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In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals

Hon. James Redford, Jane Beckering, and Michael J. Kelly

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Supreme Court No. 162221

v.

Court of Appeals No. 349631

HAMIN LORENZO DIXON

Chippewa County Circuit Court

Defendant -Appellant.

Case No. 17-003294-FH

APPELLEE'S SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

1. Whether attempted violation of MCL 800.283a necessarily requires a score of 25 points for the Offense Variable (OV) 19.

   If not, whether there is sufficient evidence to score OV 19 at 25 points on this record

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JURISDICTIONAL STATEMENT

The application is from the published opinion and order of the Court of Appeals dated September 10, 2020. The Defendant's Application for leave to appeal was received by the Clerk of the Court on November 9, 2020. The Court granted oral argument on the application in an order dated April 9, 2021. This Court therefore has jurisdiction under Const 1963, art 6, 4; MCL 600.215(2),(3) and MCR 7.303(B)(1)

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INTRODUCTION

In a *People v. Green*, 32 Misc. 3d 447, 454-55 (2011), which is not binding on this Court, it was found "that as a matter of law a cell phone, no matter how a defendant may use it, is inherently dangerous because a cell phone or other telecommunication device has a substantial probability that the item itself may be used in a manner that is likely to bring out major threats to a detention facility's institutional safety or security by the defendant, or other inmates, in the facility." It is undisputed that safety inside penal institutions is of the upmost importance. Prison security is crucial to maintaining staff and inmate safety in a correctional setting. When inmates bring contraband into the penal institution, they put the security or the institution and everyone inside at risk. Our Legislature has specifically criminalized contraband because of the seriousness of the problem. A mobile phone is nefarious – because the damage it can cause reaches far beyond the prison walls. Inmates use cell phones to organize crime operations, organize prison escapes, continue drug dealing in the outside world, and even coordinate murders. When the security and thus the safety of the institution is threatened inmates and guards can die. Security is a serious matter, which is why OV19 scores 25 points for threatening it.

In this case, the Court of Appeals upheld the law and protected inmates and guards by acknowledging the danger cellphones pose to penal institutions. The Court recognized the subjective intent of the inmate who possess the phone does not matter, it is the objective conduct of possession and the very real deaths that result from that possession that matter. Possessing a cellphone scores the same as offenses involving bombs, guns, or other dangerous weapons inside a penal institution, *People v. Dickson,* 321 Mich App 1, 24; 909 NW2d 24 (2017), because they are all are likely to result in the death or serious injury of inmates and guards.

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STATEMENT OF FACTS

In 2016 Mr. Dixon was an inmate in a prison facility in Chippewa County. JA35. During his time as an inmate on May 21st, 2016, Mr. Dixon violated MCL 800.283a and MCL 750.92. JA66. A corrections officer was conducting routine, late-night rounds and found Mr. Dixon in a bathroom stall with a cellphone. JA12. The cellphone was found on Mr. Dixon and Mr. Dixon was the only inmate in the bathroom at this time. JA46. The correction officer took the cellphone away from Mr. Dixon and followed the chain of command. *Id.* The cellphone was photographed and placed into an evidence locker. *Id.* Finding the cellphone prompted a search of Mr. Dixons cell. *Id.* During the search the officers found a phone charger in the area of the cell that is in Dixon's control. *Id.* Due to Mr. Dixon possessing a contraband cellphone he was charged with one count possession of a cellphone by a prison inmate with a habitual offender fourth notice. JA31-32. Mr. Dixon plead guilty to an added count two – attempting to possess a cellphone in a prison. JA36. In exchange for Mr. Dixon pleading guilty, the People dropped count one – possession of a cellphone in a prison and the habitual offender fourth. *Id.*

Subsequently, the Department of Correction prepared a presentencing investigation report for Mr. Dixon. JA19. The presentencing report recommended that the trial court assess Mr. Dixon 25 points for OV19. JA18. Based off his prior record variable score and his offensive variable score, the sentencing guidelines for Mr. Dixon ranged from five to seventeen months. JA25. The trial court adopted the Department of Corrections recommended guideline range and sentenced Mr. Dixon to a minimum of 11 months and a maximum of 30 months to be served consecutively with his current prison sentence. JA50.

Defense Counsel then filed a motion to correct an invalid sentence, which was ultimately denied. JA9. The Court sided with the People after hearing arguments from both sides. Finding

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that cellphones inside prisons are often used to coordinate crimes outside prison walls such as drug deals and murders, as well as creating the risk of violence inside prison walls. JA9; JA60. The Judge reasoned because of these dangers posed by a cellphone, they have the potential to be more dangerous than narcotics in a prison setting. *Id.*

Defense appealed the trial court's ruling, and the Court of Appeals correctly affirmed the ruling. Because "[t]he Legislature's criminalization of cell phone possession indicates that prisoners shall not have cell phones within a penal institution because of the inherent dangers posed by the presence of and unmonitored use of a cell phone within the confines of a penal institution," and because of precedent where possession of contraband was sufficient to score 25 points under OV19 because contraband has an inherent risk that significantly threatens the safety of both inmates and guards. JA71 (citing *People v. Dickinson*, 909 NW2d 24 (2017)).

ARGUMENT

The scoring of OV19 is a matter of state law and instructs a sentencing court to assess 25 points under the sentencing guidelines when "[t]he offender by his or her conduct threatened the security of a penal institution or court," MCL 777.49(a). Defense counsel argues that the language of OV19 and the *Per se* rule that cellphones threaten the security of a penal institution are contradictory because the OV19 requires an individualized inquiry into the risk created by the defendant's behavior and the Court of Appeals found "a prisoner *may* use such a device for illicit purposes." JA9 (emphasis added). The language of OV19 and the *Per se* rule are not contradictory. Acknowledging the dangerous, potential ways a cellphone may be used by an inmate is acknowledgment of the risk posed by the individual's actions. OV19 says nothing about subjective intent, it says "by his or her conduct." MCL 777.49(a). It does not matter what the individual

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intended their actions do, what matters is whether the objective conduct poses a threat. MCL 777.49(a).

OV19 does not distinguish between threats posed by dangerous weapons or by contraband. *Id.* It simply looks at the individuals conduct and what threat results from said conduct. In determining whether conduct poses a threat the totality of the circumstances is important. For example, the length of a beard in prison is significant, a short beard is permitted, however, a beard longer than 1/2-inch is not. *Holt v. Hobbs*, 574 U.S. 352 (2015). Regulating the length of a person's beard outside a prison would not be permitted. Just as, when it comes to cellphones outside the prison walls the legitimate uses of a cellphone prevail over the security risk imposed by possessing or attempting to possess a cellphone. However, just as beards longer than a 1/2-inch poses a risk to prison, so do cell phones.

I. The Statuary Language of OV19 Permits a Scoring of 25 Points When Defendant's Conduct Creates a Possible Risk of Danger to a Penal Institution.

Proper interpretation of sentencing guidelines presents close questions of statutory and textual interpretation. *Hughes v. United States*, 138 S. Ct. 1765 (2018). Courts must first look to the specific statutory language to determine the intent of the Legislature, and if the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Universal Underwriters Ins. Group v. Auto Club Ins. Ass'n*, 256 Mich. App. 541, 544 (2003).

MCL 777.49 controls the scoring of OV19 and states in relevant part:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

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(a) The offender by his or her conduct threatened the security of a penal institution or court 25 points

MCL 777.49. Defense counsel argues that the manner in which Mr. Dixon was intending on using the phone matters. However, "despite defendant's argument suggesting the absence of intent [to threaten], the plain language of MCL 777.49(a) does not require that a defendant have the intent to threaten the security of a penal institution." *People v. Walker,* 2021 Mich. App. LEXIS 3328. However, it does state the court assess points based on whether the defendant's conduct threatens the security. At the center of the issue before this Court is whether a possession or an attempt to possess a cellphone poses a threat. The statute does not define "threaten," so this Court should look to the term's plain and ordinary meaning and may certainly, and properly, consult dictionary definitions in giving such meaning. *Oakland Co. Bd. of Co. Rd. Comm'rs v. Mich. Prop. & Cas. Guaranty Ass'n,* 456 Mich. 590, 604 (1998); *Anzaldua v. Neogen Corp.*, 292 Mich. App. 626, 632 (2011). The Free Dictionary defines "threat" as "[o]ne that is regarded as ***a possible source of harm or danger*** . . . [t]he condition of being ***in danger or at risk.***" (emphasis added). Merriam-Webster defines "threaten" as "[t]o announce as intended or ***possible***." (emphasis added). And Lexico, powered by Oxford Dictionary, defines "threaten" as "[c]ause (someone or something) to be ***vulnerable or at risk***."(emphasis added). With an understanding that a threat to a penal institution is a possible risk of danger to the penal institution, it is clear the actual outcome and intent of the defendant's actions is not what is being scored by the court in OV19. Rather, what is being scored is whether the defendant's conduct creates a possible risk of danger to the penal institution and cellphones do create this risk.

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II. By Possessing a Cellphone Inside a Prison Mr. Dixon Did Threaten The Security of the Prison by Creating a Significant Risk of an Escape, of Physical Harm to an Inmate or Corrections Officer, and of Crimes Being Committed in the Outside World.

The Supreme Court of the United States has recognized a strong interest in keeping penal institutions safe. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 332-33 (2012). Because of this interest Courts are deferential to prison authorities "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); see also ante, at 351, n. 16; *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977); *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

Defense counsel argues "[b]ecause cell phones "serve a legitimate purpose, and bear a harmless character," the act of possessing one does not, in and of itself, threaten the security of a penal institution. Cf *People v Dorrington*, 221 Mich 571, 574–575; 191 NW 831 (1923) (holding that the possession of house keys, an alarm clock, and knitting needles does not warrant an inference of an intent to commit burglary)." *Dorrington* is distinguishable from the case at hand because *Dorrington* refers to objects within one's home, not objects within a correctional facility. This difference is crucial. In *Florence,* the Court acknowledged "Everyday items can undermine security if introduced into a detention facility: 'Lighters and matches are fire and arson risks or potential weapons." 566 U.S. at 332-33. "Cell phones are used to orchestrate violence and criminality both within and without jail-house walls." *Id.* "Something as simple as an overlooked pen can pose a significant danger. Inmates commit more than 10,000 assaults on correctional staff every year and many more among themselves." *Id.* referencing Dept. of Justice, Bureau of Justice Statistics, J. Stephan & J. Karberg, Census of State and Federal Correctional Facilities, 2000, p. v

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(2003). The Court also acknowledged that contraband "creates additional problems" because "[t]he competition . . . for such goods begets violence, extortion, and disorder." *Id.*

Furthermore, courts have found that cell phones are included in legislation that regulates hazardous tools inside prisons. *Daniel v. Rivera*, No. 1:12CV279, 2013 WL 1866967, at (E.D. Tex. Apr. 5, 2013), report and recommendation adopted, No. 1:12CV279, 2013 WL 1866953 (E.D. Tex. May 1, 2013) (inmate had fair notice that regulation prohibiting possession of a "hazardous tool" could encompass a cell phone). Courts have also upheld prison restrictions because the dangers inmate cell phone usage presents in a prison environment. See *Santiago-Lugo v. Warden*, 785 F.3d 467, 469 (11th Cir. 2015) ("For obvious reasons, prisons typically prohibit inmates from possessing cell phones."); *United States v. Blake,* 288 F. App'x 791, 794-95 (3d Cir. 2008) ("[T]he risks presented when inmates possess cell phones and cell phone chargers are patent," including use in escape plots, witness intimidation, and conducting criminal enterprises both within prison walls and in the free world.); *Rashid v. Burks*, No. 1:12-CV-140 WLS, 2013 WL 6145331, at (M.D. Ga. Nov. 21, 2013) ("Unfettered communication with individuals outside of the prison permits inmates to receive instructions from outsiders and allows the opportunity for inmates to intimidate officers, their families, and witnesses.").

Thankfully Michigan has not had many instances where inmates or guards were killed or severely injured due to a prisoner possessing a cellphone. However, just because Michigan has not experienced the dangerous reality cellphones create does not mean other states have not as well. Contraband cellphones have been used to plan murders. For example, a South Carolina Department of Corrections officer was shot six times after a hit was put out on a contraband phone, *United States v. Echols,* No. 3:13-cv-00211-JFA (D.S.C. Aug. 13, 2014) (judgment of the district court); see also *U.S. Attorney's Office*, The FBI Columbia Division, *Man Pleads Guilty to Conspiracy to*

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Commit Murder-for-Hire in Shooting of Corr. Officer, (April 09, 2014), FBI — Man Pleads Guilty to Conspiracy to Commit Murder-for-Hire in Shooting of Correctional Officer. In 2005 Tennessee inmate George Hyatte used a cell phone to coordinate an attack at the Roane County Courthouse where his wife shot two transport officers during a court hearing, which resulted in the death of one of them and serious injury of the other. *Berkeley Varitronics Systems*, How Cell Phones Play Huge Role In Prison Escapes (November 3, 2015) How Cell Phones Play Huge Role In Prison Escapes | BVS Wireless Detection (bvsystems.com). More recently, in 2020 an inmate used a contraband cell phone to arrange hits on a former girlfriend. *Joseph Cranney,* SC inmate used cellphone to plan shootings from behind the wall, authorities say (Aug 11, 2020 Updated Dec 8, 2020) SC inmate used cellphone to plan shootings from behind the wall, authorities say | News | postandcourier.com.

Contraband cellphones threaten security by causing riots within the prison. For Example in South Carolina seven inmates died when a riot broke out over contraband cellphones. *Elisha Brown* (Apr. 16, 2018 2:49PM), 7 Killed in South Carolina Prison Riot Over Cell Phones (thedailybeast.com). Also, in Georgia, inmate Whitehead seriously injured another inmate who was trying to use Whitehead's contraband phone. *Losey v. Thompson*, 2012 U.S. Dist. LEXIS 153815. Prisoners have also used cellphone to continue committing crimes outside the prison walls. For example, in California two inmates used smuggled cellphones to run a violent, drug-dealing street gang from inside Pelican Bay State Prison. *Judges In Cal. And S.C. Ord. Carriers To Brick Prison Inmates' Cellphones*, (July 23, 2018 at 8:55 pm), Judges In California And South Carolina Order Carriers To Brick Prison Inmates' Cellphones – CBS Sacramento (cbslocal.com). In 2013, while incarcerated in the Brown County Jail, inmate attorney Schwitzer used a fellow

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inmate's contraband cell phone to access the trust account in violation of the law. *Office of Lawyer Regulation v. Schwitzer* 2017 WI 53 (2017).

Cellphones are also used to help prisoners escape. For example in 2008 inmate Pender escaped from the Rockville Correctional Center in Indiana using a cell phone provided by a prison guard. *Berkeley Varitronics Systems*, How Cell Phones Play Huge Role In Prison Escapes (November 3, 2015) How Cell Phones Play Huge Role In Prison Escapes | BVS Wireless Detection (bvsystems.com). Inmate Causey used a contraband cellphone to coordinate his escape. *Bill Burr*, ABC News 4 (July 7th 2017) Prison worker fired as officials reveal cell phones, drones helped Jimmy Causey escape | WCIV (abcnews4.com). In 2011 Texas inmate Pucket escaped from the Stiles Unit maximum-security facility and escaped to Nebraska on a Greyhound bus. *Lindsay Wise,* Prisons struggle to clamp down on smuggled cell phones (Aug. 1, 2011) Prisons struggle to clamp down on smuggled cell phones (chron.com).

It is very clear that the possession or the attempted possession of a cellphone behind prison walls poses a plethora of threats to the security of a penal institution. Cellphones create a significant risk of escape, fights, riots, committing crimes on the outside, and even death. Here, Mr. Dixon plead guilty to attempted possession of a cellphone in a prison and the phone charger was found in his part of the cell. There is no question what his conduct was. Defense counsel believes it is not just the conduct of the defendant that needs to be considered, but whether he was intending to use the phone for "legitimate uses." OV19 does not acknowledge the defendant's intent; it focuses only on conduct. And here, we have the conduct that creates the threat. Thankfully, Michigan has not had much experience with the dangers of contraband cellphones, but many other states have. If this court finds cellphones do not create a threat, their regulation behind prison walls will decrease and the tragic events will begin to unfold. The People urge this

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Court to help keep prisons safe for the inmates, the guards, and the rest of the community. Denying the application for leave to appeal and upholding the judgment of the Court of Appeals will do just that.

CONCLUSION

Defense counsel acknowledges a scoring of OV19 is properly applied to the prison context when "a defendant's conduct creates a significant risk that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world." As the cases demonstrate, cellphones are used to facilitate escapes, order hits on corrections officers, and to commit crimes outside the walls of the prison. It is clear cellphones threaten the safety and security of a penal institution irrespective of the inmate's subjective intent. Thus, possessing or attempting to possess a cellphone warrants a scoring of 25 points under OV19.

For these reasons, the People respectfully request this Court to deny the application for leave to appeal and uphold the judgment of the Court of Appeals.

Respectfully Submitted,

Dated: July 2, 2021

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