STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

JAMIE LYNN LOWE,

Defendant-Appellant.

Supreme Court No. 137284

Court of Appeals No. 286373

Lower Court No. 08-321632

HILLSDALE COUNTY PROSECUTOR
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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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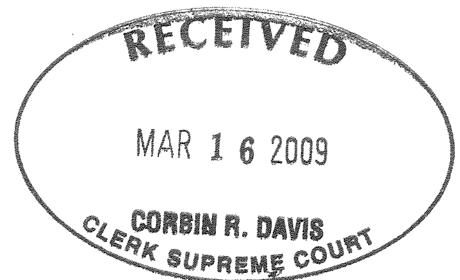

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Hillsdale County Circuit Court by plea of guilty for an offense committed on or about March 26, 2008, and a Judgment of Sentence was entered on June 9, 2008. The Court of Appeals denied Defendant-Appellant's delayed application for leave to appeal on August 15, 2008. On Septemer 11, 2008, the indigent Defendant-Appellant filed a *pro per* application for leave to appeal with this Court. This Court ordered additional briefing on the questions presented herein on February 6, 2009 and ordered the appointment of appellate counsel. This Court has jurisdiction pursuant to Mich Const 1963, art 1, § 20.

STATEMENT OF QUESTIONS PRESENTED

THE LEGISLATURE HAS IDENTIFIED THE NARROW CIRCUMSTANCES UNDER WHICH TRIAL COURTS RETAIN DISCRETION TO ENHANCE THE MINIMUM SENTENCE RANGE FOR CERTAIN REPEAT OFFENDERS. MCL 333.7413(2) IS NOT DESIGNATED AS SUCH A PROVISION UNDER THE SENTENCING GUIDELINES. IS DEFENDANT THEREFORE ENTITLED TO RESENTENCING WHERE THE TRIAL COURT DOUBLED THE RECOMMENDED MINIMUM SENTENCE RANGE BASED ON MCL 333.7413(2), WITHOUT BELIEVING THE SENTENCE WAS AN UPWARD DEPARTURE?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellant Jamie Lynn Lowe pled guilty to one count of possessing methamphetamine,[1] second offense[2] in the Hillsdale County Circuit Court. In exchange for the guilty plea, the prosecutor agreed to dismiss the remaining counts in the information.[3]

At sentencing, the parties indicated that the legislative sentencing guidelines called for a minimum sentence range of 10 to 23 months.[4] S[5] 9. Although the probation agent recommended a 12 month county jail sentence, the trial court ordered Mr. Lowe to serve 46 months to 240 months in prison. In reaching this result, the court relied on *People v John Williams,* 268 Mich App 416 (2005). The court did not believe its sentence amounted to an upward departure. S 9. The court specifically ruled:

> The guidelines would indicate zero—excuse me, 10 to 23 months. According to my records here, Mr. Lowe, the way I counted this, you've got twelve misdemeanors, this is your first felony, you've been in jail six times, probation ten times, five of your misdemeanors aren't even scored by the guidelines. This is your sixth alcohol or drug related offense.
>
> According to *People v John Williams Jr,* 268 Mich App 416, due to the fact that you are – have been enhanced under the Substance Abuse Act, I am within the guideline [sic] by doubling your guidelines due to the fact that the potential penalty was doubled due to your enhancement.
>
> Therefore, it is the sentence of this Court that you be committed to the Department of Corrections . . . for a minimum term of 46 months and not to exceed 240 months.

---

[1] MCL 333.7403(2)(b)(1).
[2] MCL 333.7413(2).
[3] In addition to the crime for which he was convicted, Mr. Lowe was originally charged with possessing methamphetamine lab components under MCL 333.7401c(2)(f), manufacturing methamphetamine under MCL 333.7401(2)(b)(i) and carrying a concealed weapon, MCL 750.227.
[4] There appears to be an error in the scoring of OV 13 at ten points that was not addressed at sentencing.

[5] "S" refers to the transcript of the sentence proceeding held on June 9, 2008.

S 9. Mr. Lowe filed a delayed application for leave to appeal his sentence with the Michigan Court of Appeals, arguing that *Williams* was wrongly decided. The Court of Appeals, however, denied the application "for lack of merit in the grounds presented." Judge Gleicher would have granted Mr. Lowe's delayed application in light of *People v Smith*, 482 Mich 292 (2008).

Acting in *pro per*, Mr. Lowe sought leave to appeal his sentence to this Honorable Court. In response, this Court ordered the appointment of appellate counsel and directed the parties to file supplemental briefs addressing the following questions:

> (1) Whether, with respect to a defendant subject to sentence enhancement of "twice the term otherwise authorized" under MCL 333.7413(2), the minimum sentence range recommended by the sentencing guidelines may be doubled;
>
> (2) Whether this question was correctly decided in *People v Williams,* 268 Mich App 416 (2005); and
>
> (3) What impact, if any, MCL 777.21(4) has on this question.

THE LEGISLATURE HAS IDENTIFIED THE NARROW CIRCUMSTANCES UNDER WHICH TRIAL COURTS RETAIN DISCRETION TO ENHANCE THE MINIMUM SENTENCE FOR CERTAIN REPEAT OFFENDERS. MCL 333.7413(2) IS NOT DESIGNATED AS SUCH A PROVISION UNDER THE SENTENCING GUIDELINES. DEFENDANT IS THEREFORE ENTITLED TO RESENTENCING WHERE THE TRIAL COURT DOUBLED THE RECOMMENDED MINIMUM SENTENCE RANGE BASED ON MCL 333.7413(2), WITHOUT BELIEVING THE SENTENCE WAS AN UPWARD DEPARTURE.

The trial court's decision to double both the minimum and maximum sentence under MCL 333.7413(2) cannot stand. First, the guidelines provisions for habitual offenders are the only place where a trial court may enhance a minimum sentence without complying with procedures for imposing an upward departure. Reading MCL 333.7413(2), MCL 777.18, MCL 777.21 and MCL 769.34 *in pari materia* reveals that this discretion does not extend to subsequent drug violations under MCL 333.7413(2). Second, the phrase "twice the term otherwise authorized" as used in MCL 333.7413(2) refers only to the maximum sentence. The Court of Appeals' holding to the contrary in *People v John Williams, supra* misinterpreted the plain language of the statute in this regard. Third, the *Williams* court erred in interpreting MCL 333.7413(2) as an exception to the binding requirements of MCL 769.34 for imposing an upward departure.

Exposing the error here reveals that the trial court's minimum sentence was, in fact, an unwarranted deviation from legislative guidelines. Because the court imposed Mr. Lowe's sentence based on a mistake of law, resentencing is required.

<u>Issue Preservation and Standard of Review</u>

Trial counsel did not object to the error presented here at sentencing. Review is therefore for plain error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1990).

This Court reviews questions of statutory interpretation *de novo*. *People v Nyx,* 479 Mich 112, 116; 734 NW2d 548 (2007). When interpreting statutes, the Court must give effect to the intent of

the Legislature by applying the plain language of the statute. *People v Koonce,* 466 Mich 515, 518; 648 NW2d 153 (2002). In interpreting the text at issue, the Court considers both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *US Fidelity Insurance & Guaranty Company v Michigan Catastrophic Claims Assn,* 482 Mich 414, 423; 759 NW2d 154 (2008). Where possible, the Court should give effect to every phrase, clause and word in a statute. *Id.*

Discussion

A. MCL 333.7413(2) Does Not Confer Discretion to Double the Minimum Sentence Range for Subsequent Controlled Substance Offenses.

In this case, the trial court doubled the high end of Mr. Lowe's minimum guideline range from 10-23 months to 46 months. The court based this decision on the holding in *Williams, supra,* which interpreted MCL 333.7413(2) as authorizing a sentencing court to double both the maximum and minimum "term" of a person convicted of a subsequent drug offense.

The trial court's decision to enhance Mr. Lowe's minimum sentence contravenes the plain language of the double drug penalty statute. MCL 333.7413(2) provides that a person convicted of a second or subsequent drug offense "may be imprisoned for a term not more than twice the term otherwise authorized . . . ." Mr. Lowe's underlying offense – methamphetamine possession – is punishable by a maximum of 10 years imprisonment. MCL 333.7403(2)(b)(1). The court was thus permitted to double Mr. Lowe's maximum sentence to 20 years under MCL 333.7413(2).

This authority did not extend, however, to the doubling of Mr. Lowe's minimum sentence. The phrase "twice the term otherwise authorized" is not defined in MCL 333.7413(2). Yet, under Michigan's sentencing scheme, no rational basis exists for interpreting the word "term" as encompassing both the minimum and the maximum sentence. Indeed, the statute under which Mr. Lowe was convicted describes no minimum penalty for the offense. Rather, a sentencing court must determine the minimum sentence for methamphetamine possession by calculating the legislative

guidelines. MCL 777.13m. MCL 333.7413(2)'s reference to "twice the term otherwise authorized" is more properly understood as a reference to the maximum penalty determined by the legislature.

This meaning becomes apparent when MCL 333.7413(2) is considered within its broader statutory context. *Brown v Genessee County Bd of Commissioners,* 464 Mich 430, 437; 628 NW2d 471 (2007) ("Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: '[i]t is known from its associates."); *Mayor of the City of Lansing v Michigan Public Service Commission,* 470 Mich 154, 167-68; 680 NW 2d 840, 848 (2004) (observing that the statutes at issue "as with all other provisions of law, are not to be read discretely, but as part of a whole.").

Sentences for drug offenses are addressed both by the Controlled Substance Act, MCL 333.7101 *et seq*, and the statutory sentencing guidelines, MCL 769.34 and 777.1 *et seq*. Statutes that relate to the same subject or share a common purpose are 'in pari materia' (literally meaning 'upon the same matter or subject'). *People v Webb,* 458 Mich 265, 274; 580 N.W.2d 884 (1998). Such provisions must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Id* at 274. Thus, to fully analyze this issue, this Court must read MCL 333.7413(2) *in pari materia* with the statutes governing the sentence guidelines for enhanced drug offenses.

MCL 333.7413(2) has existed in its current form since 1988. It is well-settled that the sentencing guidelines are mandatory for all offenses occurring after January 1, 1999. MCL 769.34(2) provides:

> Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 *shall* be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. (Emphasis supplied).

Thus, unlike the judicial guidelines, courts have no discretion in applying the statutory guidelines, which are binding and have the force of law. *People v Hegwood*, 465 Mich 434, 438; 636 NW2d 127 141 (2001) ("Because the new guidelines are the product of legislative enactment, a judge's discretion to depart from the range stated in the legislative guidelines is limited to those circumstances in which such a departure is allowed by the Legislature.").

MCL 777.18 lists subsequent controlled substance offenses as one of the enumerated felonies to which the sentencing guidelines apply. Therefore, even for a person whose maximum sentence may be enhanced under MCL 333.7413(2), a court must grant a minimum sentence within the legislative guidelines range, absent a valid departure. MCL 777.18[6]

There is one circumstance under which the guidelines authorize courts to enhance the minimum sentence range for a repeat offender; it involves calculating the guidelines for habitual offenders. The legislature evidenced its intent in this regard through the statutory language of MCL 777.21(3).

MCL 777.21 instructs courts generally on how to determine the minimum sentence range for felonies covered by the guidelines. Subsection (1) of MCL 777.21 states the general rule for all offenses. Subsection (2) describes the process for persons convicted of multiple crimes.

Subsection (3) of MCL 777.21 outlines the method for calculating a minimum sentence range for habitual offenders. It explains:

> (2) If the offender is being sentenced under section 10, 11 or 12 of chapter IX, determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense. To determine the recommended minimum sentence range,

[6] *See, Analysis of the Michigan Statutory Sentencing Guidelines*, SENTENCING GUIDELINES MANUAL p 145, by Sheila Robertson-Deming and the Michigan Judicial Institute (1st edition, October 1998) ("The Guidelines for the underlying conviction offense apply to sentencing for repeat Controlled Substance Act offenses, except where there is a mandatory sentence which supercedes the Guidelines' range. In other words, there is no increase in the authorized minimum sentence range in cases subject to discretionary sentence enhancement for second or subsequent Controlled Substance offenses." (citing MCL 777.18 and 777.21(4)).

increase the upper limit of the recommended minimum sentence range determined under part 6 for the underlying offense offense as follows:

(a) If the offender is being sentenced for a second felony, 25%.
(b) If the offender is being sentenced for a third felony, 50%.
(c) If the offender is being sentenced for a fourth or subsequent felony, 100%. ML 777.21(3).

Hence, the statute makes it clear that courts enhance the minimum sentence range for habitual offenders by complying with the specific procedures outlined above.

In the very next subsection, MCL 777.21(4) instructs on how to calculate the minimum sentence range for felonies enumerated in MCL 777.18, which includes subsequent drug violations. MCL 777.21(4) provides:

> (4) If the offender is being sentenced for a violation described in section 18 of this chapter, both of the following apply:
>
> (a) Determine the offense variable level by scoring the offense variables for the underlying offense and any additional offense variables for the offense category indicated in section 18 of this chapter.
>
> (b) Determine the offense class based on the underlying offense. If there are multiple underlying felony offenses, the offense class is the same as that of the underlying felony offense with the highest crime class. If there are multiple underlying offenses but only 1 is a felony, the offense class is the same as that of the underlying felony offense. If no underlying offense is a felony, the offense class is G.

In accordance with clear language of MCL 777.21(4) then, a court's task is limited: (1) the court must determine the offense variable level by scoring all variables identified for the designated offense categories; and (2) the court must then determine the offense class in accordance with the rules set forth in subsection 4(b). Aside from those variations, the court must determine the recommended minimum range in accordance with MCL 777.21(1).

Notably, MCL 777.21(4) sets forth no procedures for enhancing the recommended minimum range for repeat drug offenders. The detailed mechanisms in MCL 777.21(3) for habitual

offenders are missing entirely from MCL 777.21(4). This strongly suggests the legislature did not intend to authorize deviations from the minimum sentence for repeat drug offenses. As this Court has long recognized, one cannot assume the legislature inadvertently omitted language from one portion of a statute that it placed in another provision. *People v Monaco,* 474 Mich 48; 710 NW2d 46 (2006) (citing *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993)).

Absent a clear legislative directive, this Court should not interpret MCL 333.7413(2) as authorizing the doubling of a repeat drug offender's minimum sentence. Such a construction would circumvent the clear proscription in MCL 769.34(2) that, absent a valid departure, the court must sentence a defendant within the minimum sentence range. The legislature has not identified the imposition of a sentence under MCL 333.7413(2) as a circumstance that does not give rise to an upward departure from the guidelines. *See, e.g.* MCL 769.34(2)(a) (noting that a mandatory minimum sentence does not constitute a departure).

The point is further illustrated by the language in MCL 333.7413(4), which allows a court to depart from a mandatory minimum sentence imposed under MCL 333.7413(3) for substantial and compelling reasons. The existence of departure language in the subsection immediately following MCL 333.7413(2) indicates that the legislature knew how to account for deviations from the minimum sentence for repeat drug offenders. The Legislature is presumed to have knowledge of existing laws. *Jenkins v. Patel*, 471 Mich 158, 177; 684 NW2d 346 (2004). It is also assumed to have measured the effect of new laws on existing laws. *Walen v Dep't of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993). By virtue of MCL 777.18, it is clear that the legislature knew the statutory guidelines would impact the minimum sentences of repeat drug offenders. Therefore, it is significant that – despite the opportunity to do so – the legislature declined to include any language in MCL 777.21(4) (or elsewhere) to allow for deviations from the minimum sentence range for these

crimes. This strongly suggests that courts must set the minimum sentence for these crimes not according to the language of MCL 333.7413(2), but in compliance with the mandatory guidelines.

Viewed properly in light of other statutes involving criminal offenses and penalties, it becomes clear that MCL 333.7413(2) can only reasonably be construed as referencing the *maximum* sentence. Michigan operates within an indeterminate sentencing scheme. Most crimes[7] are punishable by both a minimum and maximum sentence. MCL 769.8(1); Const 1963, art 4 § 45. The maximum penalty allowed is not chosen by a trial court, but is set by the legislature.[8] MCL 769.8; *People v. Harper*, 479 Mich. 599, 612; 739 NW2d 523 (2007) (observing that the maximum portion of a defendant's indeterminate sentence must be the "maximum penalty provided by law . . . ."); *See also, Hegwood, supra* ("the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature [while] [t]he authority to impose sentences and to administer the sentencing statutes enacted by the Legislature lies the judiciary. It is, accordingly, the responsibility of a circuit judge to impose a sentence, but only within the limits set by the Legislature.") (internal citations omitted). Thus, except where authorized expressly, trial courts generally have no discretion in setting the maximum term of a defendant's sentence.

Examining the language used to describe the penalty for the vast majority of criminal offenses well illustrates the point. The legislature describes the penalty for most crimes by noting the offense is punishable by imprisonment "for not more than" a set number of years. *See e.g.,* MCL

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[7] There are a few crimes for which determinate sentencing is required, including first-degree murder, MCL 750.316 (imposing a non-parolable life sentence); felony-firearm, MCL 750.227b (imposing a 2 year sentence for a first offense); and treason (imposing a mandatory life sentence).

[8] Through the habitual offender statutes, the legislature permits trial courts to enhance a defendant's sentence beyond the usual limits of the statutory maximum. *See generally,* MCL 769.10 (allowing an enhancement of 1½ times the statutory maximum for a person with one previous felony conviction; MCL 769.11 (allowing an enhancement of twice the statutory maximum for a person with two previous felony convictions); MCL 769.12 (for a person with three or more prior felony convictions, allowing an enhancement up to 15 years for offenses carrying a statutory maximum of less than 5 years and a sentence of life in prison for offenses carrying a statutory maximum 5 years or more).

750.530 (describing unarmed robbery as felony punishable by imprisonment "for not more than 15 years"); *Accord,* MCL 750.174 (characterizing embezzlement of $100,000 or more as a felony punishable by imprisonment "for not more than 20 years."). These statutes do not express the permissible punishment using the language of an "authorized term." Nevertheless, the statutory language can only be reasonably construed as referencing the maximum penalty.

For capital offenses, the legislature typically describes the penalty as being punishable by imprisonment for "life or any term of years." *See e.g.,* MCL 750.91 (attempted murder); 750.520b (first-degree criminal sexual conduct). While a life sentence obviously refers to a statutory maximum sentence, this court has attached the same meaning to the phrase "any term of years." *People v Blythe,* 417 Mich 430; 339 NW2d 399 (1983) ("the phrase "for life or for any term of years" . . . refers to the maximum sentence to be imposed."). The legislature describes the penalty for controlled substance offenses in similar language. With few exceptions, the legislature has made drug crimes punishable by imprisonment "for not more than" a set number of years. MCL 333.7401 *et. seq.*

A fair reading of these statutes together compels the conclusion that by referring to "twice the term otherwise authorized," the legislature meant to reference the *maximum* sentence allowed by the underlying offense. The trial court therefore lacked the authority to double Mr. Lowe's minimum sentence pursuant to MCL 333.7413(2). Resentencing is required.

(2) Williams Was Wrongly Decided; MCL 333.7413(2) Does Not Authorize Courts to Double the Minimum Sentence Range for Subsequent Drug Violations.

In *Williams, supra* the Court of Appeals read MCL 333.7413(2) as authorizing discretionary doubling of the statutory minimum sentence for repeat drug offenders. *Williams,* 268 Mich App at 427; 707 NW2d at 631. The Court believed that failing to interpret MCL 333.7413(2) as applying to a minimum sentence range would contravene the express language of MCL 777.18. *Williams,* 268 Mich App at 431; 707 NW2d at 631. According to *Williams,* such an approach would also be contrary to "an overall legislative intent to increase the minimum sentences for repeat offenders as

demonstrated by MCL 777.21." *Id.* The court opined that discretionary enhancement under MCL 333.7413(2) was not a guidelines departure. *Id* at 430-431; 707 NW2d at 631.

There are several flaws in the Court's reasoning, as outlined above. No authority exists for the Court's conclusion that a sentencing judge has the discretion (but is not required) to double the minimum sentence guidelines for a subsequent drug violation. A sentencing court cannot exercise discretion under the guidelines unless that discretion has been bestowed by the legislature. *People v Babcock I,* 244 Mich App 64, 68; 624 NW2d 479, 471 (2000) ("indeterminate sentencing is a legislative delegation of constitutional authority to trial judges to tailor their sentences to the particular offender and the particular offense 'within the legislatively prescribed range' of punishment for each felony."). The Legislature specifically created an enhanced guidelines range in MCL 777.21(3) for habitual offenders sentenced under MCL 769.10 *et. seq.* No like provision exists for subsequent controlled substance offenders sentenced under MCL 333.7413(2). While MCL 777.21(4) is key to analyzing this issue, the Court of Appeals in *Williams* ignored this subsection entirely. As noted above, the only reasonable inference to be drawn under these circumstances is that the statutory language of MCL 333.7413(2) is contrary to a discretionary doubling of the guidelines range for a subsequent drug offense. Without explicit authority, courts have no discretion to enhance the minimum guidelines range set by the Legislature.

The Court of Appeals' decision in *Williams* is also untenable for other reasons. First, the Court based its holding on in part upon *People v Darnell Williams,* 205 Mich App 229, 230; 517 NW2d 315 (1994); *People v Scott,* 197 Mich App 28, 30; 494 NW2d 765 (1992); and *People v Davenport,* 205 Mich App 399, 401; 522 NW2d 339 (1994). The Court cited these cases to support its conclusion that a sentencing judge may double both the statutorily allowed maximum sentence *and* any statutory minimum sentence. Yet, a review of these decisions reveals that the proposition for which they were cited amounted to dicta. The issue presented in Mr. Lowe's case was never germane to their

analysis. In *Darnell Williams*, for instance, the main question before the court was whether a defendant whose sentence was enhanced under MCL 333.7413(2) was an "habitual offender" for purposes of the sentencing guidelines. 205 Mich App 229 at 231; 517 NW2d at 316. That portion of *Darnell Williams* cited by the Court of Appeals in *John Williams* appeared in the opening paragraph of the opinion.

The same is true of the Court's decision in *Scott, supra*, where the main question was whether the defendant's enhanced minimum sentence violated the principle of proportionality. 197 Mich App at 30; 494 NW2d at 766. *See also, Davenport, supra* (assuming without deciding that under MCL 333.7413(2), defendant was subject to a sentence of double the minimum penalty authorized by MCL 333.7401(2)(a)(iv), which at the time provided for a mandatory minimum sentence of not less than one year); *People v Green,* 205 Mich App 342, 345-46; 517 NW2d 782, 784 (1994) (construing the portion of *Scott* quoted in *John Williams* as dictum that "does not establish a rule of law concerning enhancement that is binding precedent.").

The *Williams* court also erred in concluding "there was no need to amend MCL 7413(2)" to further a legislative intent to implicate the sentencing guidelines when considering a sentence under MCL 333.7413(2), "because it had already been read by the courts as encompassing any minimum sentences authorized by law, see *Williams, supra* . . . ." This amounts to a legislative acquiescence argument, which this Court has described as "an exceedingly poor indicator of legislative intent." *Donajkowski v Alpena Power Co,* 460 Mich 243, 258; 596 NW2d 574, 581 (1999). The fact that language similar to MCL 777.21(4) does not appear in MCL 777.21(3) provides the strongest evidence of the legislature's intent that MCL 333.7413(2) does not authorize the enhancement of a minimum sentence.

Further, the *Williams* court failed to acknowledge the fundamental shift that occurred in Michigan sentencing policy toward drug offenses, effective March 1, 2003. Michigan eliminated

mandatory minimum sentences for most controlled substance violations, pursuant to Acts 665, 666 and 670 of the Public Acts of 2002. These repeals rolled back what were perceived as amongst the harshest mandatory sentences in the nation. In light of these sweeping changes, it is imperative that minimum sentences for drug offenders comply with the limits set by the legislative guidelines.

Finally, the *Williams* court erred by deciding that enhancing the minimum sentence under MCL 333.7413(2) would not be a departure, but a discretionary act by the sentencing court. As emphasized above, the legislative guidelines require a court to impose a minimum sentence in accordance with its terms, unless an upward departure is permitted. MCL 769.34(2); *Hegwood, supra; Smith, supra.* Accepting the *Williams* court's interpretation would read MCL 333.7413(2) as allowing courts to circumvent the entire departure process for repeat drug offenders, though no such words appear in any statute. Absent a clear directive from the legislature authorizing it to do so, this Court should not adopt such a broad exception from the strictures of MCL 769.34.

(3) MCL 777.21(4) Compels the Conclusion that MCL 333.7413(2) Does not Permit Doubling of a Defendant's Minimum Sentence Range.

As indicated above, MCL 777.21(4) is silent about a process for enhancing the minimum sentence of defendants convicted of repeat controlled substance violations. This provision stands in stark contrast to MCL 777.21(3), which specifically allows enhancement of the minimum sentence for habitual offenders. Where a provision included in one part of a statute is omitted from another part, the omission is construed as intentional. *People v Rahilly,* 247 Mich App 108, 112; 635 NW2d 227 (2001). Reading MCL 777.21(3) and (4) together implicates the widely accepted canon that "inclusion by specific mention excludes what is not mentioned." *See generally, People v Jahner*, 433 Mich 490; 446 NW2d 151 (1989) (also noting at n3 that "[It] is not the province of [the] court to make an exception where the legislature has made none . . . . [T]he exception, if any, shall appear in the act."). The only reasonable inference to be drawn from MCL 777.21(3) and (4) is that the

Legislature did not authorize further enhancement of the minimum sentence of repeat drug violators under MCL 333.7413(2).

Accordingly, this Court should vacate Mr. Lowe's sentence and remand for resentencing.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal or remand for resentencing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Brandy Y. Robinson

BY: ______________________________

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