**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

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**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellant,

v

**DAMACENO RICHARD ABREGO,**

Defendant-Appellee.

Supreme Court No. 152111

Court of Appeals No. 320973

Lower Court No. 13H15796FH

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# PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF FOR MINI-ORAL ARGUMENT ON THE APPLICATION FOR LEAVE TO APPEAL

**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

Cases:



Statutes:

## STATEMENT OF JURISDICTION

The People of the State of Michigan apply for leave to appeal the Court of Appeals decision in *People v Abrego*, an unpublished opinion per curiam of the Court of Appeals, issued June 11, 2015 (Docket No. 320973). This Court has jurisdiction under Const 1963, art 6, §4 and MCR 7.303(B)(1).

## QUESTION INVOLVED

I. Did the Court of Appeals err in holding that, pursuant to *People v Spanke*, 254 Mich App 642 (2003), Offense Variable 8, MCL 777.38, should not have been scored in this case where the movement was "incidental" to the offense of operating while intoxicated (second offense) with a passenger under 16?

Plaintiff-Appellee says: "Yes."

Defendant-Appellant says: "No."

Court of Appeals said: "No."

## STATEMENT OF FACTS

This case presents Abrego's fifth drunk driving conviction. He pled guilty to one count of Operating While Intoxicated (2nd Offense) with an Occupant Under 16 years old, MCL 257.625(7)(a)(ii), and one count of Possession of Marijauna, MCL 333.7403(2)(d). In exchange for his plea, the People dismissed an additional count of Operating While Intoxicated (2nd Offense) with an Occupant Under 16 years old, and one count of Operating While License Suspended (2nd Offense), MCL 257.904d. Abrego was sentenced to serve two to five years imprisonment within the Department of Corrections.

Abrego appealed the scoring of Offense Variable 8, and the Court of Appeals, in a split opinion, ruled:

> we are persuaded, albeit for reasons not discussed by defendant on appeal, that the trial court clearly erred in scoring OV 8. In particular, to score "asportation" under MCL 777.38, this Court has held there must be "some movement" of a victim that is "not merely incidental to committing an underlying offense." *Spanke*, 254 Mich App at 647. See, e.g., *People v Thompson*, 488 Mich 888, 788 NW2d 677 (2010) (finding that movement of a victim to the bedroom where a sexual assault occurred was incidental to the crime). In this case, the offense at issue involved operation of a motor vehicle while intoxicated with an occupant under the age of 16 in the vehicle. MCL 257.625(7)(a)(ii). Thus, movement of the victims to defendant's vehicle and thereafter defendant's transportation of the victims in the vehicle was incidental to his commission of the underlying offense of OWI-2nd involving an occupant under age 16. Consequently, movement of the children in this case cannot constitute "asportation" for purposes of scoring OV 8, and the trial court thus clearly erred by considering asportation as a basis for assessing 15 points.[1]

This Court directed supplemental briefs on the question of whether the Court of Appeals erred in precluding the scoring of OV-8 based on *Spanke*.

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[1] *People v Abrego*, an unpublished opinion per curiam of the Court of Appeals issued June 11, 2015 (Docket No. 320973), p 3.

## ARGUMENT

**I. The Court of Appeals erred in holding that, pursuant to *People v Spanke*, 254 Mich App 642 (2003), Offense Variable 8, MCL 777.38, should not have been scored in this case where the movement was "incidental" to the offense of operating while intoxicated (second offense) with a passenger under 16.**

Standard of Review

"[T]he circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo."[2] "The issues in this case concern the proper interpretation and application of the statutory sentencing guidelines, MCL 777.11 *et seq.*, which are both legal question that this Court reviews de novo."[3]

Discussion

Ultimately, this is a case of statutory interpretation. This Court's "goal in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.'"[4] MCL 777.38 supplies two conditions warranting a score of 15 points; (1) a victim was asported to another place of greater danger or to a situation of greater danger, or (2) a victim was held captive beyond the time necessary to commit the offense.[5] There is nothing within OV-8 that assumes the an-underlying-offense rule, especially considering trial courts are only scoring one offense to begin with. "In interpreting a statute, we avoid a construction that would render part of

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[2] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).
[3] *People v Francisco*, 474 Mich 82, 84; 711 NW2d 44 (2006).
[4] *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013)(quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008)).
[5] *See* MCL 777.38.

the statute surplusage or nugatory."[6] The an-underlying-offense rule would be surplusage as the Legislature already instructs to score only the scoring offense.

The an-underlying-offense rule was created by this Court in *People v Adams*, 389 Mich 222; 205 NW2d 415 (1973). The *Adams* Court held: "the movement element must not be merely incidental to the commission of a lesser underlying crime, i.e., it must be incidental to the commission of the kidnapping."[7] The rule was intended to protect defendants from being charged by "transform[ing] a lesser crime into kidnapping."[8] Without this judicially created rule to protect defendants, "'[a] literal reading of the kidnapping statute would permit a prosecutor to aggravate the charges against any assailant, robber, or rapist by charging the literal violation of the kidnapping statute which must inevitably accompany each of those offenses.'"[9] When scoring offenses, sentencing courts are already instructed to only score the one scoring offense. A judicially created rule to protect defendants from being scored for movement from a second offense is not necessary.

The Legislature also uses the same language when distinguishing offenses. The Legislature instructs that "[i]f the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score each offense as provided in this part."[10] Following this clarification for multiple offense situations, the Legislature begins to differentiate between those separate offenses by using the same phrase — "the underlying offense."[11] This phrase is used to indicate a separate-from-the-scoring-offense offense. In other words, it is not the scoring offense that is the underlying offense (as applied by the Court of Appeals in the present case); it is a

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[6] *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009) (citing *Baker v Gen. Motors Corp.*, 409 Mich 639, 665; 297 NW2d 387 (1980)).
[7] *People v Adams*, 389 Mich 222, 236; 205 NW2d 415 (1973).
[8] *Adams*, 389 Mich at 230.
[9] *Adams*, 389 Mich at 232-33 (quoting *People v Adams*, 34 Mich App 546, 560; 192 NW2d 19 (1971)).
[10] MCL 777.21(2).
[11] *See* MCL 777.21(4)(a), (b).

separate offense not being scored (as applied to kidnapping by *Adams*). As laid out in *McGraw*, courts should "determin[e] about how offense variables should be scored [ ] based on a reading of the sentencing guidelines statute as a whole."[12]

In dicta, the Court of Appeals in *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003), reasoned "[t]he term 'asportation' is not defined in the sentencing guidelines statute. However, in order to establish asportation *as an element of the crime of kidnapping* . . . there must be some movement of the victim taken *in furtherance of the kidnapping* that is not merely incidental to the commission of *another underlying lesser or coequal crime*."[13] It continued: "the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense."[14] Since 'lack of forcefulness' (what the defendant in *Spanke* argued was required) did not negate the "some movement" required, the *Spanke* Court held a score of 15 points was proper. Generally, asportation is just movement that is caused by a defendant;[15] *Spanke* did not establish the an-underlying-offense rule for OV-8. But even if it was judicially imputed by *Spanke*, the Court of Appeals here did not apply that rule correctly.

If the an-underlying-offense rule applies to OV-8, this Court should still reverse for the Court of Appeals's misapplication of the rule. In *People v Barker*, 411 Mich 291; 307 NW2d 61 (1981), this Court found "[w]hen it is necessary to find asportation in order to find guilt of kidnapping, it must be shown to be movement having significance independent of any accompanying offense. A course of movement incidental to both a kidnapping and another offense could be of such quality and character as to supply the asportation element of

[12] *McGraw*, 484 Mich at 124-25.
[13] *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003) (emphasis added).
[14] *Spanke*, 254 Mich App at 647 (It is this quotation most commonly used from *Spanke*).
[15] Asportation is defined as "The act of carrying away or removing (property or a person)." Black's Law Dictionary (10th ed. 2014), asportation.

kidnapping."[16] This Court was clear to note that "[o]ur holding does not preclude the possibility of the concurrent commission of first degree criminal sexual conduct and kidnapping. A properly instructed jury could find under the facts of a particular case, for example, that movement of the rape victim was sufficient to satisfy the requisite asportation element for a kidnapping conviction."[17] The purpose of the rule was to ensure the trier-of-fact was finding the movement to be incidental to the kidnapping and not just incidental to a separate underlying offense, which is precisely what the trial court did in the present case.

Here, the trial court found

> In essence, there's no question but that a child is a victim certainly being placed in danger of injury or loss of life by somebody drinking and driving. And to me, logically, you could say every inch that vehicle moves, the danger is greater and greater when you have a drinking and driving person behind the wheel. And then I look at the facts under the agent's description and it would seem to be even a little bit more so when the police tried to stop the defendant, i.e., through emergency lights, the defendant continued travelling. Then when the officer activated his siren, the defendant turned on his right turn signal. So the officer turned off his siren but defendant then continued driving. So by that, not only do you have the drinking and driving with the child in the vehicle, but you also then have when the police get involved, and it doesn't take a great deal of stretch that when people see sirens, see lights, hear sirens, the adrenaline goes up and sometimes people do things then. Now you got a person that's drinking and driving that's evading the police and I think that puts that child in greater danger. So I think the arguments are legitimate. It does fit the circumstances under OV8 and the objection is denied.[18]

The *Adams*, *Barker*, and *Spanke* Courts all came to the same conclusion. Movement associated specifically with kidnapping is not what was meant by "an underlying offense." Changing the offense to Operating While Intoxicated (second offense) with a Passenger Under 16, does not

[16] *People v Barker*, 411 Mich 291, 300; 307 NW2d 61 (1981).
[17] *Barker*, 411 Mich at 301.
[18] Sentencing Transcript dated January 21, 2014, p 8-9.

change the analysis. Although the movement occurred as part of the offense, it should be scored accordingly.[19]

For its application, the Court of Appeals instead relied upon *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010), an order of this Court. There were no facts within the order to illustrate this Court's reasoning in *Thompson* other than what is found within the Chief Justice's dissent. The order reads: "Any movement of the complainant by the defendant was incidental to commission of the crime and did not amount to asportation."[20] The present case perfectly illustrates the absurd result stemming from the Legislature requiring trial courts to score movement during a scoring offense, but appellate courts not allowing a score that is "incidental" to the scoring offense.

A proper application here would have looked something like the application in *People v Chelmicki*, 305 Mich App 58; 850 NW2d 612 (2014). In *Chelmicki*, "defendant argues that OV 8 was improperly scored in this case because there was no basis for concluding that he held the victim captive longer than the time necessary to commit the offense of unlawful imprisonment. Specifically, he argues that all of the alleged conduct in this case—beginning with grabbing the victim from the balcony and ending with him holding her down on the bed before police arrived—was not conduct that occurred beyond the time necessary to commit the offense, but rather was conduct that constituted the offense."[21] The Court of Appeals found that scoring was proper, although not for the "(2) a victim was held captive beyond the time necessary to commit the offense" reason. Instead, the court reasoned "the evidence demonstrated that the victim was standing on the balcony of her apartment, visible to her neighbors who lived in the apartment

[19] See *People v Hardy*, 494 Mich 430, 442; 835 NW2d 340 (2013) ("[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables.")
[20] *People v Thompson*, 488 Mich 888, 888; 788 NW2d 677 (2010).
[21] *People v Chelmicki*, 305 Mich App 58, 70; 850 NW2d 612 (2014).

directly below her, when defendant came outside and dragged her back inside the apartment. The victim was thus asported to a place of greater danger because she was moved away from the balcony, where she was in the presence or observation of others, to the interior of the apartment, where others were less likely to see defendant committing a crime."[22] This, even though the court "recognize[d] that all of defendant's conduct during the time he restrained the victim was conduct that occurred 'during' the offense."[23]

The Legislature did not intend to preclude scoring for movement incidental to the scoring offense when it used the term asportation, as was held by the Court of Appeals in the present case. The Legislature understood the inherent danger involved with defendants who move their victims either to a place or situation of greater danger, and presumably wished to grant a greater sentence to defendants who did so. The an-underlying-offense rule is already taken into account by the Legislature when it instructs to only score the one scoring offense, and only in crimes against a person. Even if this Court imputes the same an-underlying-offense rule to the asportation of OV-8 as in kidnapping, the Court of Appeals in the present case misapplied that rule, and should be reversed.

This Court should follow *Barker*, and *Hardy* ("absent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables."[24]), and find that defendants should be scored points when the movement is incidental to the scoring offense, incidental to both the scoring and an underlying offense (if independently significant), but not score movement that is *merely* incidental to a separate non-scored offense. Not only is there no express prohibition, trial courts already score only one offense and the need for the an-underlying-offense rule is not present in OV-8. This Court should reverse.

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[22] *Chelmicki*, 305 Mich App at 71.
[23] *Id.* at 70.
[24] *Hardy*, 494 Mich at 442.

## RELIEF REQUESTED

The People respectfully request this Court grant its application for leave to appeal, or in the alternative, in lieu of granting leave to appeal reverse the decision of the Court of Appeals.

Respectfully Submitted,

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Date: January 6, 2016

STATE OF MICHIGAN

IN THE 8th CIRCUIT COURT FOR THE COUNTY OF IONIA

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PEOPLE OF THE STATE OF MICHIGAN,
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-v-

DAMACENO RICHARD ABREGO,
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_____/

Supreme Court No 152111
COA No. 320973
Circuit No. 13H15796FH

PROOF OF SERVICE

STATE OF MICHIGAN )
) ss.
COUNTY OF IONIA )

Kimberly Fletcher, secretary to Adam M. Dreher, Assistant Prosecuting Attorney, certifies that the **PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF FOR MINI-ORAL ARGUMENT ON THE APPLICATION FOR LEAVE TO APPEAL** was served upon the following as indicated below on the 6th day of January, 2016, by __ U.S. Mail (to Supreme Court – original + 7 copies; to Court of Appeals), ___ FAX, _____ Hand Delivered, XX Email (to Defense), __ Other (Defense pickup; interoffice mail to Circuit Court Clerk and District Court Clerk).

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