counsel. *People v Kimble, supra*; *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). Defendants have a constitutional right to effective assistance of counsel at sentencing. *People v Pubrat,* 451 Mich 589, 594; 548 NW2d 595 (1996); *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); US Const Amends VI & XIV; Const 1963, art 1, § 20. The Court should entertain no argument that the challenge has been waived by defense counsel's statement at sentencing that the guidelines "appear to be correct" (ST 5, 29a) since this statement is at best equivocal, it was not endorsed by Mr. McGraw, and defense counsel's statement reflects

counsel's failure to closely review the facts of the case. Mr. McGraw made a timely motion for resentencing to correct the scoring error, as he is permitted to do under MCL 769.34(10). Further, even the prosecutor acknowledged on appeal that there was only one victim placed in danger of injury or loss of life by the "continuum of conduct" in this case. *Plaintiff-Appellee's Brief on* Appeal pp. 4-5; 68a-69a. The prosecutor also made no argument as to waiver in responding to the defendant's appeal in the Court of Appeals. All told, the error is properly before the Court.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, Defendant-Appellant asks this Court to reverse the decision of the Court of Appeals and remand for resentencing and any further relief deemed appropriate by the Court.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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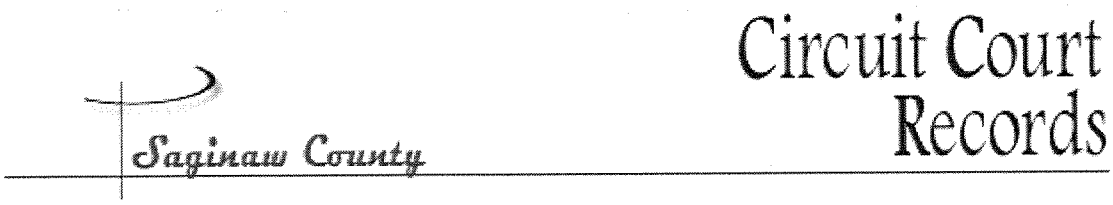
Dated: March 20, 2009

ATTACHMENT A

BOWEN DOCKET ENTRIES



Criminal Records

Circuit Court Criminal Records

Case Information:
Case number: 03-022709 Case Type: FH
Judge: Darnell Jackson
Status: Closed
Active Date: 2/6/2003
Bench-Warrant:
Non Jury: J
Closed Date: 7/31/2003
Appearance: Date:

Defendant
Name: Bowen, John Thomas
Attorney: Michael J. Sovansky

Charges:

CHG DISP	COUNT	MCLA/ORDINANCE	CHARGE DESCRIPTION	CHARGE DATE
Nolle Pros	01-00	750.110	CSP B&E BLDG W/INTENT	1/6/2003
Guilty Plea	02-00	750.110	B&E BLDG W/INTENT	1/6/2003
Nolle Pros	03-00	750.116	POSS BURGLARS TOOLS	1/6/2003
Nolle Pros	04-00	750.479A3	FLEEING-3RD DEGREE	1/6/2003

Events:

Date	Type	Comment
2/6/2003	C	CASE FILED WITH CIRCUIT COURT
2/6/2003	PFC	PULLED FILE FOR COURTROOM
2/7/2003	APR	ARRAIGNMENT SCHEDULED FOR 2/18/2003 AT 1:30 PM
2/7/2003	-	(VIDEO ARRAIGNMENT - COURTROOM 410)
2/7/2003	*	DISBURSEMENT PAYMENT VOUCHER DAVE HOFFMAN FOR $110.00 BY
2/7/2003	-	HON. L.L. HEATHSCOTT
2/18/2003	NH	NOT HEARD
2/18/2003	-	ADJOURNED FOR 2 DAYS. PROSECUTOR DID NOT HAVE FILE
2/21/2003	APR	ARRAIGNMENT SCHEDULED FOR 3/03/2003 AT 1:30 PM

2/21/2003	-	RESET FROM 2/18/03
2/28/2003	INF	FELONY INFORMATION FILED BY PROSECUTOR
2/28/2003	-	AND PEOPLE S REQUEST FOR DISCOVERY
3/3/2003	06R	CT. REPORTER: C. HARRISON, CSR-4662
3/3/2003	ARR	ARRAIGNMENT
3/3/2003	-	DEF PRESENT WITH ATT R BRISBOIS (FOR ATT B DENTON)
3/3/2003	-	AND PROSECUTOR R KING.
3/3/2003	100	DEFENDANT PRESENT IN COURT WITH COUNSEL, WAIVED READING
3/3/2003	-	OF INFORMATION; STOOD MUTE, COURT ENTERED NOT GUILTY
3/3/2003	-	PLEA.
3/3/2003	SCH	COURT ADMIN TO SCHEDULE
3/3/2003	-	TRIAL
3/3/2003	101	BOND CONTINUED PENDING FURTHER PROCEEDINGS.
3/3/2003	RET	FILE RETURNED TO CLERK S OFFICE
3/4/2003	RCO	FILE RETURNED FROM COURT TO CLERK S OFFICE
3/12/2003	APR	TRIAL SCHEDULED FOR 6/03/2003 AT 8:30 AM
5/30/2003	PFC	PULLED FILE FOR COURTROOM
6/2/2003	ADJ	ADJOURNED TRIAL ORIG. SCHED. 6/03/2003
6/2/2003	-	ATTY DENTON HAS CONFLICT IN MORNING; SET IN AFTERNOON
6/2/2003	APR	TRIAL SCHEDULED FOR 6/03/2003 AT 1:30 PM
6/2/2003	-	ATTY DENTON HAS CONFLICT IN MORNING; SET IN AFTERNOON
6/3/2003	05R	COURT REPORTER: E. PRZYBYLSKI, CSR-3789
6/3/2003	H	HEARING HELD
6/3/2003	-	DEFT PRES W/ATTY E BRADY DENTON & PROS ATTY A REIMERS ON
6/3/2003	-	DATE SET FOR TRIAL; PLEA REACHED
6/3/2003	PLG	DFDT PLEAD GUILTY TO
6/3/2003	-	CT II (B&E BLDG INTENT) & ALL OTHER COUNTS TO BE DIS-
6/3/2003	-	MISSED AT TIME OF SENTENCE; NO SENTENCE AGREEMENT; DNA
6/3/2003	-	PROFILING & PAY $60 FEE
6/3/2003	DOC	REFERRED TO DEPARTMENT OF CORRECTIONS
6/3/2003	DNA	ORDER FOR DNA PROFILING
6/3/2003	GP	GUILTY PLEA 02-00 B&E BLDG W/INTENT
6/4/2003	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
7/31/2003	05R	COURT REPORTER: E. PRZYBYLSKI, CSR-3789
7/31/2003	S	SENTENCED
7/31/2003	-	DEFT PRES W/ATTY E BRADY DENTON, PROS ATTY K MILLER & R
7/31/2003	-	RAY OF DOC; PROB 5 YRS W/1ST YR IN JAIL & 209 DAYS CREDIT
7/31/2003	-	CONCUR W/03-22668-FH, 03-22705-FH & 03-22706-FH; OBTAIN
7/31/2003	-	GED/HIGH SCHOOL DIPLOMA; COMPLETE MICH DOC SAI AFTER JAIL
7/31/2003	-	INCLUDING AFTER CARE PROGRAM; NOT ENGAGE IN ASSAULTIVE
7/31/2003	-	BEHAVIOR; SUBMIT TO SEARCH OF PERSON/VEHICLE/RESIDENCE;

7/31/2003

	-	70 HRS COMM SERV; $60 VRF W/IN 30 DAYS; SUPERV FEE $16/MO
7/31/2003	-	BEG 1ST MONTH AFTER JAIL; PAY REST $1427 IN 03-22841,
7/31/2003	-	$379.60 IN 03-22840 & $2697.63 IN 03-22841; SEEK/MAINTAIN
7/31/2003	-	EMPLOYMENT
7/31/2003	NAR	NOTICE OF APPEAL RIGHTS PROVIDED TO DEFENDANT
7/31/2003	*	MOTION/ORDER OF NOLLE PROSEQUI
7/31/2003	NP	NOLLE PROS 01-00 CSP B&E BLDG W/INTENT
7/31/2003	NP	NOLLE PROS 03-00 POSS BURGLARS TOOLS
7/31/2003	NP	NOLLE PROS 04-00 FLEEING-3RD DEGREE
7/31/2003	SN	COUNT 02-00 SENTENCED
7/31/2003	JOS	JUDGMENT OF SENTENCE
7/31/2003	FDC	FINAL DISPOSITION-GUILTY PLEA
8/7/2003	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
8/14/2003	RCO	FILE RETURNED FROM COURT TO CLERK S OFFICE
8/29/2003	*	PETITION/ORDER FOR AMENDMENT OF ORDER OF PROBATION
8/29/2003	-	PAY RESTITUTION ON 03-022709 $379.69; DELETE 03-22841;
8/29/2003	-	03-22840 AND 03-22841
8/29/2003	*	ORDER OF PROBATION
9/8/2003	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
9/12/2003	MSP	MSP EJUD COUNT 002 PLG CONFIRMED
9/12/2003	MSP	MSP EJUD COUNT 001 NOP CONFIRMED
9/12/2003	MSP	MSP EJUD COUNT 003 NOP CONFIRMED
9/12/2003	MSP	MSP EJUD COUNT 004 NOP CONFIRMED
1/28/2004	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
5/11/2005	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
9/1/2005	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
5/24/2007	*AT	SOVANSKY, MICHAEL J. REPLACES DENTON, E. BRADY AS ATTORN
5/24/2007	*	MOTION, AFFIDAVIT AND SUMMONS REGARDING PROBATION
5/24/2007	-	VIOLATION
5/24/2007	APR	MOTION SCHD FOR 5/29/2007 AT 2:30 PM
5/24/2007	-	P.V. SHOW CAUSE
5/24/2007	PFC	PULLED FILE FOR COURTROOM
5/30/2007	APR	SHOW CAUSE, CT ORDER SCHD FOR 6/18/2007 AT 2:30 PM
5/30/2007	-	PROB. SHOW CAUSE: REG: RESTITUTION
6/18/2007	05R	COURT REPORTER: E. PRZYBYLSKI, CSR-3789
6/18/2007	H	HEARING HELD
6/18/2007	-	DEF PRESENT W/ATTY SOVANSKY; PA P. DUGGAN/ DOC KEN
6/18/2007	-	MACIEJEWSKI PRESENT AT DATE SET FOR PROB. SHOW CAUSE
6/18/2007	-	REGARDING RESTITUTION: DEF PROBATION CONT D WITH ALL
6/18/2007	-	CONDITIONS/ DEF TO MAKE RESTITUTION PAYMENTS; OF $375.00
6/18/2007	-	MONTHLY UNTIL PAID IN FULL.

6/19/2007

	RET	FILE RETURNED TO CLERK S OFFICE
6/19/2007	RCO	FILE RETURNED FROM COURT TO CLERK S OFFICE
7/17/2007	*	PETITION & ORDER FOR AMENDMENT OF
7/17/2007	-	ORDER OF PROBATION
7/24/2007	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION
7/18/2008	DFP	PET/ORDER FOR DISCHARGE FROM PROBATION
7/18/2008	-	SUCCESSFUL
7/22/2008	*	DEFN INFO CHANGED BY CIRCUIT COURT PROBATION

New Search