

STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE MICHIGAN COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. 159384

Plaintiff-Appellant,

COA No. 342953

v

Trial Ct No. 17-000174-FC

DANIEL RAY BEAN,

Defendant-Appellee.

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Charles Justian (P35428)  
Muskegon County Prosecutor's Office  
990 Terrace Street, Floor 5  
Muskegon, MI 49442  
231.724.6435

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CHARTIER & NYAMFUKUDZA, P.L.C.  
Attorneys for Defendant-Appellee  
Mary Chartier (P65327)  
Kurt E. Krause (P41843)  
2295 Sower Boulevard  
Okemos, MI 48864  
mary@cndefenders.com  
517.885.3305

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**DEFENDANT-APPELLEE'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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**STATEMENT OF THE BASIS OF JURISDICTION**

The government's statement of the basis of this Court's jurisdiction is incomplete, having left out the date of this Court's order granting leave. On October 4, 2019, this Court granted the government's application for leave to appeal in *People v Bean*, 504 Mich 975; 933 NW2d 312 (2019), and ordered the parties to address whether second-degree child abuse, MCL 750.136b(3)(b), is an adequate predicate "other felony" to sustain a charge of criminal sexual conduct in the first degree, MCL 750.520b(1)(c), when the alleged act of child abuse is a sexual penetration that is the same sexual penetration that forms the basis of the criminal sexual conduct in the first degree charge.

**COUNTERSTATEMENT OF QUESTION INVOLVED**

- I. The Court of Appeals reversed the circuit court’s denial of Mr. Bean’s motion to quash the charge of criminal sexual conduct in the first degree, MCL 750.520b(1)(c). The government originally charged Mr. Bean with criminal sexual conduct in the third degree, MCL 750.520d(1)(a), but elevated it based on the notion that the same alleged conduct of sexual penetration constituted child abuse, which qualified as an “other felony” under the statute. In determining that the circuit court erred, the Court of Appeals stated that the government’s interpretation would automatically elevate every case of criminal sexual conduct in the third degree to criminal sexual conduct in the first degree, which is contrary to the statute’s language and the legislature’s intent. Did the Court of Appeals reach the correct ruling?

Mr. Bean answers “Yes.”

The Court of Appeals answered “Yes.”

The trial court answered “No.”

The prosecutor answered “No.”

## INTRODUCTION

This case is about the government's overreach by attempting to ignore the statutory language and intent at issue. The Court of Appeals was indeed correct that if the government's interpretation of the law were to prevail, every criminal sexual conduct in the third degree (CSC III) would automatically be elevated to criminal sexual conduct in the first degree (CSC I). This would not only contradict the plain language of the term "other felony" in MCL 750.520b(1)(c) and the legislature's clear intent in drafting the statute and providing for gradations of offenses in the statute, but it would effectively render the CSC III statute, MCL 750.520d(1)(a), as surplusage or nugatory. The government's zeal to charge Mr. Bean with CSC I because he would not accept a plea offer has made it blind to the fact that it is violating the rules of statutory construction and interpretation in its quest. Countenancing the government's position would result in an outcome that is unjust and violates the law. The Court of Appeals decision should be affirmed.

## COUNTERSTATEMENT OF FACTS AND PROCEEDINGS BELOW<sup>1</sup>

Mr. Bean was originally charged with CSC III. (PE I, 5.) He waived his preliminary examination in January 2017 with the agreement that he retained the right to remand the matter if a resolution could not be reached in the circuit court.

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<sup>1</sup> For ease of reference, transcripts will be delineated as follows:

PE I	Preliminary Examination Hearing I, 07/20/2017
PE II	Preliminary Examination Hearing II, 08/10/2017
PE III	Preliminary Examination Hearing III, 08/31/2017
MH	Motion Hearing, 02/20/2018

(PE I, 5.) An agreement was not reached. (PE I, 5.) After remand, the government indicated that it may opt to increase the charge from CSC III to CSC I based on the age of the complainant and the relationship of Mr. Bean to the complainant during the preliminary examination. (PE I, 5.) The government went on to say that it intended to amend the charge after testimony was taken. (PE I, 5.)

The complainant's family and Mr. Bean's family often spent time together. (PE III, 57-58, 59, 66-67.) In September 2016, the complainant's family—including her mother, stepfather, eleven-year-old brother, and fifteen-year-old brother—went to help Mr. Bean and his wife move to a new house. (PE I, 9, 10, 20; PE III, 60-61.) The complainant and her family left and went to dinner, then the three children said they wanted to stay at the Bean's house, so they called and asked if they could spend the night. (PE I, 21; PE III, 61-63.) The children often spent the night at each other's houses. (PE III, 59, 67.) The complainant's mother and stepfather dropped the children off and left, and the complainant and her brothers stayed with their aunt, Mr. Bean, and three of her cousins. (PE I, 10-11.)

After arriving at the home, the complainant said that she eventually went and laid on a small couch in the family room in the basement. (PE I, 12, 29.) She stated that Mr. Bean, her brothers, and her cousins were also in the room and that Mr. Bean came and sat on the end of the couch she was on and put her legs on top of his lap. (PE I, 12, 14, 31-32, 33, 35.) The complainant alleged that she fell asleep on the couch, and she claimed that she was then sexually assaulted by Mr. Bean. (PE I, 14-16, 35.)

She claimed that Mr. Bean touched her legs, her chest, and her vagina. (PE I, 14, 35, 37, 39.) She also claimed there was digital penetration. (PE I, 15-16.)

There were some discrepancies and inconsistencies in the complainant's story, including how many times she told the story when interviewed. (PE I, 51-52.) There was also a question of whether Mr. Bean allegedly touched and penetrated her vagina or touched around her vaginal area but not her actual vagina. (PE I, 15-16, 53, 54, 65, 67-68.) She alleged that Mr. Bean was moving her legs so that he could reach her better, but she had a difficult time explaining just what she meant by that and how he was moving her legs. (PE I, 60-61.)

The government requested bind over on an amended charge of CSC I based on the age of the complainant being fifteen at the time of the incident and because the complainant and Mr. Bean were related by blood or affinity to the fourth degree. (PE I, 97.) The government argued that Mr. Bean was an uncle through her stepfather, which satisfied the rule of affinity as related to stepparents being related to the third degree. (PE I, 97.) Because the statute allows affinity up to fourth degree—one level beyond a stepparent—the government argued that it satisfied the affinity requirements for the purposes of CSC I. (PE I, 97.)

Trial counsel argued for bind over on fourth-degree criminal sexual conduct (CSC IV), if any, because there was a discrepancy regarding whether any penetration occurred. (PE I, 97-99.) And trial counsel argued against bind over on CSC I based on the affinity argument. (PE I, 99-106.) While there was a matrimonial bond between the people involved, trial counsel stated there was no affinity bond between them.

(PE I, 102.) The parties reconvened on August 10, 2017. (PE II, 3.) The government raised an additional issue—child abuse—that was not addressed at the preliminary examination that created a new reason to bind over on CSC I. (PE II, 4, 5.)

After proceedings related to this issue, an amended complaint was filed on August 14, 2017. (PE III, 73, 103.)<sup>2</sup> Mr. Bean was charged with one count of CSC I. (PE III, 73.) It was alleged that there was digital penetration, that Mr. Bean and the complainant were related by blood or affinity to the fourth degree, and that it was committed during the commission of the felony of child abuse in the second degree. (PE III, 73-74, 103.) The court found that there was probable cause to satisfy the penetration element and the age element. (PE III, 104.) The court further reasoned that there was another felony committed, and it was committed during the course of a sexual penetration. (PE III, 110-111.) The court then bound Mr. Bean over on the amended complaint. (PE III, 112.)

Mr. Bean's motion to quash was denied, and Mr. Bean filed an interlocutory appeal of the circuit court's order denying his motion to quash the CSC I count that rested on the argument that it occurred during the commission of "any other felony." (Exh. A, 1.) On February 27, 2018, the Court of Appeals reversed the circuit court's decision and held that the circuit court abused its discretion in denying Mr. Bean's motion to quash. (Exh. A, 4-5.)

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<sup>2</sup> There is a typographical error in the transcript that says the amended complaint was filed on August 17, 2014.

On October 4, 2019, this Court granted the government's application for leave to appeal in *People v Bean*, 504 Mich 975; 933 NW2d 312 (2019), and ordered the parties to address whether second-degree child abuse, MCL 750.136b(3)(b), is an adequate predicate "other felony" to sustain a charge of CSC I, MCL 750.520b(1)(c), when the alleged act of child abuse is a sexual penetration that is the same sexual penetration that forms the basis of the CSC I charge.

### **STANDARD OF REVIEW AND PRESERVATION OF ISSUE**

This Court reviews a trial court's decision on a motion to quash the information for an abuse of discretion. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001). "Determining the scope of a criminal statute is a matter of statutory interpretation, subject to de novo review." *People v Nyx*, 479 Mich 112, 116; 734 NW2d 548 (2007). This issue is preserved by Mr. Bean having raised it in the circuit court in his motion to quash and in his application for leave to appeal in the Court of Appeals.

### **ARGUMENT**

- I. **Because MCL 750.520b(1)(c) is unambiguous on its face, and because there is no language suggesting legislative intent to the contrary, the term "other felony" must be interpreted to mean some *other* felony, separate and distinct from the alleged sexual penetration comprising the first-degree criminal sexual conduct itself.**

This is a case about the government's misunderstanding of the statute and the rules of statutory interpretation and construction; thus, a review of the fundamental rules is necessary.

- A. **The rules of statutory construction and interpretation require this Court to affirm the holding of the Court of Appeals.**

This Court has stated that “[w]e construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature.” *Macomb County Prosecuting Atty v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). This Court’s primary task in construing a statute is to discern and give effect to the intent of the legislature. *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005). This Court is to begin by examining the plain language of the statute. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Where language is unambiguous, the Court is to “presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.” *Id.* This Court must give effect to every word, phrase, and clause in the statute, and avoid an interpretation that would render any part of the statute surplusage or nugatory. *People v Pinkney*, 501 Mich 259, 282; 912 NW2d 535 (2018). The legislature is “presumed to understand the meaning of the language it enacts into law . . . . Each word of a statute is presumed to be used for a purpose . . . . The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.” *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

When discerning legislative intent, this Court must first look to the language of the statute. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999). Unambiguous language should be enforced as written. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002). This Court “must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory.” *Borchard-Ruhland*, 460

Mich at 285. “The words of a statute provide the most reliable indicator of the Legislature’s intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used.” *People v Flick*, 487 Mich 1, 10-11; 790 NW2d 295 (2010). “An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a ‘term of art’ with a unique legal meaning.” *Id.* at 11. A statute must be strictly construed according to its plain meaning to meet statutory and constitutional requirements. *Dowling v United States*, 473 US 207, 213-214; 105 S Ct 3127; 87 L Ed 2d 152 (1985).

If the plain meaning of the statutory guideline is ambiguous, the ambiguity must be resolved in the defendant’s favor. *United States v Lanier*, 520 US 259, 266; 117 S Ct 1219; 137 L Ed 2d 432 (1997). An additional, fundamental, and long-standing rule of construction of criminal statutes is that “they cannot be extended to cases not included within the clear and obvious import of their language.” *People v Ellis*, 204 Mich 157, 161; 169 NW2d 930 (1918). If there is doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of the defendant. *Id.* “In other words, nothing is to be added by intendment.” *Id.*; see also *People v Jahner*, 433 Mich 490, 498; 446 NW2d 151 (1989).

Under the statutory “rule of lenity,” “courts should mitigate punishment when the punishment in a criminal statute is unclear.” *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). “[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered . . . .” *Lanier*, 520 US at 266. The United States

Supreme Court further stated that “due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *Id.*

Indeed, this rule of statutory construction is required by due process. *Dunn v United States*, 442 US 110, 112; 99 S Ct 2190; 60 L Ed 2d 743 (1979). “This practice reflects not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.” *Id.* Criminal statutes are to be strictly construed and not found to encompass behavior that is not clearly within the scope of the statute. *Jahner*, 433 Mich at 498. The rule is based on concerns of notice, but it also recognizes that it is the function of the legislature, and not the judiciary, to establish by statute, laws that proscribe criminal conduct and establish criminal penalties. *Id.* at 499. Finally, but importantly, statutes must be construed to prevent absurd results, injustice, or prejudice to the public interest. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).

**B. Interpreting “other felony” to apply to second-degree child abuse renders portions of the statute nugatory and would result in every CSC III charge being elevated to a CSC I charge.**

Under MCL 750.520b(1)(c), “[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if . . . [the] [s]exual penetration occurs under circumstances involving the commission of any other felony.” The legislature did not define “any other felony” in MCL

750.520b(1)(c) or elsewhere in MCL 750.520a, which contains the definitions to be used in the criminal sexual conduct chapter. Thus, as the Court of Appeals correctly noted, the court may “consult the dictionary to discern [the word’s] meaning[.]” (Exh. A, 2.) This Court has also stated that courts “may consult dictionaries to discern the meaning of statutorily undefined terms.” *Stone*, 463 Mich at 563.

In the instant case, in pertinent part, the dictionary defines “other” as “being the one (as of two or more) remaining or not included;” “being the one or ones distinct from that or those first mentioned or implied;” or “not the same [or] different.” *Merriam-Webster’s Collegiate Dictionary* (11th ed). In this case, there is no separate, “other” act underlying the “other felony”—the second-degree child abuse. As explained in *People v Jones*, 144 Mich App 1, 4; 373 NW2d 226 (1985), the Court of Appeals outlined the rationale as follows:

The Legislature . . . did not attempt to narrowly define the coincidence or sequence of the sexual act and the other felony; rather it chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the combination of sexual offenses and *other* felonies by treating the sexual acts as major offenses when they occur “under circumstances involving the commission of any *other* felony.” [Emphasis added.]

In accord with *Jones*, the Court of Appeals stated in *Waltonen*, 272 Mich App at 692-693:

The key language of the statute is “occurs under circumstances involving,” which does not necessarily demand that the sex act occur during the commission of the felony, although this generally will be the case. But the statutory language does require a direct interrelationship between the felony and the sexual penetration.

The *Waltonen* court concluded that to support a charge of MCL 750.520b(1)(c), the government is “required to submit evidence sufficient to establish probable cause to believe that defendant sexually penetrated the victim, that defendant committed the underlying felony, and that there existed a direct interrelationship between the felony and the sexual penetration, which does not necessarily require that the penetration occur during the commission of the felony.” *Id.* at 680. Intrinsic to the *Waltonen* court’s conclusion is the clear understanding that the conduct of the underlying felony, i.e., the sexual penetration, is separate and apart from the conduct of the predicate *other* felony.

As the Court of Appeals found here, “there are no ‘increased risks’ or ‘debasing indignities inflicted’ upon the child because there was no *combination* of a sexual act with another felony” (Exh. A, 3, emphasis added.) Additionally, the government is required to show “a direct interrelationship” between the separate other “felony and the sexual penetration[.]” *Waltonen*, 272 Mich App at 694. But here, there is no direct interrelationship between the other felony and the sexual penetration because the sexual penetration *is* the basis of the other felony. The sexual penetration underlying the second-degree child abuse is not “distinct” or “different” from the sexual penetration underlying the CSC III charge, but rather is the exact same conduct. Thus, as the Court of Appeals concluded, “under the facts of this case, the second-degree child abuse cannot constitute the ‘other felony’ in MCL 750.520b(1)(c), and the trial court abused its discretion in denying [Mr. Bean’s] motion to quash on this ground.” (Exh. A, 3.)

In *People v Pettway*, 94 Mich App 812, 814; 290 NW2d 77 (1980), the defendant argued that under the criminal sexual conduct statute, sexual penetration under the circumstances involving the commission of breaking and entering with intent to commit criminal sexual conduct was not and could not by itself be CSC I. The court disagreed because “[t]he fact is that criminal sexual conduct is simply not identical with breaking and entering with intent to commit criminal sexual conduct.” *Id.* at 816. The court noted, “[a]s the prosecution correctly argues, felony, as construed in the phrase ‘any other felony’, refers to any felony *other* than criminal sexual conduct.” *Id.* at 817. The court further explained:

It would appear that the “other felony”, breaking and entering with intent to commit criminal sexual conduct, is a separate and distinct offense from the completed act of sexual penetration. Thus, it can be argued that breaking and entering an occupied dwelling with intent to commit criminal sexual conduct can be proved without proof of the act of sexual penetration. They are separate and distinct crimes requiring proof of different elements so that the argument that one is a necessary lesser included offense of the other is without merit. Accordingly, the language of the statute, “any other felony”, is satisfied by proof of the felony, to wit: breaking and entering with intent to commit criminal sexual conduct. [*Id.*]

The court thus declined to “hold that breaking and entering with intent to commit criminal sexual conduct is *not* another felony for purposes of MCL 750.520b(1)(c)[.]” *Id.* at 817-818. The court concluded, “[o]n the contrary, we believe the Legislature intended breaking and entering an occupied dwelling with intent to commit criminal sexual conduct, followed up with sexual penetration with another person in that dwelling, to be first degree criminal sexual conduct.” *Id.* at 818.

In the instant case, the child abuse allegation is not an “other felony.” It is *the* felony. There is no other separate and distinct offense by Mr. Bean apart from the alleged act of sexual penetration to form the factual basis for a charge of second-degree child abuse. The second-degree child abuse charge could not be proven without proof of the act of sexual penetration.

The government’s position is wholly contrary to the fundamental rules of statutory construction and would render the criminal sexual conduct gradation nugatory. It further runs counter to the plain meaning of the statute’s language and the legislature’s intent, and it would have an absurd result with no notice to Michigan’s citizens. Indeed, what the government seeks to do is to drastically re-write the entire criminal sexual conduct legislative scheme. If the government’s position were to prevail, it would eviscerate the legislature’s detailed and comprehensive CSC structure altogether. It automatically elevates every CSC III case to a CSC I, and every CSC IV case to CSC II.

For instance, MCL 750.520b(1)(c) would be rendered nugatory because the sexual penetration of a minor aged 13 to 16 would always be committed during an “other felony,” which would be child abuse. Thus, it would always be CSC I, contrary to the statutory language. For adults, CSC III would always be elevated to CSC I because the penetration would be committed during an “other felony” of criminal sexual conduct in the fourth degree, which is touching done for a sexual purpose. If this were the legislature’s intent, then entire sections of the statute would be unnecessary. A CSC III would be automatically elevated under the “other felony”

provision and the six specific subsections outlined by the legislature to elevate CSC III to CSC I would not be needed. Likewise, the similar provisions in MCL 750.520c(1)(b) related to CSC II would be unnecessary because of the “other felony” provision. This absurd result was not intended by the legislature and is not supported by the statutory language, as well as the rules of statutory construction and interpretation. The legislature defined a statutory scheme with proportionate penalties for alleged conduct. The government seeks to avoid this statutory language and rewrite the statute to serve its own ends. This cannot be countenanced.

#### **CONCLUSION AND RELIEF SOUGHT**

As noted at the outset, this case is about the government’s overreach. If allowed to carry the day, the government’s argument will turn the legislature’s criminal sexual conduct statutory scheme upside down, with the absurd result of automatically elevating every CSC III charge to a CSC I and every CSC IV to a CSC II. Words matter. The law matters. The legislature’s intent matters. The government’s blind zeal must not be allowed to surpass the plain words and meaning of the legislature’s statutory scheme regarding criminal sexual conduct. Accordingly, Mr. Bean respectfully requests that this Court affirm the holding of the Court of Appeals.

Respectfully submitted,

Chartier & Nyamfukudza, P.L.C.

Dated: 8/31/2020

/s/MARY CHARTIER  
Mary Chartier

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing was served on the attorneys of record, and, if required, all parties in the above case on August 31, 2020, by mailing same to them at their respective addresses as disclosed by the pleading of record with postage fully prepaid by US First Class Mail or by \_\_\_ Fax \_\_\_ Hand Delivery \_\_\_ Express Mail \_\_X\_ Other (MiFile).

/s/KIM BARRUS

Kim Barrus

**TABLE OF EXHIBITS**

Exhibit A	People v Bean unpublished Court of Appeals Opinion, dated 02/14/2019
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