
*STATE OF MICHIGAN
IN THE
SUPREME COURT*

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Shapiro, P.J., Sawyer and Hoekstra, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

Supreme Court
No. 144327

DONALD MICHAEL HARDY,

Defendant-Appellant.

Court of Appeals No. 306106
Circuit Court No. 2010-233501 FC

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED

I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ASSESSING 50 POINTS FOR OFFENSE VARIABLE 7, WHERE RACKING A SHOTGUN IS CONDUCT THAT WOULD SUBSTANTIALLY INCREASE THE VICTIM'S FEAR OF AGGRAVATED PHYSICAL HARM?

The People contend the answer is, "No".

Defendant contends the answer should be, "Yes".

II. HAS DEFENDANT SHOWN A SERIOUS ERROR BY COUNSEL OR RESULTING PREJUDICE IN COUNSEL'S FAILURE TO CHALLENGE THE SCORING OF OV 7 AT SENTENCING, WHERE OV 7 WAS PROPERLY SCORED AND, IN ANY EVENT, THE SCORING ISSUE WAS ARGUED AND RULED UPON BELOW?

The People contend the answer is, "No".

Defendant contends the answer should be, "Yes".

COUNTER-STATEMENT OF FACTS

On January 19, 2011, Defendant Donald Michael Hardy pleaded guilty as charged to one count of carjacking, MCL 750.529a (29a-38a).¹ On March 3, 2011, Judge Michael Warren sentenced Defendant to serve 12-50 years in prison (49a).

Defendant sought leave to appeal in the Court of Appeals, raising one issue: that he should not have been assessed points for offense variable ["OV"] 7. The Court of Appeals denied the application for lack of merit on November 18, 2011 (7a).

Defendant then sought leave to appeal in this Court, adding a claim that counsel's failure to object to the scoring of OV 7 at sentencing constituted ineffective assistance of counsel. This Court granted the application on June 8, 2012 (8a).

At the plea-taking in the trial court, Defendant stated that on July 24, 2010, he and his cohort Edward Perkins spent a couple of hours talking about stealing a car (33a, 36a). They both agreed to do it (36a). Defendant walked up to a man who was standing next to his [the man's] car, a Pontiac Grand Prix (34a). Defendant pointed a shotgun at the man and demanded his car (34a-35a). Perkins jumped into the driver's seat (35a). Defendant got in the car, and they drove away (34a, 36a).

The presentence report fleshed out the details of the offense. The victim had just parked his car outside his home (15a). He got out of his car and bent down to pick up

¹ This was a *Cobbs*-type plea, *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), tendered with the expectation that the sentence would be one year above the low end of the guidelines (27a-28a, 33a-34a).

something (15a). When he stood back up, he saw Defendant and Perkins standing in front of his car (15a). Defendant had a shotgun and was pointing it at the victim (15a). Defendant “pumped” the shotgun (15a). Defendant and Perkins demanded everything the man had, and started to feel the victim’s waist and pockets (15a). The victim pushed their hands away from him (15a). The victim grabbed the barrel of the shotgun and pushed it so that it was not pointing at him (15a). The victim and Defendant struggled over the shotgun (15a). During the struggle, the victim’s hand was cut, he suffered a blow to the head, and his car was deeply scratched (15a). Meanwhile, Perkins got into the driver’s seat of the victim’s car (15a). Defendant, still holding the shotgun, got into the car, and they drove away (15a). When the car was recovered a few hours later, Defendant was driving it, and the police found a 12 gauge shotgun shell in the driver’s door (15a). The gun was never found.²

At sentencing, the prosecutor requested that 50 points be added to the scoring for OV 7 (43a-45a). The prosecutor noted Defendant did not simply display a shotgun (44a). Defendant also racked the shotgun and pointed it at the victim (44a). The prosecutor argued that the sound of a shotgun being racked is “one of the most frightening experiences you could imagine. It’s conduct designed only to threaten the victim with immediate violent death” (44a). Defense counsel did not dispute the prosecutor’s point, stating, “I cannot argue with that, your Honor. In other words, your Honor, I think it

² While this case pending, Defendant cut off the tether that was a condition of his bond and, on January 11, 2011, committed an armed robbery. Defendant pleaded guilty in that case on March 31, 2011 (Oakland Circ No. 2011-235419 FC) and was sentenced on May 5, 2011.

would be appropriate for the court to score that based on [the prosecutor's] rendition of what occurred" (45a). The trial court agreed that those points were proper, "I agree as well. We will score the seven – OV-7 at fifty points" (45a).

Appellate defense counsel later filed a Motion to Correct Sentencing Guidelines and for Resentencing, arguing that 50 points should not have been assessed for OV 7, and that prior defense counsel was ineffective by agreeing to that scoring (1b). The prosecutor filed a response, asserting that the scoring was proper,

At sentencing, defense counsel expressly agreed with the assessment that OV 7 was properly scored at 50 points. Therefore, this claim is waived on appeal. *People v Carter*, 462 Mich 206, 216 (2000). The fact is that *People v Hornsby*, 251 Mich App 462 (2002) stands for the proposition that OV 7 was properly scored in this case.

. . .The People deny that [*People v*] *Sturdevant* [unpublished opinion per curiam of the Court of Appeals, decided 7/28/11 (Docket No 295982)] is applicable here. OV 7 does not score points for conduct that is *solely* designed to increase the fear of the victim. Nor does OV 7 require that the victim *actually* be placed in fear. The focus is on the intent of the defendant not on the effect on the victim because OV 7 scores points for conduct designed to increase the fear not whether or not the victim is actually placed in fear.

* * *

The conduct that the *Hornsby* court found merited the scoring of OV 7 was conduct that the defendant used to try and complete the robbery, as was the case here.

* * *

Just as in *Hornsby*, in racking the shotgun, the defendant implied that the victim faced instant death. Certainly that conduct was over and above what was necessary to commit the offense of armed robbery [sic] and was done for no other purpose than to instill fear in the victim.

(5b)(emphasis in original)

The trial court denied the motion (without oral argument) by order dated August 29, 2011

(7b). In its order the trial court stated,

For the reasons articulated in the Response, the Motion is DENIED. Without in any manner limiting the People's Response, the Court agrees that the issue has been waived and the lawyer was not ineffective at sentencing.

Moreover, the Court finds that *People v Sturdevant*, unpublished opinion of the Court of Appeals, docket no. 295982, decided July 28, 2011, actually supports the scoring of the guidelines in this case. Unlike assault with intent to murder (AWIM), carjacking does not necessarily require an act of brutality, cruelty, or savagery. A carjacking can be committed by using a finger in a jacket pocket to pretend to have a gun or the simple brandishing of a weapon. Although such acts typically strike fear in a victim, in the instant case the pointing of a shotgun and racking the gun goes beyond what was necessary and was "conduct designed to substantially increase the fear and anxiety of a victim suffered during the offense." OV 7.

(7b).

Defendant sought leave to appeal in the Court of Appeals. That Court denied leave for lack of merit.³ Defendant then sought and was granted leave to appeal in this Court.

This Court's leave grant states,

On order of the Court, the application for leave to appeal the November 18, 2011 order of the Court of Appeals is considered, and it is GRANTED. The parties shall address whether the trial court erroneously assessed 50 points for offense variable 7 (OV 7), MCL 777.37(1)(a), because the defendant racked a shotgun during the carjacking, and whether trial counsel was ineffective for waiving this issue.

(8a)

³ Judge Shapiro would have remanded for resentencing based on his view that the scoring of OV 7 was improper.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ASSESSING 50 POINTS FOR OFFENSE VARIABLE 7. RACKING THE SHOTGUN IS CONDUCT THAT WOULD SUBSTANTIALLY INCREASE THE VICTIM'S FEAR OF AGGRAVATED PHYSICAL HARM.

Standard of Review

The interpretation and application of the legislative sentencing guidelines, MCL 777.1 et seq, involve legal questions that this Court reviews de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). Whether the facts support assessing points in a particular case is reviewed for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Issue preservation

At sentencing, the defense conceded that 50 points should be assessed for OV 7 (45a). However, the defense then filed a motion to correct the guidelines scoring, MCR 6.429(B) & (C) (1b), which the trial court denied by order dated August 29, 2011 (7b).

Analysis

Defendant was properly assessed 50 points for offense variable 7 ["OV 7"] in this case.

That variable is described in MCL 777.37,

(1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by

assigning the number of points attributable to the one that has the highest number of points:

- (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense..... 50 points
- (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense..... 0 points

(2) Count each person who was placed in danger of injury or loss of life as a victim.

(3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

(8b)

Although the variable addresses aggravated physical abuse, actual physical contact is not required under MCL 777.37. *People v Mattoon*, 271 Mich App 275, 277-279; 721 NW2d 269 (2006); see also *People v McDonald*, 293 Mich App 292, 298-299; 811 NW2d 507 (2011), lv den 491 Mich 851 (2012)(verbal threat of future physical harm). On the contrary, the conduct covered by the variable also necessarily includes threatened or attempted aggravated physical abuse if it substantially increases the victim's fear of suffering actual physical abuse. As the Court of Appeals correctly recognized in *Mattoon*, the statute's subsections direct that points be assessed for conduct that does not involve physical contact. Subsection (1)(b) directs that points be scored for conduct by the defendant that substantially increases the victim's fear and anxiety; and subsection (3) directs that points be scored for conduct subjecting the victim to humiliation for the

offender's gratification. Such conduct does not require physical contact. It may be accomplished without any physical contact taking place. If the Legislature had intended to limit the sort of fear-inducing or humiliating conduct to cases involving physical contact, it would logically have referred to "physical abuse" having that effect, rather than the broader reference to any "conduct" having that effect. *Mattoon, supra* 271 Mich App at 277-278.

Of course, this is not to say that the statute's reference to aggravated *physical* abuse has no significance.⁴ Read as a whole, the provisions of MCL 777.37 provide that the physical abuse at issue encompasses conduct causing physical harm, as well as conduct that substantially increases the victim's fear of suffering such harm. Perhaps this point is best illustrated by considering hypothetical fear-inducing conduct that would *not* fall under OV 7. For instance, if a defendant engages in conduct designed to substantially increase the victim's fear of suffering damage to or loss of his or her property, with no component of potential physical harm, no points should be assessed under OV 7. Similarly, if a defendant engages in conduct designed to substantially increase the victim's fear not of physical harm, but of other sort of harm – e.g. harm to professional reputation, harm to economic interests, etc. – no points should be assessed under OV 7. Offense variable 7 is limited to conduct involving actual or threatened aggravated

⁴ Cf. *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008)(victim "vulnerab[ility]" is broad theme of OV 10). By the same token, in this case, aggravated physical abuse is the broad theme of OV 7.

physical harm.

In this case Defendant's conduct fell within subsection (1)(a) of the statute, so the trial court did not abuse its discretion in assessing 50 points.⁵

First, this case did involve some physical contact. The victim and Defendant struggled over the gun, and during the struggle the victim's hand was cut and he suffered a blow to the head (15a). And, as discussed *infra*, Defendant's act of racking the gun substantially increased the victim's fear of suffering aggravated physical harm, namely being shot.

Second, even if there had been no physical contact – or if the physical contact was not itself “aggravated” or was somehow viewed as distinct and severable from Defendant's use of the shotgun – Defendant's conduct threatened aggravated physical harm, thereby substantially increasing the victim's fear and putting OV 7 in play.

During the carjacking Defendant not only pointed a shotgun at the victim, he racked the gun.⁶ The sound of a shotgun being racked is a unique sound that most people (apart from hunters) will, hopefully, never hear in their lifetimes. It is a “distinctive and

⁵ This version of the statute was enacted in 2002, 2002 PA 137. It was part of a package of bills passed in the wake of the 9/11 attacks. Before the 2002 amendment, OV 7 included the word “terrorism”, which was defined as “conduct designed to substantially increase the fear and anxiety a victim suffers during the offense”. Although that conduct is still expressly covered by OV 7, it is no longer called terrorism. “Terrorism” is now addressed in OV 20, MCL 777.49a, using a different definition for the word.

⁶ Because a weapon was pointed at the victim in this case, 15 points were assessed for OV1 (aggravated use of a weapon), MCL 777.31, and OV 2 (use of lethal weapon), MCL 777.32. This scoring does not preclude scoring the conduct under OV 7 as well. The same facts may be used in the scoring of multiple variables. See *People v Raby*, 218 Mich App 78, 89-90; 554 NW2d 25 (1996)(Special Panel)(Markman, J.), *aff'd* on oth grds 456 Mich 487 (1998).

threatening” sound. *Crosby v Monroe County*, 394 F3d 1328, 1330 (CA11, 2004). A “distinctive noise”, *Robinson v United States*, 744 F Supp 2d 684, 689 n 2 (ED Mich, 2010). It is “[a] sound you won’t forget”, see *United States v Rouse*, 2009 US Dist LEXIS 45774 (SD Ga)[adopted at 2009 US Dist LEXIS 100247]. In fact, the nature of that sound is one reason that police departments use shotguns:

When you get out of a car with (a shotgun) and you hear the sound of the racking action, everyone knows the next thing you’re going to hear is an exceptionally large bang. It’s a confidence thing. It means business.

– Sgt. David Bonenberger, president of the St. Louis Police Officers’ Association (explaining reason for the SLPD’s move back to shotguns).⁷

A victim is undoubtedly frightened when an assailant points a gun at him or her. The victim fears being shot. But, when the assailant takes the next step of racking the gun, the victim’s fear is heightened. Few assailants take that next step, to ready the gun for firing. There are only two reasons to rack a shotgun: (1) to chamber a round readying the gun for imminent firing, or (2) to chamber a round so that someone will think the gun is being prepared to fire. In either scenario, the victim’s fear and anxiety of suffering aggravated physical harm is substantially increased by the event. It may be inferred that any assailant racking a gun does so by design – to substantially increase the victim’s fear

⁷ Byers, *St Louis Police Adding Shotguns, Higher-Powered Rifles*, St Louis Post-Dispatch, April 19, 2012 < http://www.stltoday.com/news/local/crime-and-courts/st-louis-police-adding-shotguns-higher-powered-rifles/article_b471c707-3581-5837-9488-583d286caeec.html > (accessed April 12, 2013).

and anxiety. *People v Hornsby*, 251 Mich App 462, 468-469; 650 NW2d 700 (2002)(points properly assessed for increased fear under OV 7 where assailant cocked handgun and threatened to kill the robbery victims).

Further, the fact that a shotgun is used by the assailant, rather than a handgun or rifle, would itself increase a victim's fear of suffering physical harm. A shotgun, after all, fires a load of pellets ("buckshot") in a scattershot pattern. When a shotgun is fired it is more apt to hit and cause serious injury to someone in front of the muzzle. This is contrasted with a handgun or rifle which fires a single projectile, and when fired in a stressful and violent encounter, is more likely to miss the target.

Defendant argues that points should not be assessed where the conduct is already encompassed in the sentencing offense, here carjacking. But he cites no law in support of his position. In fact, current Court of Appeals caselaw is to the contrary. Points may be assessed for aspects of the incident already encompassed in the elements of the conviction offense itself. *People v Gibson*, 219 Mich App 530, 534-535; 557 NW2d 141 (1996), lv den 455 Mich 871 (1997). This is the rule unless a specific variable directs otherwise, see e.g. MCL 777.33(2)(d)(do not score bodily injury under OV3 if injury was an element of the offense); MCL 777.41(2)(c)(do not score the sexual penetration underlying the conviction offense under OV 11).

In any event, even if "aggravated" conduct were to be equated with conduct beyond that necessary to commit the offense, the conduct scored in this case was not necessary to commit the conviction offense of carjacking. As the trial court noted (7b), carjacking can be carried out without the use of a weapon, MCL 750.529a. Even if the

perpetrator is armed, a carjacking can be carried out without pointing a deadly weapon at the victim. Even if the perpetrator is armed and points a gun at the victim, a carjacking can be carried out without racking the gun. These additional aspects of this case, which are reflected in the scoring of OV 7, are not inherent in the conviction offense.

In sum, Defendant was properly assessed 50 points for OV 7. His conduct in aiming and racking the shotgun substantially increased the victim's fear of suffering aggravated physical harm or abuse.

II. DEFENDANT CANNOT SHOW A SERIOUS ERROR BY COUNSEL OR RESULTING PREJUDICE IN COUNSEL'S FAILURE TO CHALLENGE THE SCORING OF OV 7 AT SENTENCING BECAUSE OV 7 WAS PROPERLY SCORED AND, IN ANY EVENT, THE SCORING ISSUE WAS ARGUED AND RULED UPON BELOW.

Standard of Review

The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

Issue preservation

Defendant first raised this issue in the trial court in a motion to correct guidelines scoring (1b). The trial court found that counsel was not ineffective (7b).

Analysis

The next issue is whether Defendant was denied effective assistance of counsel based on defense counsel's agreement with the scoring of OV 7 at the time of sentencing.

At sentencing, the prosecutor requested that 50 points be scored for OV 7, because Defendant did not simply display a shotgun, he also racked the shotgun and pointed it at the victim (43a-45a). The prosecutor argued that the sound of a shotgun being racked is "one of the most frightening experiences you could imagine. It's conduct designed only to threaten the victim with immediate violent death" (44a). Defense counsel did not dispute the prosecutor's point, stating, "I cannot argue with that, your Honor. In other

words, your Honor, I think it would be appropriate for the court to score that based on [the prosecutor's] rendition of what occurred" (45a). The trial court agreed that those points were proper, "I agree as well. We will score the seven – OV-7 at fifty points" (45a).

Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense. Const 1963, art 1, § 20; US Const, Am VI. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). The federal and state rights to counsel are co-extensive. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Analysis of a claim that a defendant was denied effective assistance of counsel starts with the presumption that the defendant *was* afforded effective assistance of counsel. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). The burden of overcoming this presumption rests with the defendant. *Id.* The defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different. *Armstrong, supra* 490 Mich at 290.

Not every mistake by counsel equates with the sort of serious mistake that falls below an objective standard of reasonableness. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [Constitution]." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Reed*, 453 Mich 685, 694; 556 NW2d 858 (1996).

The purported error in this case was counsel's failure to dispute the scoring of OV 7 at sentencing.

However, as discussed in Issue I of this brief, the scoring of OV 7 was correct in this case. Counsel, therefore, was not ineffective in failing to dispute the point below. Counsel need not raise meritless objections. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Even if the scoring of OV 7 is found to have been incorrect, the People's argument in Issue I of this brief demonstrates that that result was not a foregone conclusion at the time of sentencing. On the contrary, sound arguments existed to support the scoring of OV 7 in this case. The scoring of OV 7 was supported by the Court of Appeals holding in *Hornsby*, *supra* 251 Mich App at 468, a case involving a gun being cocked. Counsel should not be faulted for acting in accordance with binding precedent that existed at the time of sentencing. The failure to advocate for a change in the law, or the lack of prescience to foretell a legal development, is not a serious error. *Reed*, *supra* 453 Mich at 695.

Even if *Hornsby* were not binding on the issue (or were treated as materially distinguishable), there was no serious error by counsel in light of the reasonable and good faith argument set forth in Issue I of this Brief. Failure to raise an issue that is, at best, arguable, should not be equated with the sort of serious error that effectively rendered the defendant counselless. If reasonable legal minds could differ about whether an issue has legal merit, the failure to raise that issue is not a serious error, or "gross incompetence", by counsel. See *People v Reed*, 449 Mich 375, 387 n 9; 535 NW2d 496 (1995)(Boyle,

J.)(discussing ineffectiveness of appellate counsel). The right to counsel does not guarantee infallible counsel. *People v LeBlanc*, 465 Mich 575, 592; 640 NW2d 246 (2002)[quoting *People v Mitchell*, 454 Mich 145, 170-171 (1997)].

In any event, if the scoring of OV 7 is found to have been incorrect, and if counsel's failure to challenge the scoring at sentencing was a serious error, Defendant cannot show that he was thereby prejudiced.

If the scoring was incorrect and resentencing is required, that is not due to counsel's error below. That would not be a matter of ineffectiveness, but a matter relating to the validity of the sentence itself. The current complaint *about counsel* is that he agreed to the scoring at sentencing. What prejudice could possibly flow from such a purported deficiency? The only form of prejudice that could causally be connected to counsel's purported deficiency would arise if Defendant were denied an opportunity to challenge the scoring of OV 7. But Defendant has not been denied that opportunity.

Despite counsel's agreement at sentencing, the trial court ruled on the scoring issue below. First, at the time of sentencing, the court stated that it agreed with the parties that the scoring was proper (45a). The trial court did not decline to consider the issue due to a waiver by the defense. The trial court then revisited the issue after sentencing. After sentencing, appellate defense counsel filed a Motion to Correct Sentencing Guidelines and for Resentencing in the trial court, arguing that 50 points should not have been assessed for OV 7, and that prior defense counsel was ineffective by agreeing to that

scoring (1b).⁸ The trial court considered and ruled upon that motion (7b). Although the trial court found the scoring issue to have been waived by defense counsel at sentencing, the court also went on to reject the scoring challenge on its merits (7b). It also rejected the ineffective-assistance claim (7b). Thus, Defendant's challenge to the scoring issue was raised and considered by the trial court. The trial court rejected the challenge. The waiver at sentencing did not deprive Defendant of the chance to challenge the scoring. He had that chance, used it, and was unsuccessful. Counsel cannot be deemed ineffective simply because the court ruled against his position. *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992). Counsel cannot control the court.

Further, the scoring issue is now apparently being reviewed by this Court (under the terms of the leave grant). So any waiver or lack of preservation, has posed no impediment to Defendant raising his challenge to the scoring of OV 7.

Lastly, Defendant also asserts in his Brief that the sentence imposed in this case violated the terms of his *Cobbs* plea.⁹ However, that issue is not properly before the Court in the context of this appeal, the parameters of which are set forth in this Court's order granting leave to appeal.

⁸ Under MCR 6.429(C) a motion for resentencing preserves sentencing issues for review. Although an affirmative waiver could conceivably preclude a defendant from later raising a sentence issue by motion, the record in this case shows that counsel's "waiver" did not have that effect in this case.

⁹ See *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). In this case the trial court stated at the time of Defendant's plea that it anticipated imposing a minimum sentence of one year above the bottom end of the guidelines range (27a-28a). The final guidelines range was 108-180 months (24a, 45a). The minimum sentence imposed was 12 years, or 144 months.

RELIEF

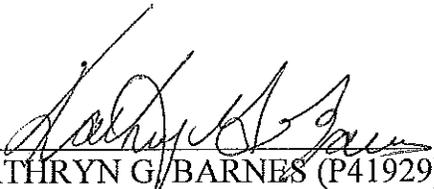
WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Kathryn G. Barnes, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court affirm Defendant's sentence.

Respectfully submitted,

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DATED: April 15, 2013