

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE LYNN LOWE,

Defendant-Appellant.

Michigan Supreme Court No. 137284

Court of Appeals No. 286373

Hillsdale County Circuit Court
No. 08-321632

**PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION
TO APPLICATION FOR LEAVE TO APPEAL**

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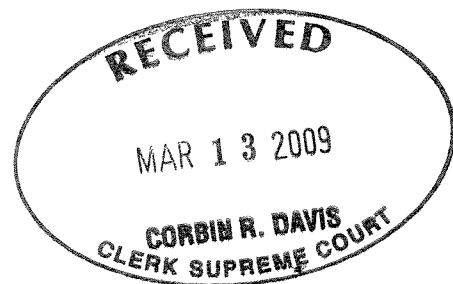


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QUESTIONS PRESENTED

In an order dated February 6, 2009, this Court directed the parties to file supplemental briefing and asked the parties to address the following three issues:

- (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.

INTRODUCTION

This question presents a clean issue of statutory construction. The statute at issue, MCL 333.7413(2), authorizes the doubling of a sentence for a defendant convicted of a drug offense in the Controlled Substances Act of the Public Health Code who has previously been convicted of a drug offense. The statute provides that for a second drug offense a defendant "may be imprisoned for a term not more than twice the term otherwise authorized." Because Michigan law generally provides for an indeterminate sentencing scheme for prison sentences, the word "term" includes the minimum and maximum terms of the sentence. In context here, "term" means period of time or duration. The plain language is clear. Thus, the defendant's guidelines for his minimum sentence would double from 10-to-23 months, to 20-to-46 months.

The decision of the Court of Appeals in *People v Williams* reaching the same result was correctly decided.

This analysis is confirmed by a review of MCL 777.21(4), within the sentencing guidelines chapter, which provides that the offense variables for the sentence enhancement are determined by the underlying offense. The specific provision indicates that MCL 333.7413(2) is a sentence enhancement and not a substantive crime. The sentencing guidelines in this chapter use the same basic language in MCL 777.21(3) to describe how the enhancement operates for the habitual sentencing scheme.

Because the answers to these three questions are interrelated, the people will address them all together, in one issue.

The people ask this Court to deny leave since the decision in *Williams* provides adequate guidance – and the correct analysis – for the bench and bar on this issue.

FACTS AND PROCEEDINGS

Defendant was originally charged in a four-count information with the following felonies:

(1) possession of a laboratory equipment that was being used for the manufacturing of methamphetamines; (2) manufacturing of methamphetamines; (3) intentionally possessing methamphetamine; and (4) carrying a concealed weapon (Plea hearing, May 5, 2008, pp 4-5).

With regard to the third count, the information provided notice of an enhancement based on defendant's three prior drug-related convictions (Plea hearing, p 4). The crime of possessing methamphetamines is a ten-year felony under MCL 333.7403(2)(b)(i),¹ which is enhanced to a twenty-year felony here under MCL 333.7413(2) based on defendant's prior drug convictions.

On May 5, 2008, defendant pled guilty to count 3, possession of methamphetamines, after the trial court informed him that he would be facing up to twenty years in prison for his conviction (Plea hearing, pp 14, 21-28). The plea was based on an agreement, in which the prosecution agreed to dismiss the other three counts in exchange for his plea to the count subject to the second or subsequent offender notice as a drug offender (Plea hearing, p 19).

On June 9, 2008, defendant was sentenced for his conviction. The sentence information report (SIR) from the probation department determined that his guidelines were 10-to-23 months. See Attachment A, sentence information report. The trial court noted that the guideline range was doubled based on *People v Williams*, extending the minimum guideline range to 46 months (Sentencing, June 9, 2008, p 9).² Based on defendant's extensive misdemeanor criminal activity while on probation, the trial court sentenced defendant to 46 months on the minimum to 20 years on the maximum in prison:

¹ MCL 333.7403(2)(b)(i) refers to substances under MCL 333.7212(g)(i), which includes methamphetamines.

² *People v Williams*, 268 Mich App 416; 707 NW2d 624 (2005).

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, you have violated the terms of probation ten times, five of your misdemeanors aren't even scored by the guidelines. This is your sixth alcohol or related offense.

According to *People versus 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 by doubling your guidelines due to the fact that the potential penalty was doubled due to your enhancement.

Therefore, it is the sentence of the Court that you be committed to the Department of Corrections, to be confined in such institutions as the Commission shall direct under the Code of Criminal Procedure, the Michigan Penal Code and the Department of Corrections Act for a minimum term of 46 months and not to exceed 240 months. [Sentencing, p 8.]

The court dismissed the remaining counts (Sentencing, p 10).

Defendant filed an application for leave in the Michigan Court of Appeals. On August 15, 2008, the Court of Appeals denied leave. There was a dissent by one judge who indicated that she would grant leave in light of *People v Smith*, in which this Court examined the adequacy of a trial court's justification for an upward departure.³

On September 11, 2008, defendant filed an application for leave with this Court. On February 6, 2009, this Court directed the parties to address the issues listed in the Statement of the Questions.

³ *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008).

SUPPLEMENTAL ARGUMENT

The statutory provision expressly provides that a person convicted of a prior drug crime may be subject to a term of imprisonment that is not more than twice the term that is authorized by law. In giving "term" its plain meaning under Michigan law, the statute doubles the minimum and maximum sentences, which comprises the ordinary prison term of sentence in Michigan. The decision of the Court of Appeals in *People v Williams* properly evaluated the question. The statutory provision in MCL 777.21(4) confirms this legal conclusion. This Court should deny leave.

A. Preservation

Defendant did not raise this issue at sentencing, but apparently raised it for the first time on appeal. In fact, defendant specifically pled guilty to the charge of possessing methamphetamines under MCL 333.7403(2)(b)(i) with an understanding that this crime was subject to a sentence enhancement under MCL 333.7413(2). Although this plea may operate as a waiver to any claim regarding the minimum guideline, the people do not address this issue because the Court did not ask for briefing on this question.

B. Standard of Review

Defendant raises a claim of statutory interpretation on appeal. As a question of law, this matter is reviewed de novo.⁴

C. Analysis

In response to the three questions posed by this Court, the people contend that (1) the plain language of MCL 333.7413(2) provides that the word "term" encompasses both the minimum and the maximum sentence as used in Michigan law so that the minimum and maximum are subject to the doubling; (2) that the analysis of the Court of Appeals in *People v Williams* was proper; and (3) that MCL 777.21(4) confirms that the minimum and maximum sentence may be doubled.

⁴ *People v Cleveland Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

- 1. The plain language of MCL 333.7413(2) provides that the term of sentence – which is the minimum and maximum – may be doubled if a defendant has a prior drug offense.**

In examining a statute, this Court looks to the language of the text to understand the intent of the Legislature.⁵ The statute at issue is the sentence enhancement that appears within the Controlled Substances Act within the Public Health Code under MCL 333.7413(2). In creating a sentence enhancement provision in the Controlled Substances Act, the Legislature took a factor, the defendant's prior criminal convictions, a traditional consideration in determining a defendant's sentence, and authorized a weight to be given that factor to double the sentence.⁶

In examining the statute, the plain language of MCL 333.7413(2) allows the sentencing court to double the "term" otherwise authorized by law:

[A]n individual convicted of a second or subsequent offense under this article may be imprisoned for a *term* not more than twice the *term* otherwise authorized[.] [Emphasis added.]

The word "term" as used here includes both the minimum sentence and maximum sentence. This is because Michigan's sentencing scheme is an indeterminate one, in which a defendant who is sentenced to prison is generally given both a minimum sentence and a maximum sentence consistent with MCL 769.9(2).

In context, this understanding of "term" in MCL 333.7413(2) comports with the dictionary definition of the word. In the *Random House College Dictionary*, (2d Revised Edition, 2001), p 1350, one of the definitions provided is "the time or period through which something lasts." Likewise, in *Webster's New World Dictionary*, (3d College Edition, 1988), p 1380, provides in

⁵ *People v Nyx*, 479 Mich 112, 117; 34 NW2d 548 (2007).

⁶ *People v Eason*, 435 Mich 228, 232-233; 458 NW2d 17 (1990).

one of its definitions "a set period of time; duration." Given Michigan's indeterminate sentencing scheme, this is exactly what the word "term" means here.

This understanding is confirmed by the fact that the word "term" is used twice in the sentence of MCL 333.7413(2), which authorizes this doubling of the punishment. This is significant. The sentence indicates that a person is "imprisoned for a term." Since there is both a minimum sentence and maximum sentence imposed for the ordinary prison sentence, "term" therefore identifies a *range of time*.⁷ This range of time then is enhanced by a multiplying of this range of "not more than twice the term," meaning twice the range of time. Thus, the time for the minimum sentence as governed by the guidelines as well as the maximum sentence is subject to this doubling.

Finally, this conclusion is supported by the phrase "otherwise authorized." The sentencing guidelines provide the authority for the minimum sentences under Michigan law.⁸ And MCL 769.9 provides that for the maximum sentence, the statutory number of years is the maximum unless the statute provides for a life sentence. Here, for possession of methamphetamines, the statutory maximum was ten years: the "felony [is] punishable by imprisonment for not more than 10 years" under MCL 333.7403(2)(b)(i). The minimum would be determined by examining the guidelines under MCL 777.13m. The statute provides that these authorized sentences may be twice what they would otherwise be in law.

⁷ There does not appear to be a "flat" or determinate sentence to prison within the Controlled Substances Act.

⁸ *People v Harper*, 479 Mich 599, 613; 739 NW2d 523 (2007).

2. The analysis in *People v Williams* was proper.

The Michigan Court of Appeals examined this issue in *People v Williams*.⁹ The analysis of that Court was right on all points, and therefore there is currently adequate guidance for the bench and bar on this question.

In examining the statute at issue, MCL 333.7413(2), the Court of Appeals noted that the word "term" provided for the minimum and the maximum sentence in examining the text of the statute itself:

The statute in its current form has been in place since 1988. The word "term" is defined, in part, as "the time or period through which something lasts" or "a period of time to which limits have been set[.]" Random House Webster's College Dictionary (2001). Clearly then, imprisonment for a "term" can encompass both the minimum and maximum sentences authorized by law because a period is created by reference to both. This Court, quite often, refers to a defendant's term of imprisonment by recitation of both the minimum and maximum sentences.

Additionally, the clear and unambiguous language of MCL 333.7413(2) does not differentiate or suggest a distinction, either explicitly or implicitly, between maximum and minimum sentences; therefore, the word "term" can entail and contemplate both maximum and minimum sentences. MCL 333.7413(2) also speaks of doubling a term of imprisonment "otherwise authorized" There is no dispute between the parties that the maximum prescribed sentence for any given offense is considered authorized punishment for purposes of MCL 333.7413(2) and that MCL 333.7413(2) permits a court to double the statutory maximum sentence.¹⁰

The Court of Appeals later reached the conclusion that the minimum sentence was included within the word "term:"

[T]he inclusion of authorized minimum sentences for doubling purposes, which necessarily includes a sentence imposed under the mandatory guidelines, falls within the clear language of the statute.¹¹

⁹ *Williams*, 268 Mich App 416.

¹⁰ *Williams*, 268 Mich App at 427, 430 (paragraph break added).

¹¹ *Williams*, 268 Mich App at 430.

Stated otherwise, the Court determined that the term of a sentence for prison in Michigan contemplates the minimum and maximum sentence because of the indeterminate sentencing scheme. This is right.

The *Williams* Court further noted that the Court of Appeals had reached the same conclusion regarding the application of this statute to both the minimum and maximum sentence in examining the same language under the judicially-created guidelines in a 1994 decision, *People v Darnell Williams*.¹² As a consequence, this has been the judicial understanding of this statute for many years.

Lastly, the Court examined MCL 333.7413(2) and related it to the provisions within the statutory guidelines of MCL 777.1 *et seq.* The Court determined that these provisions further supported its conclusion, and that to refuse to apply it to the minimum term would frustrate the evident legislative intent underlying it:

Furthermore, to read the doubling provision of MCL 333.7413(2) as not being applicable to a minimum sentence calculated under the guidelines would, aside from being contrary to the express language of MCL 777.18, *appear to also be contrary to an overall legislative intent to increase minimum sentences for repeat offenders as demonstrated by MCL 777.21*.¹³

This point is well taken. Given the fact that the Department of Corrections frequently will release prisoners after they have served their minimum sentence, the decision to only apply the doubling to the maximum sentence would blunt the effect of this statute on the real time that drug offenders actually serve.

¹² *People v Darnell Williams*, 205 Mich App 229, 231; 517 NW2d 315 (1994).

¹³ *Williams*, 268 Mich App at 430 (emphasis added).

3. The analysis of the sentencing guidelines provisions, particularly MCL 777.21(4), only confirm that the statute doubles the minimum and maximum sentence.

Chapter 777 of the Code of Criminal Procedure governs the sentencing guidelines. The guidelines delineate a special category of offenses listed in MCL 777.18 that are not substantive offenses, and therefore are treated differently than the general listing of crimes:

<u>MCL</u>	<u>Category</u>	<u>Description</u>	<u>Stat Max</u>
333.7410	CS	Controlled substance offense or offense involving GBL on or near school property or library	Variable
<i>333.7413(2) or (3)</i>	<i>Pub trst</i>	<i>Subsequent controlled substance violations</i>	<i>Variable</i>
333.7416(1)(a)	CS	Recruiting or inducing a minor to commit a controlled substance felony	Variable
750.157a(a)	Pub saf	Conspiracy	Variable
750.157c	Person	Inducing minor to commit a felony	Variable
750.188	Pub ord	Voluntarily suffering prisoner to escape	Variable
750.237a	Pub saf	Felony committed in a weapon-free school zone	Variable
750.367a	Property	Larceny of rationed goods	Variable

[Emphasis added.]

There are some offenses that are sentence enhancements, including this one and MCL 333.7410 (controlled substance on school property), and others in this list that are derivative from another substantive crime, such as conspiracy under MCL 750.157a or committing a felony in a school zone under MCL 750.237a. The guidelines provide under MCL 777.21(4) that these listed offenses are scored by reference to the underlying crime:

(4) If the offender is being sentenced for a violation described in section 18 [MCL 777.18] 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. [Emphasis added.]

The language of this provision requires that the offense variables be scored by reference to the underlying crime. The underlying crime here was possession of methamphetamines under MCL 333.7403(2)(b)(i). The guidelines were scored with respect to this offense at 10-to-23 months. See Attachment A, SIR.

The inclusion of this offense within this class in MCL 777.18 and referenced by MCL 777.21(4) confirms that the sentence enhancement in MCL 333.7413(2) applies to the minimum and maximum sentence. This chapter authorizes the scoring of the guidelines for the underlying offense. The sentence enhancement in MCL 333.7413(2) then empowers the sentencing court to double the "term otherwise *authorized*." The sentence for the minimum here was 10-to-23 months and 20 years for the maximum sentence. This range is then subject to being doubled at the discretion of the sentencing court. The authority is permissive because MCL 333.7413(2) uses the word "may" in its empowering of the sentencing court.

By analogy, in Chapter 777 of the guidelines the habitual offender sentence enhancement operates in a similar fashion. The guidelines under MCL 777.21(3) provide that the guidelines for a sentence as a habitual offender are calculated by reference to the underlying offense:

(3) If the offender is being sentenced under section 10, 11, or 12 of chapter IX [habitual offender statutes], *determine the offense category, offense class, offense variable level, and prior record variable level based on the underlying offense.*

This is the same basic language as used in paragraph (4) of the same section, which governs the non-habitual sentence enhancements that are listed in MCL 777.18. The guidelines under MCL 777.21(3) then provide a scheme for enhancing the minimum sentence for habitual offenses by "increas[ing] the upper limit of the recommended minimum sentence range," the amount of the enhancement depending on whether the defendant was charged as a habitual second, third, or fourth. Where the defendant is charged based on a prior drug conviction, the enhancement then occurs based on the doubling provision of MCL 333.7413(2). In short, these schemes (habitual and drug enhancement) parallel on another.

Here, defendant was scored as a D-III for Class D offense, placing him in the 10-to-23 month variable range. See Attachment A, SIR. If he had committed three prior felonies, the guidelines would have been enhanced under MCL 769.12 to 10-to-46 months for the defendant as a habitual offender fourth. Whereas here, defendant was charged with a prior drug offense under MCL 333.7413(2), so his guidelines doubled to the range 20-to-46 months. To underscore the point that both the habitual offender statute and the drug sentence enhancement perform the same basic function, the prosecution must elect between these two enhancements and cannot employ them both.¹⁴

Consequently, the trial court sentenced defendant within the guidelines. Because the minimum sentence range was 10-to-23 months and the maximum sentence was 10 years, in doubling this range, the new term became 20-to-46 months for the minimum and 20 years for the

¹⁴ See, e.g., *People v Wyrick*, 474 Mich 947; 707 NW2d 188 (2005)(affirming the authority of the prosecution to elect between the sentence enhancement for a drug crime under the habitual offender statute and the drug enhancement provision).

maximum. Consistent with MCL 333.7413(2), the sentence of 46 months to 20 years was proper because defendant was sentenced to a term not more than twice the term that was otherwise authorized under law. This Court should deny leave.

Conclusion and Relief Sought

WHEREFORE, the People of the State of Michigan, Appellee, respectfully request that this Honorable Court deny defendant's application for leave.

Respectfully submitted,

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Dated: March 13, 2009
2009004720A/Lowe, Jodie/Brf in Opp to Application

Attachment A

SENTENCING INFORMATION REPORT

Offender: Lowe, Jamie Lynn SSN: [REDACTED] Workload: 2347 Docket Number: 08321632
Judge: The Honorable Michael R. Smith Bar No.: P30865 Circuit No.: 01 County: 30

Conviction Information

Conviction PACC: 333.74032B1 Offense Title: Controlled Substance-Possession of Methamphetamine (333.74132 VDL 2nd or Subs.)
Crime Group: Public Trust (CS) Offense Date: 03/26/2008
Crime Class: Class D Conviction Count: 1 of 1 Scored as of: 03/26/2008
Statutory Max: 240 Habitual: No Attempted: No

Prior Record Variable Score

PRV1: 0 PRV2: 0 PRV3: 0 PRV4: 0 PRV5: 20 PRV6: 5 PRV7: 0
Total PRV: 25
PRV Level: D

Offense Variable

OV1: 0 OV2: 0 OV3: 0 OV4: 0 OV9: 0 OV10: 0 OV12: 5
OV13: 10 OV14: 10 OV15: 0 OV16: 0 OV19: 0 OV20: 0
Total OV: 25
OV Level: III

Sentencing Guideline Range

Guideline Minimum Range : 10 to 23

Minimum Sentence

	<u>Months</u>	<u>Life</u>
Probation:	_____	<input type="checkbox"/>
Jail:	_____	
Prison:	_____	<input type="checkbox"/>

Sentence Date: 06/09/2008
Guideline Departure: _____ Consecutive Sentence: _____
Concurrent Sentence: Yes

Sentencing Judge: _____ Date: _____

Prepared By: LANGSTON, ELLIE S

Lowe, Jamie Lynn - 689234