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STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. EVAN TAYLOR ARMOGEDA, Defendant-Appellant.	MSC Case No. 167760 Court of Appeals No. 365184 Circuit Court No. 21-260-FC

DEFENDANT-APPELLANT'S REPLY BRIEF

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ADDRESSING THE COUNTERSTATEMENT OF FACTS

In its Counterstatement of Facts, Appellee asserts multiple contested facts as uncontested at trial or misrepresents the facts. Mr. Armogeda will not address each of these and will instead rely on its previous Application and the transcripts but will briefly address only the most important misrepresentation necessary for this Court to give fair consideration.

Plaintiff asserts that the admitted text messages do not establish that the complainant had texted Mr. Armogeda in an antagonizing manner based on the admitted text messages. Mr. Armogeda testified to the nature of the text messages including that there were probably 50 messages exchanged with Mr. Wickizer and Ms. O'Connor in the three days before the incident. 12-12-2022 T. at 105:9-106:9. He testified that these messages included multiple pictures of them together with "kissy face" emojis and a picture of Ms. O'Connor kissing Mr. Wickizer on the cheek. 12-09-2022 T. at 137:17-138:6, 12-09-2022 T. at 141:16-18. It is undisputed that not all these messages were admitted at trial. Screenshots of some text messages were exhibits 94a-100. The messages admitted have missing messages - any of the partial conversation prior to Exhibit 95, for instance.

This is because the phone extraction that occurred was not a full extraction – so all the messages sent could not be accessed – only the messages that Mr. Armogeda had screenshot. Ms. Danielle Vandenhuevel, a digital forensic analyst of the Michigan State Police (12-08-2022 T. at 237:12-20), testified that the forensic examination of Mr. Armogeda's cell phone was only a partial extraction because the technology at the time did not have the ability to do a full extraction without the pass code (12-08-2022 T. at 238:17-239:25). The only messages that were able to be retrieved and introduced are screenshots of messages. 12-08-2022 T. at 242:8-21. This is confirmed by the Appellee during closing argument stating. 12-13-2022 T. at 10:17-25.

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ARGUMENT

Sentencing Guidelines

Plaintiff argues that because the sentencing judge said that the sentence would have been the same no matter the guidelines, Mr. Armogeda should not be resentenced. In support of its position, Plaintiff cites *Francisco* and *Latham*. *Francisco* has not been as narrowly interpreted as the Plaintiff seeks to apply it here except for *Latham* – which is not applicable. According to *People v Francisco*, 474 Mich 82, 711 NW2d 44 (2006), a defendant is entitled to be resentenced if there has been a scoring error or inaccurate information has been relied upon. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006) (citing MCL 769.34(10)). When the appropriate guideline range changes upon proper calculation of the guidelines, the defendant is entitled to resentencing – even if the original sentence was within the new guidelines range. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

In *People v Latham*, 334 Mich App 501, 965 NW2d 248 (2020), the Court of Appeals carved out a small exception when: (1) The Trial Court calculated the guidelines as required by MCR 6.425; (2) Took the guidelines into account and considered them a "highly relevant factor" as required by *Lockridge*; and (3) sufficiently established a record as to why the same sentence (the mathematical center of the previous wrongfully-calculated guidelines here) was more proportionate than an in-guidelines sentence. None of this occurred here. In support of its position, Plaintiff cites the 2021 unpublished case of *People v Epplett* in which the Court of Appeals upheld the same sentence being imposed when the Trial Court calculated the proper guidelines and stated why this sentence was proportional. That is not the case here as Judge Jordon did not calculate the correct guidelines or explain why such was proportional.[1]

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[1] The Plaintiff continues to misspell the Honorable Judge David Jordon's name and falsely state he was a Circuit Court Judge though Judge Jordon did not sit as a Circuit Court Judge except as a visiting judge.

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By comparison, this Court recently reaffirmed in *People v Nelson*, ____ Mich ___, 5 NW3d 346 (Order issued May 10, 2024) that because the applicable guidelines range changed, resentencing was required. This was not done with the caveats that the Plaintiff seeks to broadly assert that such is true "unless the sentence would be the same." This exception was also not articulated in the published opinion from the Court of the Appeals in *People v Skippergosh*, ___ Mich App ____, ___ NW3d ___ (Case No. 364127, Decided October 28, 2024). If this Court were to allow the Court of Appeals opinion to stand in this matter, there would be legal support for the proposition that a Trial Court could completely insulate a sentence from appellate review by stating summarily that it would sentence the defendant to the same sentence no matter the guidelines (even stating a few examples of guidelines) – even without calculating such – and without going through a proportionality review of the offense and the offender – contradicting this Court's multiple decisions.

Testimony Regarding Father's Absence in Mr. Armogeda's Life

Appellee summarily asserts that this issue is not preserved because of an allegedly limited record. This argument was rejected by the Court of Appeals and is incorrect because at three different times for two different witnesses, Defense Counsel tried to elicit background information on Mr. Armogeda's relationship with his father and the Trial Court heard arguments about the evidence and the intended purpose of such evidence spanning four pages of transcript testimony. 12-12-2022 T. at 14:23-16:13; 12-12-2022 T. at 23:1-15; and 12-12-2022 T. at 43:7-44:18. Appellee would have Defense Counsel blurt out the evidence that the Trial Court sought to exclude from the jury hearing to preserve an objection. Consistent with MRE 103, the substance of the evidence was apparent from the context within which questions were asked. Michigan law, including MRE 103, does not require that every time an objection is upheld, the proponent must ask to exclude the jury from the room to establish a

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second record. Such is not practical, logical, or required by Michigan law. Furthermore, this Court has additional information before it about what the substance of the testimony would have had even more than what the Trial Court had at the time – though the Trial Court felt it had enough information in order to rule.

The Presentence Interview Report (attached to the Application in this case as Appendix E) states:

> The defendant reports that he was raised by his mother who was an alcoholic and he revealed that he last had contact with his father when he was 30 years old. The defendant further reported that his dad had him selling illegal drugs when he was 15 years old and was in and out of his life. He stated he saw him on average every 6 months when he was growing up. Mr. Armogeda indicated that when he did have contact [with] [sic] his father, he suffered both physical and mental abuse.

Appendix E at 16-17. This information was elicited from Mr. Armogeda and could have been testified to by himself. It also could have been testified to by his Aunt Kathleen Boss – from whom Defense Counsel attempted to elicit the testimony. Ms. Boss is mentioned as his support system in the PSIR at two locations. Appendix E at 3, 17. Ms. Boss testified at trial that Mr. Armogeda and her were very close and talked every day. 12-12-22 T. at 14:5-9. This testimony would have been elicited from her as well – a witness other than the individual accused of a crime and with significantly less incentive to mislead or overstate Mr. Armogeda's tragic upbringing and his strained and abusive relationship with his father. Appellee also asserts that the clear error standard applies to this unpreserved error, but such is not the applicable because the issues were preserved by timely arguments in the Trial Court.

The Appellee also asserts "defendant was not even entitled to the mitigation instruction." Plaintiff's Response at 10. This is contrary to the position that Plaintiff took at trial and is contrary to the clear law and facts applicable to this case. At trial, the Plaintiff consented to the jury instructions which included the mitigation instruction and much of the

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Plaintiff's closing argument and rebuttal argument was explicitly aimed at addressing the proper application of such according to the Plaintiff. The highlight of such is the Plaintiff stating in rebuttal closing argument:

> What you will not find in those instructions is just the fact that this defendant may have had a rough childhood is a defense for Assault with Intent to Commit Murder. You will not find is just the fact that this defendant may have been suffering from anxiety or depression at the time is not a defense for Assault with Intent to Commit Murder. Why did those facts come out then? Because they do lend to the mitigating circumstances instruction. Absolutely you can consider whether or not the defendant was under some sort of emotional stress. But that's not the only thing to consider and that's not the baseline.

12-13-2022 T. at 82:23-83:9.

Plaintiff also asserts "the mitigation allowance does not apply where the defendant has had time to cool down (as happened here)." Plaintiff's Response at 10. Plaintiff cites no precedent for when the Mitigating Circumstances jury instruction does not apply in cases where the defendant is accused of Assault with Intent to Murder – because no such authority exists. Plaintiff simply seeks to assert as a matter of fact that no jury could ever decide that Mr. Armogeda would have been still disturbed by emotional excitement approximately 10-20 minutes later when the stabbing occurred. In the case of excited utterances, "there is no express time limit" (*People v Walker (Walker I)*, 265 Mich App 530, 534; 697 NW2d 159 (2005)) and excited utterances have been upheld two hours later (*People v Walker (Walker II)*, 477 Mich 856, 720 NW2d 754 (2006)) and a week later (*People v Layher*, 238 Mich App 573, 607 NW2d 91 (1999)). This is a factual question that should have gone to the jury with all the admissible evidence considered.

Finally, the Plaintiff asserts that even if this Court should grant relief, the relief should be entry of a lesser conviction (Assault with Intent to Commit Great Bodily Harm) with an option for the prosecution to request a new trial to attempt to obtain a conviction for Assault

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with Intent to Murder - rather than automatically asserting a new trial itself – citing *People v Thomas*, 399 Mich 826, 349 NW2d 867 (1977). That case, related to first-degree murder and involuntary manslaughter, does not appear to be remotely applicable here. Even with Mr. Armogeda admitting that he intended to hurt someone the way he was hurt (12-12-2022 T. at 93:25-94:1), the jury would have to determine what Mr. Armogeda's intent was beyond any reasonable doubt, and we cannot automatically impute an intent to commit great bodily harm to such where the jury could find that he only intended assault with a weapon (felonious assault) – but not assault with intent to commit great bodily harm.

New Judicial Docket

Finally, Appellee asserts two arguments against Mr. Armogeda's assertion that Judge David Jordon was unconstitutionally sitting as a Circuit Court Judge and such structural error necessitates a new trial. First, Appellee asserts that structural error must still satisfy the plain error test from *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999) based on *People v Cain*, 498 Mich 108, 869 NW2d 829 (2015). Second, Appellee asserts the same claim made in the Trial Court – that the system employed in this case is consistent with the Michigan Constitution as it has always been applied. Both arguments are incorrect.

First, *People v Cain* does not stand for the proposition that constitutional structural errors are subject to the plain error test. *Cain* was the application of the plain error test to the failure to swear an impaneled jury – an error of omission no doubt, but a very different error in practice and in magnitude than a judge unconstitutionally presiding over a trial – as alleged. *People v Duncan*, 462 Mich 47, 610 NW2d 551 (2000) is quite clear that constitutional structural errors warrant automatic reversal. This is because, as stated in *Duncan*:

> Structural errors […] are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. Structural errors deprive defendants of basic protections without which a criminal trial

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> cannot reliably serve its function as a vehicle for determination of guilt or innocence.

People v Duncan, 462 Mich 47, 51; 610 NW2d 551 (2000). That a structural error warrants automatic reversal, without consideration of either the harmless error or plain error test, was recently upheld by this Court in *People v Yarbrough*, 511 Mich 252, 999 NW2d 372 (2023). In that case, this Court held that hampering the parties' peremptory challenges was a structural error that required automatic reversal instead of being subject to harmless-error review (for preserved error in that case). *People v Yarbrough*, 511 Mich 252, 256; 999 NW2d 372 (2023). Even the dissent in that case conceded that structural error warranted automatic reversal, but asserted the error in the case did not constitute structural error. *People v Yarbrough*, 511 Mich 252, 275-276; 999 NW2d 372 (2023) (Justice Zahra, dissenting).

Addressing Appellee's second argument that this was not an error, Appellee cites *In re Huff*, 352 Mich 402; 91 NW2d 613 (1958) stating such "rejected many of defendant's claims." Response at 17. This case is wholly inapplicable to the argument here – that the creation of a new docket and "assignment" of a visiting judge or judges to preside over such is not truly an assignment, but instead an appointment or substitute to the election of a new judge. The assignment process is routinely used, including in Ingham County, to provide coverage to a judge who is unavailable to preside over their docket for a day or months at a time due to illness, family emergency, or other unavailability such as the removal by the State Court Administrative Office (as happened in *Huff*). The creation of a wholly new docket over which an otherwise unqualified judge (based on age or other eligibility requirement applicable to candidates for appointments or election) may sit is not a lawful assignment contemplated by the Michigan Constitution – but instead a subversion of the law regarding elections and appointments of judges. For all the same reasons asserted in Mr. Armogeda's Application,

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such assignment in this case was not constitutional and Mr. Armogeda's trial suffered from a structural error warranting automatic reversal.

RELIEF REQUESTED

For the reasons stated above, and in the Application previously submitted, Mr. Armogeda respectfully requests that this Court grant the relief sought in the Application previously submitted or take other action as is just under the law of the State of Michigan.

Respectfully Submitted,

THE NICHOLS LAW FIRM, PLLC

Dated: November 18, 2024

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Word Count

Pursuant to MCR 7.212(B)(2) and (3), this Brief contains 2,745 countable words including footnotes.

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