

**State of Michigan
In the Supreme Court**

The People of the State of Michigan

Plaintiff-Appellee,

MSC No. 167677

v.

Mario Cortize Jackson

COA No. 366078

Defendant-Appellant.

Wayne County CC

Case No. 21-004539-01-FH

**Mario Cortize Jackson's
Response to the Prosecutor's Application for Leave**

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Statement of Jurisdiction

Mr. Jackson agrees with the State's Statement of Jurisdiction.

Statement of the Question Presented

First Question

Did the Court of Appeals rightly rely on binding precedent to conclude that OV 3 may not be scored using conduct occurring outside the sentencing offense?

Statement of Facts

Mario and an old friend, Latisha Ely, spent a day together. T, 130. They didn't have much of a plan besides "riding around just hanging out." T, 130. They visited some stores, they drank some liquor. T, 130.

As day turned to evening, Ms. Ely became too drunk to drive. T 130-131. She told Mario she wanted to go home. T, 130-131. Mario didn't want the night to end and didn't want Ms. Ely to leave. T, 131.

Mario has paraplegia and is confined to a wheelchair. T, 168. After he grew upset with Ms. Ely for wanting to go home, Ms. Ely tossed his wheelchair out of the car and told him to "get out and call somebody to come get you." T, 131, 143.

According to Ms. Ely, Mario became angrier. T, 132-133. Ms. Ely claimed Mario started biting her arm. T, 132. And she said Mario had a pistol in his lap. T, 132. Ms. Ely said Mario took the pistol and hit her in the mouth with it. T, 132-133, 135. The blow knocked out two of Ms. Ely's teeth. T, 134-135, 139.

Ms. Ely claimed she called the police but insisted they never came and never spoke to her that night. T, 133-134. However, the prosecutor showed Ms. Ely bodycam footage of her conversation with a responding officer from the night of the incident. T, 137-138. Ms. Ely changed her story; the police must have come, and she must have talked with them. T, 137-138, 145-146.

The officer's bodycam captured Ms. Ely too intoxicated to remember Mario's last name, despite knowing him for years. T, 129, 141-143, 144.

When Ms. Ely tossed Mario's wheelchair out of the car and told him to call someone, Mario phoned his aunt, Yvette Jackson. T 160. Ms. Jackson went to help Mario. T, 160. When Ms. Jackson arrived, Mario and Ms. Ely were still in the car, Ms. Ely was visibly intoxicated, and Ms. Ely had all her teeth. T, 161-162, 163, 167.

Ms. Jackson saw Mario's wheelchair on the ground, in pieces, and "nowhere near where he [could] get 'em." T, 162. Ms. Jackson gathered

the pieces of the wheelchair, took them back to Ms. Ely's car, and asked Mario for help putting his wheelchair back together. T, 162-163.

As Ms. Jackson and Mario reassembled the wheelchair, Ms. Ely hit Mario on the head. T, 163. Mario responded by punching Ms. Ely in the face, using just his fist, and the blow knocked out two teeth. T, 163, 166.

Then Ms. Ely kept "beating" on Mario. T, 66. Mario bit Ms. Ely. T, 166. Eventually, Ms. Jackson successfully broke up the fight. T, 166.

Ms. Jackson never saw Mario with "any kind of weapon." T, 163. The police officer that responded to the scene never found a pistol. T, 151, 152.

Relying solely on Ms. Ely's account, Wayne County charged Mario with four felonies: (1) assault with intent to commit great bodily harm; (2) felony firearm; (3) assault with a dangerous weapon; and (4) felony firearm. *Information*.

Mario went to trial. The jury acquitted him of assault with a dangerous weapon and both counts of felony firearm. T2, 7-8. They convicted Mario of assault with intent to commit great bodily harm. T2, 7-8.

At sentencing, the sides disputed whether to score OV 1, OV 2, OV 3, and OV 9. The dispute homed in on whether the court could consider acquitted conduct (use or possession of a firearm) or conduct occurring after the sentencing offense (events that unfolded after the assault on Ms. Ely and never presented at trial). S, 10, 11-12, 18-19.

That night, Ms. Ely's brothers came to help Ms. Ely, just as Ms. Jackson went to help Mario. S, 11-12. At some point after Mario and Ms. Ely fought, somebody shot Ms. Ely's brothers. S, 11-12. One of them lived, the other did not. S, 11-12, 15. Mario was also shot. S, 15.

Mario's lawyer objected to scoring the OVs as if Mario shot Ms. Ely's brothers after the assault. Defense counsel objected because any events that unfolded after the assault fell beyond the scope of the OVs. S, 14. Counsel reminded the court that the jury "acquitted [Mario] on the gun

charges[.]” and the State’s case did not include any proofs about events after the assault.¹ S, 10-11, 13, 14. The prosecutor never charged Mario based on any conduct that occurred after the assault on Ms. Ely. S, 10, 14.

Return to sentencing. Despite all the above, the circuit court overruled defense counsel’s objection to scoring OVs 1, 2, 3, and 9. S, 13, 15. Specific to the issue before this Court, the trial court scored OV 3 at 100 points based on the argument that Mario shot and killed Ms. Ely’s brother after the assault. S, 15.

Scoring all the disputed OVs increased Mario’s OV total by 140 points, resulting in an OV Level VI, and a guidelines range of 29 months to 57 months. PSIR, SIR. Relying on the incorrect range, the circuit court sentenced Mario to a minimum term of 42 months. *Judgment of Sentence*.

Mario appealed. He argued the trial court erred in scoring the OVs based on acquitted conduct and conduct occurring after the sentencing offense. *Appellant’s Brief on Appeal*, Record. In a published opinion, the Court of Appeals agreed. *People v Jackson*, ___ Mich App ___ (2024) (Docket No. 366078). As relevant here, all three members of the panel affirmed that OV 3 is a *McGraw* variable, it cannot be scored based on conduct occurring after the sentencing offense, and the 100-point score for OV 3 relied on post-offense conduct. *Jackson*, slip op at 3; see also *Jackson*, slip op at 1 (O’Brien, J., concurring).

The State now seeks leave to appeal.

¹ The lack of trial evidence was not an accident. Pretrial, the State moved in limine to exclude any testimony about the shooting. T, 8-9. The trial court granted the motion, reasoning the jury didn’t need to learn about events unfolding after the charged conduct. T, 9.

Argument

I. OV 3 is a *McGraw* variable. The State’s application wrongly argues to the contrary. This Court should deny the application.

Offense Variable 3 permits a 100-point score where a “death results from the commission of a crime and homicide is not the sentencing offense.” MCL 777.33(2)(b). One hundred points applies in the rare instance where a non-homicide sentencing offense is the “but for” cause of a death. *People v Laidler*, 491 Mich 339, 346 (2012).

One hundred points does not apply to Mario. His sentencing offense was an assault on one person which resulted in minor physical injury to that same person. According to the State, the Legislature’s use of “results from” contemplates conduct occurring after the sentencing offense. *State’s Application for Leave*, p 4-5. Hence, the State thinks OV 3 allows sentencing courts to look beyond the sentencing offense when scoring the variable.

This Court should deny the State’s application. Binding precedent, given short shrift by the State, gets to the right answer for the right reason: OV 3 contains no *specific*, textual authorization allowing courts to consider conduct occurring after the sentencing offense. *People v Biddles*, 316 Mich App 148, 165 (2018); see also *People v Mushatt*, 486 Mich 934 (2010) (both sides agree that OV 3 is a *McGraw* variable).

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. The actual words used in the statute provide us with the best evidence of intent. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548–549 (2004). We must consider “both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.” *Speicher v Columbia Tp Bd of Trustees*, 497 Mich 125, 134 (2014). We cannot adopt a construction that would render any part of a statute surplusage or nugatory. *People v Cunningham*, 496 Mich 145, (2014) (citations omitted).

People v McGraw creates the default rule of statutory construction for the OV's. The OV's are scored based solely on conduct occurring during the sentencing offense. *People v McGraw*, 484 Mich 120, 126-127 (2009). The default rule gives effect to the Legislature's use of specific text instructing courts to look beyond the scope of the sentencing offense. *Id.* For example, OV 14 tells trial courts to look at "the entire criminal transaction" when scoring the variable. *Id.*, citing MCL 777.44(2)(a). OV 11 says courts may consider conduct "extending beyond the sentencing offense" when scoring OV's 12 and 13. MCL 777.41(2)(b). Those specific authorizations to look beyond sentencing offense conduct only have meaning if the OV's are otherwise confined to the sentencing offense. *McGraw*, 484 Mich at 120. *McGraw* thus gives force to every word and phrase within the entire guidelines sentencing scheme. *Id.*

OV 3 contains no specific authorization to look past the sentencing offense, a conclusion the Court of Appeals has already reached. *Biddles*, 316 Mich App at 165. Wishing otherwise, the State leans on the phrase "results from." MCL 777.33(2)(b). The State believes those words allow a 100-point score for OV 3 anytime a criminal act is the "but for" cause of a death.

Primarily, the State relies on *Laidler*, but that case is unhelpful. In *Laidler*, two men committed a home invasion. *Laidler*, 491 Mich at 341-342. During the home invasion, the homeowner shot and killed one of the men. *Id.* at 342. This Court decided two distinct issues: (1) "results from" requires factual causation, and (2) the dead home invader counted as a victim of the home invasion. *Id.* at 346, 347.

Notably, *Laidler* didn't confront conduct occurring after the sentencing offense because the death occurred during the home invasion. *Id.* at 347. As the concurrence below points out, there's no conflict between *Laidler* and *McGraw*. *Jackson*, slip op at 1 (O'Brien, J., concurring). *Laidler* came down two years after *McGraw* and nowhere does the opinion even cite *McGraw*. *Id.*; see also *People v Skippergosh*, ___ Mich App ___ (2024) (Docket No. 364127), slip op at 12. Thus, the use of "results from" does not signal a departure from the default *McGraw* rule.

Change the facts to see how *McGraw* and *Laidler* coexist. Imagine if Mario committed a continuous assault. Say he continued to strike Ms. Ely while her brothers were present on scene. If her brothers opened fire, trying to stop Mario, and inadvertently killed Ms. Jackson, then both *McGraw* and *Laidler* would permit a 100-point score. Mario’s “commission of a crime”—the continuous assault on Ms. Ely—“result[ed]” in the death of Ms. Jackson, a victim for the purposes of OV 3. *Laidler*, 491 Mich at 346-347.

The State’s read of “results from” leads to absurd results. Consider a case involving one person’s theft and sale of an automobile to a second person. Weeks later, and unbeknownst to person one, the second person operates the stolen car while impaired and kills a pedestrian. On the State’s read of OV 3’s “results from” catch-all, the robbery resulted in a death. So, a sentencing court could assign 100 points at the first person’s sentencing, even though the score was based on a second person’s criminal conduct for which the first person had no criminal culpability. If the Legislature intended such a broad sweep for OV 3, they needed to provide the specific, textual authorization—found in other variables—that permits courts to look beyond the sentencing offense.

This Court should deny the State’s application. OV 3 is a *McGraw* variable, as it contains no express authorization to look beyond the sentencing offense. The phrase “results from” asks the sentencing court to decide whether the sentencing offense conduct caused a death, nothing more.

Conclusion and Relief Requested

For the reasons set forth above, Mario Cortize Jackson asks this Court to deny the State's application for leave to appeal.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this document contains 3258 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 18-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

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