

STATE OF MICHIGAN  
IN THE SUPREME COURT

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Appeal from the Michigan Court of Appeals

Whitbeck, C.J., and Saad and Schuette, JJ.

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

Supreme Court  
Docket No. 132876

vs.

Court of Appeals  
Docket No. 264052

MATTHEW LLOYD MCGRAW,  
Defendant-Appellant.

Circuit Court Docket  
No. 03-022840-FH-5

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BRIEF ON APPEAL - APPELLEE

\* ORAL ARGUMENT REQUESTED \*

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**STATEMENT OF JURISDICTION**

In an order dated January 29, 2009, this Court granted Defendant's application for leave to appeal the Court of Appeals' judgment dated November 16, 2006. Accordingly, jurisdiction over this case is vested in this Court.<sup>1</sup>

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<sup>1</sup> See MCR 7.302(G)(3).

**COUNTERSTATEMENT OF QUESTIONS INVOLVED**

- I. VIEWING THE ENTIRE CRIMINAL TRANSACTION PROMOTES THE LEGISLATURE'S INTENT OF UNIFORMITY IN SENTENCING AND FOLLOWS A PLAIN READING OF THE OFFENSE VARIABLES. ARE THE OFFENSE VARIABLES OF THE STATUTORY SENTENCING GUIDELINES TO BE SCORED BASED ON DEFENDANT'S CONDUCT DURING THE ENTIRE CRIMINAL TRANSACTION?

**Defendant-Appellant says "NO".**  
**Plaintiff-Appellee says "YES".**  
**Court of Appeals says "YES".**

- II. TO DETERMINE WHEN THE UNBROKEN CHAIN OF EVENTS SURROUNDING THE ENTIRE CRIMINAL TRANSACTION ENDS, SENTENCING COURTS MUST EXAMINE THE TIME, PLACE, CAUSATION, AND CONTINUITY OF ACTION BETWEEN THE CHAIN OF EVENTS AND THE SENTENCING OFFENSE. FOR PURPOSES OF SCORING THE OFFENSE VARIABLES, IS AN OFFENSE COMPLETED ONCE THE UNBROKEN CHAIN OF EVENTS SURROUNDING THE ENTIRE CRIMINAL TRANSACTION ENDS?

**Defendant-Appellant says "NO".**  
**Plaintiff-Appellee says "YES".**  
**Court of Appeals says "YES".**

- III. UNDER THE PLAIN LANGUAGE OF MCL 777.39(2)(a), AS LONG AS AN ACCOMPLICE WAS PLACED IN DANGER OF INJURY OR LOSS OF LIFE, THE ACCOMPLICE CAN BE COUNTED AS A VICTIM. CAN AN ACCOMPLICE TO THE UNDERLYING CRIME BE CONSIDERED A VICTIM UNDER MCL 777.39?

**Defendant-Appellant says "NO".**  
**Plaintiff-Appellee says "YES".**  
**Court of Appeals says "YES".**  
**Sentencing Court says "YES".**

IV. DEFENDANT PLACED HIS TWO ACCOMPLICES IN DANGER OF INJURY OR LOSS OF LIFE WHEN HE BECAME INVOLVED IN A CAR CHASE WITH POLICE WHILE THE ACCOMPLICES WERE IN DEFENDANT'S VEHICLE. DEFENDANT EVENTUALLY DROVE THROUGH A FRONT YARD AND CRASHED INTO A FENCE. WAS THE EVIDENCE SUFFICIENT TO SCORE TEN POINTS FOR OV 9?

**Defendant-Appellant says "NO".**  
**Plaintiff-Appellee says "YES".**  
**Court of Appeals says "YES".**  
**Sentencing Court says "YES".**

**KEY TO ABBREVIATIONS**

The following abbreviations shall be used in this brief.

“App” refers to Appellant’s Appendix.

“DB” refers to Defendant’s Brief dated March 20, 2003.

“PSIR” refers to the Presentence Investigation Report, which was provided to the Court by Defendant.

“PT” refers to the Plea Transcript dated June 3, 2003.

“ST” refers to the Sentencing Transcript dated August 14, 2003.

## COUNTERSTATEMENT OF FACTS

Defendant was charged with Conspiracy to Commit Breaking & Entering with Intent to Commit Larceny, Breaking & Entering with Intent to Commit Larceny,<sup>2</sup> Possession of Burglar's Tools, and Third-degree Fleeing & Eluding.<sup>3</sup> On June 3, 2003, Defendant pled guilty to Breaking & Entering.<sup>4</sup> (App 22a) On August 14, 2003, the Honorable Leopold P. Borrello, Tenth Circuit Judge, sentenced Defendant as an habitual offender, fourth offense, to 9 to 30 years in prison. (App 32a-33a) In exchange for Defendant's guilty plea, the remaining charges were dismissed.<sup>5</sup> (App 20a, 34a)

In the early morning hours of January 5, 2003, Defendant and two companions broke into the Marion Springs General Store by breaking a window, entered the store, and stole a variety of items which were placed in the trunk of their car. (App 22a-23a; PSIR 2-3) In response to the store alarm and to a call from a neighbor, Officer Henige responded to the scene. While en route, he observed Defendant's vehicle, with the license plate covered with black plastic, traveling down the road. The officer pursued Defendant's car. The car stopped, but once Officer Henige exited his patrol car, the vehicle sped off. Officer Henige chased

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<sup>2</sup> MCL 750.110.

<sup>3</sup> MCL 750.479a(3).

<sup>4</sup> Defendant also pled guilty to two separate counts of Breaking & Entering in 03-022841-FH and in 03-022842-FH. (App 22a-23a)

<sup>5</sup> Two separate charges of conspiracy in 03-022841-FH and in 03-022842-FH were also dismissed. (App 20a)

Defendant's car. Eventually, it drove into a yard, crashed through a chain link fence, and stopped. The three occupants then fled on foot. Defendant and one of his accomplices were quickly captured. (PSIR 2)

In calculating Defendant's sentence, the sentencing court assessed ten points under OV 9 of the sentencing guidelines. Defendant's total OV score of 35 placed him in OV Level IV, setting his guidelines range from 29 to 114 months. (App 29a) Defendant filed a motion for resentencing with the sentencing court, arguing that the court incorrectly scored OV 9.<sup>6</sup> Defendant's motion was denied.<sup>7</sup> Defendant then filed an application for leave to appeal his sentence to the Court of Appeals, which was also denied. Defendant then filed an application for leave to appeal in this Court. In lieu of granting it, this Court remanded the case to the Court of Appeals for consideration as on leave granted.<sup>8</sup> In an unpublished opinion, the Court of Appeals affirmed Defendant's sentence.<sup>9</sup>

As more facts become pertinent, the People shall cite to the record *infra*.

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<sup>6</sup> See App 36a-42a.

<sup>7</sup> See App 43a.

<sup>8</sup> See *People v McGraw*, 473 Mich 877; 701 NW2d 744 (2005).

<sup>9</sup> *People v McGraw*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2006 (Docket No. 264052). See App 72a-74a.

## ARGUMENT I

THE OFFENSE VARIABLES OF THE STATUTORY SENTENCING GUIDELINES ARE TO BE SCORED BASED ON DEFENDANT'S CONDUCT DURING THE ENTIRE CRIMINAL TRANSACTION. VIEWING THE ENTIRE CRIMINAL TRANSACTION PROMOTES THE LEGISLATURE'S INTENT OF UNIFORMITY IN SENTENCING AND FOLLOWS A PLAIN READING OF THE OFFENSE VARIABLES.

### A. ISSUE PRESENTED BY THE COURT

The Court asks the parties to determine

whether, absent an express indication to the contrary, the offense variables of the statutory sentencing guidelines, MCL 777.1 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)) . . . .

### B. PRESERVATION OF ISSUE

Defendant filed a motion for resentencing, which was denied by the trial court. (App 36a-42a, 43a) Defendant appealed the decision to the Court of Appeals, but in an unpublished opinion, the decision was affirmed. (App 72a-74a)

### C. STANDARD OF REVIEW

The People agree with Defendant that the standard of review is de novo.<sup>10</sup>

### D. THE PEOPLE'S ARGUMENT

The United States Supreme Court indicated that the fundamental respect for humanity requires consideration of the character and record of the individual

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<sup>10</sup> See *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

offender and the circumstances of the particular offense in determining a just and fitting sentence.<sup>11</sup> In 1983, this Court stated that “the policy of this state favors individualized sentencing for every convicted defendant. The sentence must be tailored to fit the particular circumstances of the case and the defendant.”<sup>12</sup> In 1994, the Legislature appointed an independent commission and charged it with designing and recommending to the Legislature guidelines which would have the status of law. The Legislature gave the sentencing commission one of the following tasks concerning the sentencing guidelines: “[r]educe sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences.”<sup>13</sup> In the mission statement of the Michigan Sentencing Guidelines Commission, the Commission stated that its goal was to “[d]evelop sentencing guidelines which provide protection for the public, are proportionate to the seriousness of the offense and the offender’s prior record, and which reduce disparity in sentencing throughout the state.”<sup>14</sup> This Court recognized that the

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<sup>11</sup> *Lockett v Ohio*, 438 US 583, 603-605; 98 S Ct 2954; 57 L Ed 2d 973 (1978); *Williams v New York*, 337 US 241, 247; 69 S Ct 1079; 93 L Ed 2d 241 (1949).

<sup>12</sup> *People v Coles*, 417 Mich 523, 537, 539; 339 NW2d 440 (1983), citing *People v McFarlin*, 389 Mich 557, 574; 208 NW2d 504 (1973).

<sup>13</sup> PA 1994, No. 445; MCL 769.33 repealed [by PA 2002, No. 31] after the Sentencing Guidelines Commission had completed its task (i.e. after the sentencing guidelines had been passed by the Legislature and initial modifications had been proposed).

<sup>14</sup> Michigan Sentencing Guidelines Commission, *Report of the Michigan Sentencing Guidelines Commission*, (1997) p 6.

Legislature designed the guidelines to promote uniformity in sentencing.<sup>15</sup> Further, the guidelines' purpose was "to ensure a degree of consistency in sentencing defendants with comparable histories who have committed comparable crimes, while also affording the sentencing court a degree of discretion to account for the specific circumstances of the case."<sup>16</sup>

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."<sup>17</sup> The Court of Appeals adopted the Sentence Review Committee's belief that "the underlying factual findings which the sentencing judge may have to make must be upheld if there is any evidence to support them."<sup>18</sup> "[W]here the crimes involved constitute one continuum of conduct, . . . it is logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range with respect to each offense."<sup>19</sup>

In *People v Cheesebro*,<sup>20</sup> the Court of Appeals determined that "the offense

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<sup>15</sup> *People v Gary Smith*, 482 Mich 292, 309-310 n 41; 754 NW2d 284 (2008).

<sup>16</sup> *People v Horn*, 279 Mich App 31, 42-43; 755 NW2d 212 (2008).

<sup>17</sup> *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). See also *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993), abrogated on other grounds *People v Mitchell*, 454 Mich 145 (1997); *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

<sup>18</sup> *People v Richardson*, 162 Mich App 15, 17; 412 NW2d 227 (1987), quoting Sentencing Review Committee Report and Recommendation, p 30 (July, 1982).

<sup>19</sup> *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

<sup>20</sup> *People v Cheesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994).

variables are to be scored only with respect to the specific criminal transaction that gives rise to the conviction for which the defendant is being sentenced unless the instructions for a variable specifically and explicitly direct the trial court to do otherwise.”

Furthermore, Offense Variable 6 [the equivalent of OV 9 under the former judicial sentencing guidelines] does not necessarily require a contemporaneous criminal act. The instructions for Offense Variable 6 provide that a victim is each person who is placed in danger of injury or loss of life. It does not necessarily require that a separate criminal offense have occurred with respect to that victim. For example, in a robbery, the defendant may rob only one victim, but scoring Offense Variable 6 for multiple victims is nevertheless appropriate because there are other individuals present at the scene of the robbery who were, therefore, endangered.<sup>21</sup>

In *People v Barbee*,<sup>22</sup> this Court looked beyond the specific offense in affirming points assessed under OV 19.<sup>23</sup> The defendant was convicted of drunk driving. The sentencing court assessed points under OV 19 for interfering with the administration of justice when the defendant gave a false name at the time of the traffic stop.<sup>24</sup> In looking at the entire criminal transaction, this Court stated, “[C]onduct that ‘interfered with or attempted to interfere with the administration of justice’ does not have to necessarily rise to the level of a chargeable offense because it is merely being used as one of various factors to determine a defendant’s

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<sup>21</sup> *Id.* at 473.

<sup>22</sup> *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004).

<sup>23</sup> See MCL 777.49.

<sup>24</sup> *Barbee*, *supra* at 285.

sentencing guidelines range.”<sup>25</sup>

In *Morson*, this Court viewed the defendant’s continuum of conduct. One of the issues was whether the number of victims under OV 9 included “all persons placed in danger at any point during the criminal episode”.<sup>26</sup> Looking to the entire criminal transaction, this Court found by the plain language of MCL 777.39(2)(a) that more than one person was placed in danger.<sup>27</sup> In other words, by reading the plain language of the statute, the Court looked beyond the elements of the specific offense and considered the entire criminal transaction as a whole. *Morson* reflects that the Legislature intended the courts to view the entire criminal transaction when scoring the offense variables.

In *People v Sargent*,<sup>28</sup> this Court followed the plain-language reading in *Morson* and in *Cheesebro*. For purposes of scoring OV 9, the commission of the sentencing offense “or, at the most, during the same criminal transaction” can be considered.<sup>29</sup> Accordingly, based on the plain language of MCL 777.39(2)(a), a defendant does not have to commit more than one offense to be scored under OV 9.<sup>30</sup> The Court focused on the persons who were placed in danger by the criminal

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<sup>25</sup> *Id.* at 287.

<sup>26</sup> *Morson*, *supra* at 254 n 7. See MCL 777.39(2)(a).

<sup>27</sup> *Morson*, *supra* at 262-263.

<sup>28</sup> *People v Sargent*, 481 Mich 346; 750 NW2d 161 (2008).

<sup>29</sup> *Id.* at 350.

<sup>30</sup> *Id.* at 350-351 n 2.

transaction, not just by the crime itself. In looking past the specific offense, the Court viewed the entire criminal transaction. The conduct associated with the offense was thus considered in scoring the offense variable. In addition, this Court held that “only conduct that relates to the offense being scored may be considered.”<sup>31</sup> This holding in conjunction with the Court’s findings proves that conduct surrounding the offense can be used in scoring the offense variables.

Defendant argues that *Morson* supports the scoring of the offense variables for the specific sentencing offense. (DB 7-8) However, as evidenced by the holding, this Court looked beyond the robbery and found that Bish was a person placed in danger. Looking at the plain language of MCL 777.39(2)(a), the Legislature intended that the entire criminal transaction be reviewed in scoring OV 9, and the Court correctly viewed the entire criminal transaction. “If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written.”<sup>32</sup> Defendant also contends that *Sargent* follows only an analysis of the sentencing offense. (DB 9-11) On the contrary, the Court expressly held that the criminal transaction and conduct relating to the offense can be reviewed to support the scoring of the offense variables. If this Court had held that only the specific offense was to be considered, then the Court would have not included “criminal transaction” and “conduct relating to the offense” in its opinion.

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<sup>31</sup> *Id.* at 350.

<sup>32</sup> *Sun Valley Food Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

In addition, Defendant argues that viewing the entire criminal transaction results in needless complexity and uncertainty as to the length of the transaction. (DB 21) But sentencing courts already view the sentencing offense's continuum of conduct for scoring offense variables. As long as there is evidence to support the scoring, the scoring will be upheld. The way courts view the sentencing offense for scoring purposes will not change the difficulty in assessing the criminal transaction.

Defendant proposes that factors not part of the sentencing offense could be used to depart from the guidelines if the factors are substantial and compelling. (See DB 23) Such a proposal goes against the Legislature's purpose for the guidelines. "[I]t constitutes the Legislature's recognition that uniformity can be advanced only if departures from the guidelines are limited to cases involving unusual circumstances."<sup>33</sup> Uniformity would not occur if a specific-offense approach was used.

The People agree with Defendant that MCL 769.31 does not apply to the scoring of the offense variables. (See DB 15) Justices Young and Markman have advanced in *Morson* that the specific offense plus any offense resulting in a conviction from the same transaction and listed in MCL 791.233b can be considered for scoring the offense variables.<sup>34</sup> However, as Defendant notes, MCL 769.31 only applies to the statute itself and to MCL 769.34, which deals with minimum sentences and sentencing departures. Also, applying this scheme would result in an

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<sup>33</sup> *Smith, supra* at 314 n 51.

<sup>34</sup> *Morson, supra* at 273-274, 278-279. See also *Sargent, supra* at 349.

additional complexity for the sentencing courts to follow. Not only would the courts have to examine the sentencing offense, but they would also have to examine any other conviction arising out of the same transaction and enumerated in MCL 791.233b.

**E. CONCLUSION**

The People thus ask this Honorable Court to find that the offense variables of the sentencing guidelines are to be scored based on the defendant's conduct during the entire criminal transaction. Accordingly, the People ask this Court to affirm the decision of the Court of Appeals.

## ARGUMENT II

FOR PURPOSES OF SCORING THE OFFENSE VARIABLES, AN OFFENSE IS COMPLETED ONCE THE UNBROKEN CHAIN OF EVENTS SURROUNDING THE ENTIRE CRIMINAL TRANSACTION ENDS. TO DETERMINE WHEN THOSE EVENTS ARE COMPLETED, SENTENCING COURTS MUST EXAMINE THE TIME, PLACE, CAUSATION, AND CONTINUITY OF ACTION BETWEEN THE CHAIN OF EVENTS AND THE SENTENCING OFFENSE.

### A. ISSUE PRESENTED BY THE COURT

This Court asks the parties to determine when an offense is completed for purposes of scoring the offense variables.

### B. PRESERVATION OF ISSUE

This issue was not raised in the courts below, but Defendant moved the sentencing court to resentence him based on an incorrect scoring of OV 9. (App 36a-42a) The court denied the motion, which in turn was affirmed by the Court of Appeals. (App 43a, 72a-74a)

### C. STANDARD OF REVIEW

How the sentencing guidelines are applied is reviewed de novo.<sup>35</sup>

### D. THE PEOPLE'S ARGUMENT

In defining "perpetration" as used in the felony-murder statute, this Court looked beyond the definitional elements of the predicate felony and viewed the unbroken chain of events surrounding the offense.<sup>36</sup> The Court recognized that while the predicate felony may be completed before the murder, the felony-murder

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<sup>35</sup> *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

<sup>36</sup> *People v Gillis*, 474 Mich 105, 125; 712 NW2d 419 (2006).

rule may still apply.<sup>37</sup> *People v Sargent* illustrated that for purposes of scoring offense variables, a criminal transaction does not end once the elements of sentencing offense are satisfied.<sup>38</sup> By examining the criminal transaction, the Court found “the abuse of the complainant’s sister did not arise out of the same transaction as the abuse of the complainant.”<sup>39</sup> This was also illustrated in *People v Morson*, that the crime is not completed even when the defendant satisfies the elements of the offense.<sup>40</sup> “Though Sevakis was the only person actually robbed, Bish, who was standing nearby and responded to Sevakis’s call for help, was also ‘placed in danger of injury or loss of life’ by the armed robbery of Sevakis.”<sup>41</sup>

For purposes of scoring offense variables, a criminal transaction is completed when the unbroken chain of events surrounding the sentencing offense ends. To find when the chain of events ends, this Court can adopt the analysis found in *Gillis*. *Gillis* applied four factors: time, place, causation, and continuity of action.<sup>42</sup>

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<sup>37</sup> *Id.* at 128.

<sup>38</sup> See *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008).

<sup>39</sup> *Id.* at 351.

<sup>40</sup> Defendant argues “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.” (DB 25, footnote 20) On the contrary, this Court looked beyond the elements of armed robbery and unequivocally read the plain language of MCL 777.39 to warrant the scoring. See *People v Morson*, 471 Mich 248, 262-263; 685 NW2d 203 (2004).

<sup>41</sup> *Id.* at 262 (footnote omitted).

<sup>42</sup> *Gillis*, *supra* at 127, citing 2 LaFave, *Substantive Criminal Law* (2d ed), § 14.5(f), p 463.

While these factors do not have to be exclusive,<sup>43</sup> they can be easily applied to determine when the chain of events is completed.

With the first factor, the closer the events are in time with the sentencing offense, the more those events are part of the criminal transaction. In *Sargent*, the abuse of the victim's sister did not occur contemporaneous with the sentencing offense.<sup>44</sup> In *Morson*, the shooting occurred right after the robbery.<sup>45</sup>

The second factor considers the proximity of the events to the sentencing offense.<sup>46</sup> A defendant's attempts to flee are considered part of the criminal transaction. "When a defendant plans to commit a felonious act, it is 'a legitimate assumption that . . . [the defendant] also planned to escape from the scene of his crime.'"<sup>47</sup> "The escape ceases to be a continuous part of the original felony when the escaping felon reaches a point of at least temporary safety or [has been successfully taken into police custody]."<sup>48</sup>

The third factor considers whether there was a causal connection between the conviction and the offenses which support the scoring.<sup>49</sup> For example, such acts can

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<sup>43</sup> See *Gillis, supra*.

<sup>44</sup> See *Sargent, supra* at 347, 351.

<sup>45</sup> *Morson, supra* at 252-253.

<sup>46</sup> See *Gillis, supra* at 129.

<sup>47</sup> *Id.* at 115-116 (citation omitted).

<sup>48</sup> *Id.* at 124, citing *People v Goree*, 30 Mich App 490, 495; 186 NW2d 872 (1971).

<sup>49</sup> See *Gillis, supra* at 130. *Gillis* found support in *People v Smith*, 55 Mich App 184,

include the defendant's attempts to escape the police's detection.<sup>50</sup> Further, as long as this connection is not interrupted by an intervening event or circumstance, any act connected with the convicted offense is considered part of the criminal transaction.<sup>51</sup>

Finally, the fourth factor considers whether there was a break in the chain of events between the conviction and the acts supporting the offense variables' scoring. This has been applied to the sentencing guidelines previously by looking at the "continuum of conduct".<sup>52</sup>

In the instant case, the time between the breaking and entering and Defendant's chase from police was very minimal. Officer Henige was en route to the breaking and entering alarm when he caught sight of Defendant. (PSIR 2) The distance from the breaking and entering and Defendant's flight was also very minimal. The officer found Defendant driving not too far away from the breaking and entering. The causal connection between the breaking and entering and Defendant's flight was Defendant's attempt to flee from the scene to a temporary place of safety. Finally, there was not a break in the chain of events. Defendant tried to escape the scene when he was spotted by police. Defendant refused to stop

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189; 222 NW2d 172 (1974), where the underlying felony must be part of a continuous transaction or is immediately connected with the murder. See *Gillis*, *supra* at 124.

<sup>50</sup> See *id.* at 136.

<sup>51</sup> *Id.*

<sup>52</sup> See *People v Cook*, 254 Mich App 635, 641; 658 NW2d 184 (2003).

and ended his attempt to escape by crashing into a fence. From applying the four factors, the criminal transaction ended when the police apprehended Defendant.

Defendant asks this Court to differentiate between completed offenses and those which are continuous. Defendant's proposed analysis would provide an unnecessary obstacle in calculating the scoring of the offense variables. The Legislature never intended that whether a crime is a completed or continuous offense must be factored into the guidelines. The Legislature's purpose for generating the sentencing guidelines was to promote uniformity in individualized sentencing. That purpose will not be further promoted through Defendant's argument.

**E. CONCLUSION**

The People thus ask this Honorable Court to find that for purposes of scoring offense variables, an offense is completed when the unbroken chain of events of the entire criminal transaction ends.

### ARGUMENT III

**AN ACCOMPLICE TO THE UNDERLYING CRIME CAN BE CONSIDERED A VICTIM UNDER MCL 777.39. UNDER THE PLAIN LANGUAGE OF MCL 777.39(2)(a), AS LONG AS AN ACCOMPLICE WAS PLACED IN DANGER OF INJURY OR LOSS OF LIFE, THE ACCOMPLICE CAN BE COUNTED AS A VICTIM.**

#### **A. ISSUE PRESENTED BY THE COURT**

This Court asks the parties to answer “whether an accomplice to the underlying crime can be considered a ‘victim’ under MCL 777.39”.

#### **B. PRESERVATION OF ISSUE**

Defendant filed a motion for resentencing with the sentencing court. (App 36a-42a) In a written opinion, the motion was denied. (App 43a) The Court of Appeals subsequently affirmed the sentencing court’s decision. (App 72a-74a)

#### **C. STANDARD OF REVIEW**

This Court reviews the issue de novo because it is a proper interpretation and application of the sentencing guidelines.<sup>53</sup>

#### **D. THE PEOPLE’S ARGUMENT**

OV 9 involves the number of victims.<sup>54</sup> At the time Defendant committed the instant offense, a victim was “each person who was placed in danger of injury or loss of life”.<sup>55</sup> Ten points was assessed where there were two to nine victims.<sup>56</sup> In

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<sup>53</sup> *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

<sup>54</sup> MCL 777.39.

<sup>55</sup> MCL 777.39(2)(a).

*People v Morson*, this Court found that the plain language of MCL 777.39(2)(a) instructed the sentencing court to count each person who was placed in danger of injury or loss of life.<sup>57</sup> So, anyone who was placed in danger could be counted. For instance, passengers in a defendant's vehicle could be scored as victims under OV 9.<sup>58</sup>

Based on the whole criminal transaction, in his attempt to get away, Defendant fled from police with his two accomplices as passengers. The chase ended when Defendant drove into a yard and then crashed into a chain link fence. (PSIR 2) The persons who were placed in danger of injury or loss of life were the two accomplices. By fleeing from the scene of the burglary, Defendant placed his occupants in danger.

Defendant asks this Court to preclude a perpetrator or accomplice included from the definition of "victim". Defendant cites *Morson* for its holding that while a bystander can be a victim, a perpetrator cannot be a bystander. (DB 42) However, a plain reading of MCL 777.39(2)(a) reveals that any person who was placed in danger of injury or loss of life is to be counted under OV 9. The statute does not differentiate between a bystander, perpetrator, or accomplice. Clearly, the sentencing court must score each person who was placed in danger by Defendant. Further, a plain reading of the statute does not exclude accomplices. If the

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<sup>56</sup> MCL 777.39(1)(c).

<sup>57</sup> *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).

<sup>58</sup> See *People v Lutzman*, 153 Mich App 270, 274; 395 NW2d 56 (1986).

Legislature intended to exclude accomplices from being scored, then it would have done so.<sup>59</sup> While perpetrators may cooperate in the crime, this is not suggested by Defendant under the facts in the instant case. Even if the perpetrators had cooperated with Defendant in escaping, their innocence or lack thereof does not affect whether they were placed in danger. Including accomplices and perpetrators within the meaning of MCL 777.39(2)(a) would not broadly interpret the statute. A plain reading of the statute clearly indicates that accomplices and perpetrators who are placed in danger of injury or loss of life by Defendant must be counted as victims under OV 9.

#### **E. CONCLUSION**

The People thus ask this Honorable Court to find that an accomplice can be considered a victim under MCL 777.39(2)(a) as long as the accomplice was placed in danger of injury or loss of life by the defendant.

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<sup>59</sup> See *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999) (“When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case . . .”).

## ARGUMENT IV

THE EVIDENCE WAS SUFFICIENT TO SCORE TEN POINTS FOR OV 9. DEFENDANT PLACED HIS TWO ACCOMPLICES IN DANGER OF INJURY OR LOSS OF LIFE WHEN HE BECAME INVOLVED IN A CAR CHASE WITH THE OFFICER WHILE THE ACCOMPLICES WERE IN DEFENDANT'S VEHICLE. DEFENDANT EVENTUALLY DROVE THROUGH A FRONT YARD AND CRASHED INTO A FENCE.

### A. ISSUE PRESENTED BY THE COURT

The Court asks the People to address whether the sentencing court properly scored ten points for OV 9 when, in an attempt to escape from the scene of the breaking and entering, Defendant fled from the police which resulted in an accident.

### B. PRESERVATION OF ISSUE

Defendant filed a motion for resentencing with the sentencing court. (App 36a-42a) In a written opinion, the motion was denied. (App 43a) The Court of Appeals subsequently affirmed the sentencing court's decision. (App 72a-74a)

### C. STANDARD OF REVIEW

This Court reviews for clear error the trial court's factual findings at sentencing and reviews the sentencing court's scoring of the sentencing guidelines for any evidence in the record to support it.<sup>60</sup>

### D. THE PEOPLE'S ARGUMENT

At the taking of his guilty plea, Defendant stated that he drove the vehicle.

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<sup>60</sup> *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

(App 22a) The PSIR indicated that a police officer attempted to stop Defendant. The officer only saw the driver, who had light hair. The Basic Information Report (CFJ-101) attached to the PSIR reflected that Defendant has red hair, which could be construed as light hair. Consequently, the sentencing court had a better position to view Defendant's hair. Instead of stopping, Defendant fled, driving through a chain link fence and ending in a crash. (PSIR 2) In affirming the sentencing court's scoring of OV 9, the Court of Appeals held 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." (See App 73a-74a) Because Defendant placed two persons in danger, the evidence supported ten points for OV 9.

#### **E. CONCLUSION**

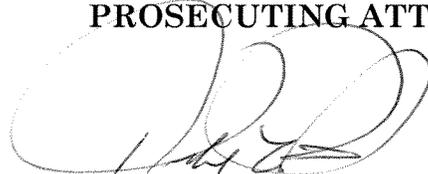
The People thus ask this Honorable Court to affirm the Court of Appeals' decision, finding that the evidence adequately supported the sentencing court's scoring of OV 9.

**SUMMARY AND RELIEF SOUGHT**

**WHEREFORE**, the People respectfully request that this Honorable Court affirm the Court of Appeals' judgment and affirm Defendant-appellant's sentence.

Respectfully submitted,

**MICHAEL D. THOMAS (P23539)**  
**PROSECUTING ATTORNEY**



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