

STATE OF MICHIGAN  
IN THE SUPREME COURT

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PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

vs.

SC No. 134682

GARY SMITH,

Defendant-Appellee

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Lower Court No. 03-012800  
Court of Appeals No. 267099

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*134682  
PLAEE'S SUPPL*

**SUPPLEMENTAL BRIEF IN OPPOSITION  
OF DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL**

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## JUDGMENT APPEALED FROM AND RELIEF SOUGHT

On September 29, 2004, Defendant's jury convicted him of three counts of first degree criminal sexual conduct.<sup>1</sup> The trial court sentenced Defendant to a term of 30 to 50 years incarceration.<sup>2</sup> Defendant applied to this Court for leave from the July 19, 2007 decision of the Court of Appeals affirming Defendant's conviction and sentence.<sup>3</sup> Defendant argues that the trial court abused its discretion by departing from the sentencing guidelines and imposing a sentence twice the minimum guidelines range in violation of *People v Babcock*.<sup>4</sup>

On January 11, 2008, this Court ordered oral argument on Defendant's Application and directed the parties to file supplemental briefs discussing the following issues:

“(1) Whether the upward departure from the recommendation of the sentencing guidelines is proportionate [pursuant to *People v Babcock, supra*, 469 Mich 247]; and

(2) Whether the trial court fulfilled its obligation to ‘articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure.’”  
*Babcock, supra* at 272 (emphasis in original).”

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<sup>1</sup>9/29/04, 63-66.

<sup>2</sup>10/15/04, 6-8.

<sup>3</sup>See *People v Smith*, unpublished opinion per curiam of the Court of Appeals, decided July 19, 2007 (Docket No.267099).

<sup>4</sup>*People v Babcock*, 469 Mich 247 (2003).

## STATEMENT OF QUESTIONS PRESENTED

- I. The trial court fulfills its obligations under the law by stating on the record substantial and compelling reasons that justify its departure from the minimum sentencing guidelines. Having satisfied its statutory requirements, was the trial court obligated to explain why it chose one degree of departure over another potential departure?**

**The Court of Appeals answered: NO**

**The People answer: NO**

**Defendant answers: YES**

- II. A trial court abides by the principle of proportionality by imposing a sentence that takes into consideration the seriousness of the offense and the offender. Here, was the judge's choice to impose a sentence of 30 to 50 years outside the permissible principled range of outcomes for a defendant who repeatedly raped a 10 year old girl for over a year by threatening to make her and her family homeless?**

**The Court of Appeals answered: NO**

**The People answer: NO**

**Defendant answers: YES**

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant, Gary Thomas Smith, was tried by jury and convicted of three counts of first degree criminal sexual conduct for molesting ten year old Erica Stark.<sup>5</sup> Judge Timothy Kenny of the Third Circuit Court sentenced Defendant to a term of 30 to 50 years incarceration.<sup>6</sup>

The trial record shows that Cynthia Stark trusted Gary Smith and his wife Carol Smith, who ran a day care out of their home, to provide day care for her daughter, Erica, from the time that Erica was a year old. Over the years, Stark and Erica came to think of the Smiths as family, both describing Erica's relationship with Defendant as one of a father-daughter.<sup>7</sup> The Smiths maintained this relationship for the period of time that Stark moved to Atlanta with Erica and Stark's younger daughter, Alexis, the two girls traveling back to visit the Smiths during the summers.<sup>8</sup> In fact, Stark's bond with the Smiths was so strong that in May 2002, she sent Erica – ten years old by this time, and Alexis, seven – to live with them until Stark could join them three months later.<sup>9</sup>

Over the next year or more, while Erica and her family lived with the Smiths, Defendant molested Erica repeatedly.<sup>10</sup> Erica testified that each time that Defendant sexually assaulted her, they were in the living room, watching television while Carol Smith was in the basement on the computer. The first time, Defendant put his hand down her pants, placed his hand on top of her

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<sup>5</sup>9/29/04, 63-66.

<sup>6</sup>10/15/04, 6-8.

<sup>7</sup>9/27/04, 4-14.

<sup>8</sup>*Id.*; 9/27/04, 54-59.

<sup>9</sup>9/27/04, 18, 58-59.

<sup>10</sup> 9/27/04, 64.

underwear, and rubbed her buttock. Erica testified that she was scared and did not move at first. Defendant stopped when Erica got up from the couch and left the room.<sup>11</sup> Defendant molested Erica again about two weeks later. This time, Defendant placed his hand inside her underwear. Eric testified that Defendant put his finger inside the “place where she would go pee” and he rubbed the area. Erica said that this felt uncomfortable and Defendant stopped when Erica got up and left the room.<sup>12</sup> The next time, Defendant put his finger inside the “part where women have their periods.” Erica testified that this hurt her and she tried to move and push his hand away, but Defendant stiffened his arm.<sup>13</sup> Erica testified that, at the end of the summer, Defendant put his finger inside the “place where she would go poop.” Erica stated that this hurt like he was stretching her skin. She pushed his hand away and he removed his finger.<sup>14</sup> On another occasion, Defendant rubbed Erica with two fingers in the place where she went “poop.” In one incident, Erica saw Defendant rubbing himself on his private parts with his other hand until he had a wet spot on his shorts.<sup>15</sup> Defendant told her that if she told anyone he would kick her family out of the house, so Erica was afraid to say anything for some time.<sup>16</sup>

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<sup>11</sup>9/27/04, 60-64, 76-77.

<sup>12</sup>9/27/04, 65-70, 76.

<sup>13</sup>9/27/04, 71-75.

<sup>14</sup>9/27/04, 77- 78.

<sup>15</sup>9/27/04, 79-83.

<sup>16</sup>9/27/04, 83.

Finally, on August 20, 2003, Erica spent the night at her friends' house and confided in her friends' family, including their mother, Laura Helton, that Defendant had been touching her in her private parts.<sup>17</sup>

The following day, Laura Helton, who was a friend of the Smiths, went shopping with them and Erica's mother, Cindy Stark. Helton pulled Carol Smith aside and told her what Erica had stated about Defendant.<sup>18</sup> Carol Smith became upset and started shaking.<sup>19 20</sup> Carol Smith told Stark, who started crying.<sup>21</sup> The three women decided to drive back to the house in one car and Defendant followed in the other car. When they reached the house, Stark took Erica into the back room and Erica told her mother that Defendant had touched her in a sexual way.<sup>22</sup>

Cindy Stark started packing her family's belongings and Carol Smith yelled at Stark for believing Erica over Defendant. Stark told Carol that she loved her but that she believed her daughter and could not stay there any more.<sup>23</sup> Carol Smith responded by spitting in Cindy's face. Cindy Stark and her children move their belongings to Helton's house. The next day, Stark reported the crime to the police and took Erica to the hospital.<sup>24</sup>

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<sup>17</sup>9/27/04, 85-91, 120-149; 9/28/04, 15-21.

<sup>18</sup>9/27/04, 152.

<sup>19</sup>9/27/04, 152-153.

<sup>20</sup>9/27/04, 26.

<sup>21</sup>9/27/04, 152-153.

<sup>22</sup> 9/27/04, 26-33.

<sup>23</sup>9/27/04, 34-42.

<sup>24</sup>9/27/04, 92-99, 150-156.

## ARGUMENT

- I. The trial court fulfills its obligations under the law by stating on the record substantial and compelling reasons that justify its departure from the minimum sentencing guidelines. Having satisfied its statutory requirements, the trial court was not obligated to explain why it chose one degree of departure over another potential departure.**

### *Statutory Requirements for Sentencing*

In 1983, the *Coles* Court expanded the power of the appellate courts to review, pursuant to an abuse of discretion standard, a trial court's imposition of a sentence.<sup>25</sup> Review focused on whether the sentence “shocked the conscience” of the appellate court.<sup>26</sup> In 1990, *Milbourn* rejected the “shock the conscience” standard and set forth a proportionality analysis.<sup>27</sup> “[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.”<sup>28</sup>

In 1998, the Legislature enacted statutory sentencing guidelines<sup>29</sup> applicable to enumerated felonies committed on or after January 1, 1999.<sup>30</sup> The legislative scheme provides a numeric calculation of the seriousness of a defendant’s prior record and the specific offense variables of each

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<sup>25</sup>*People v Coles*, 417 Mich 523, 550-551 (1983).

<sup>26</sup>*Id.*

<sup>27</sup>*People v Milbourn*, 435 Mich 630, 653-654 (1990).

<sup>28</sup>*Id.* at 636.

<sup>29</sup>MCL § 777.1 et seq.

<sup>30</sup>MCL § 769.34(2).

offense and thus embodies the principle of proportionality.<sup>31</sup> But the legislative scheme also recognizes that guidelines cannot possibly account for all the circumstances and individuals the trial courts would encounter. Thus, the statute provides that where a trial court determines that a sentence departure from the statutory guidelines would result in a sentence more proportionate to the circumstances of the offense and the offender, the sentencing court would have the discretion to impose a sentence outside the guidelines range. Accordingly, the trial court must impose a sentence within the appropriate sentence range unless the court “has a substantial and compelling reason for that departure and states on the record the reasons for departure.”<sup>32</sup>

■ “...*substantial and compelling reason for that departure...*”

In *People v Babcock*,<sup>33</sup> the Court of Appeals held that a substantial and compelling reason such as to justify a departure must be of a quality that “‘keenly,’ or ‘irresistibly’ grabs our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.”<sup>34</sup> Moreover, these substantial and compelling reasons must be factors that are objective and verifiable.<sup>35</sup> In other words, the factors must be “‘actions or occurrences which are external to the minds of the judge, defendant and others involved in making the decision ... [that are] capable

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<sup>31</sup>*People v Babcock* 469 Mich 247, 263-264 (2003).

<sup>32</sup>MCL § 769.34(3).

<sup>33</sup>*People v Babcock*, 244 Mich App 64, 75-76 (2000).

<sup>34</sup>*Babcock, supra*, citing *People v Fields*, 448 Mich 58, 66-67 (1995).

<sup>35</sup>*Id.*

of being confirmed.”<sup>36</sup> A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.<sup>37</sup>

The Supreme Court in *Babcock* stated that “the role of the Court of Appeals has [] changed from reviewing the trial court's sentencing decision for ‘proportionality’ to reviewing the trial court's sentencing decision to determine, first, whether it is within the appropriate guidelines range and, second, if it is not, whether the trial court has articulated a “substantial and compelling” reason for departing from such range.”<sup>38</sup>

But a “mere listing of garden variety ‘factors,’ even objective and verifiable ones” will not satisfy the legislative intent of substantial and compelling reasons.<sup>39</sup> Instead, “the sentencing court must also specifically articulate the reasons why the factors it identifies and relies upon collectively provide “substantial and compelling” reasons.<sup>40</sup> Likewise, not every upward or downward departure is justified by “substantial and compelling” circumstances.<sup>41</sup> Rather, the ““substantial and compelling’ circumstances articulated by the court must justify the *particular* departure in a case, i.e., ‘that departure.’”<sup>42</sup>

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<sup>36</sup>*Id.*

<sup>37</sup>*Babcock, supra*, 244 Mich App at 75-76, quoting *Fields, supra*, 448 Mich at 77-78.

<sup>38</sup>*Babcock, supra*, 469 Mich at 256; *People v Reincke*, 261 Mich App 264, 265 (2004).

<sup>39</sup>*Babcock, supra*, 469 Mich at 272, citing *People v Daniel* 462 Mich 1, 9 (2000).

<sup>40</sup> *Id.*

<sup>41</sup>*Babcock, id*, citing *People v Hedgewood*, 465 Mich 432 (2001).

<sup>42</sup>*Hedgewood, Id*, 465 Mich at 438, n 10. Emphasis in original.

The principle of proportionality, therefore, remains relevant under *Babcock*.<sup>43</sup> That is because the test of whether a trial court’s substantial and compelling reasons justifies a particular departure depends on the principle of proportionality. As *Babcock* explained, while “substantial and compelling” identifies the quality of the reasons that must be cited in support of a departure from the guidelines, the principle of proportionality defines the standard against which the decision to depart, and the particular departure imposed, must be assessed.<sup>44</sup>

Thus, the appellate courts review a trial court's substantial and compelling reasons to depart *and the degree of departure* for abuse of discretion. See argument II for discussion on proportionality.

■ “...states on the record the reasons for departure.”

The law states the trial court must articulate its substantial and compelling reasons to depart from the guidelines on the record.<sup>45</sup> But the trial court’s articulation requirements under the statute do not obligate the trial court to “explain why it chose a twelve-month departure as opposed to an eleven-month departure (or indeed as opposed to any one of countless other potential departures).”<sup>46</sup>

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<sup>43</sup>*Babcock, supra*, 469 Mich at 251.

<sup>44</sup>*Id*, 469 Mich at 262 n 20.

<sup>45</sup>MCL § 769.34(3); *Babcock, supra*, 469 Mich at 258.

<sup>46</sup>*Babcock, id*, 469 Mich at 260, n14.

moreover, the trial courts are not required to use “any formulaic or ‘magic’ words” when articulating substantial and compelling reason.<sup>47</sup> As long as the quality of the trial court’s statement is sufficient to allow for effective appellate review, a short statement would suffice.<sup>48</sup>

The Michigan courts have long rejected any type of arithmetic formula for assessing the reasonableness of particular departures<sup>49</sup> or a review of proportionality based on a comparison to sentences for other, unrelated crimes.<sup>50</sup> In *People v Cervantes*,<sup>51</sup> this Court stated that there was no mathematical equation for establishing proportionality. Justice Cavanagh, in his concurrence/dissenting opinion, stated that “a simple mathematical approach (i.e., doubling the guidelines maximum/minimum range)” cannot be implemented for determining proportionality.<sup>52</sup> “This is due to the fact that there is no place in the principle of proportionality for any type of rigid approach, be it mathematical or otherwise. A rigid mathematical approach simply fails to consider the surrounding circumstances of the offense and offender.”<sup>53</sup> Instead, the test is “whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines’ recommended range.”<sup>54</sup>

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<sup>47</sup>*Babcock, id.*, 469 Mich at 259, n 13.

<sup>48</sup>*Id.* *Babcock* suggested that the trial court might say, “[t]he substantial and compelling reason that justifies my twelve-month departure here is ...’.”*Id.*

<sup>49</sup> *People v Houston*, 448 Mich. 312, 320 (1994).

<sup>50</sup> *People v Knapp*, 244 Mich App 361, 389-390 (2001).

<sup>51</sup> *People v Cervantes*, 448 Mich 620, 626 (1995).

<sup>52</sup>*Id.*, 448 Mich at 634.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*, citing *Milbourn, supra* at 661.

In this case, since Judge Kenny stated that the guidelines inadequately reflected the seriousness of this case and this Defendant, and further articulated proper substantial and compelling reasons to depart from the sentencing guidelines, he fulfilled his statutory obligations under the law. Thus, the Court of Appeals correctly affirmed Defendant's sentence and that ruling should not be disturbed.

### *Conclusion*

- The statutory guidelines range for any given case represents the presumptive proportionate sentence for that offense and that offender.
- If the trial court rules that the statutory guideline range fails to adequately reflect the seriousness of the offense and the offender, the statute allows the trial court to depart from the guidelines if the court
  - articulates substantial and compelling reasons to depart on the record, and
  - base those reasons on objective and verifiable factors
- The statute does not impose an additional articulation obligation on the trial court to explain why it chose one degree of departure over another, nor to compare its sentencing decision with an unrelated case.
- Regardless of the trial court's degree of departure, review by the appellate courts is for an abuse of discretion.

**II. A trial court abides by the principle of proportionality by imposing a sentence that takes into consideration the seriousness of the offense and the offender. Here, the judge’s choice to impose a sentence of 30 to 50 years was not outside the permissible principled range of outcomes for a defendant who repeatedly raped a 10 year old girl for over a year by threatening to make her and her family homeless.**

*Appellate Standard of Review*

A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.<sup>55</sup> An abuse of discretion occurs when the trial court chooses an outcome falling outside the “permissible principled range of outcomes.”<sup>56</sup> The Court recognized that the “core” of this standard acknowledges that “there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.”<sup>57</sup> So, the trial court does not abuse its discretion when its decision is within the range of options from which a person would expect a reasonable trial judge to select.<sup>58</sup>

Relative to the abuse of discretion standard in the context of sentencing departures is the rule that the appellate court must give deference to the trial court, “recognizing that the trial court [is] in the better position to make [a departure] determination[.]”<sup>59</sup> The deference given to the trial court

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<sup>55</sup>*Babcock, supra*, 244 Mich App at 75-76, quoting *Fields, supra*, 448 Mich at 77-78.

<sup>56</sup>*Id.*

<sup>57</sup>*Babcock, id.*, 469 Mich at 269 (internal citations omitted).

<sup>58</sup>*Id.*

<sup>59</sup>*Babcock, id.*, 469 Mich at 270.

“is an acknowledgment of the trial court's extensive knowledge of the facts and that court's familiarity with the circumstances of the offender.”<sup>60</sup>

*Application*

Defendant’s guidelines range was nine years to fifteen years. Judge Kenny found that the circumstances in this case – “absolute worst type of exploitation”– justified an upward departure from the sentencing guidelines.<sup>61</sup> Under the circumstances of this case, Judge Kenny’s upward departure of thirty to sixty did not fall outside the principled range of outcomes.<sup>62</sup>

The evidence showed that Cynthia Stark entrusted Gary Smith and his wife with the care of Erica, from the time that Erica was only a year old. Erica loved the Smiths and thought of Defendant as her father – even after he started molesting and threatening to throw her and her family out into the street. Judge Kenny recognized that Defendant’s actions betrayed Erica’s trust making her his “sex toy” and perhaps causing irreparable harm: “I mean its’s unimaginable to me to think that a 10 year old who may be fearful of the fact that she may lose the roof over her head for herself, her mother and her two siblings, is forced to silently endure this kind of sexual exploitation.”<sup>63</sup>

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<sup>60</sup> *Id.*

<sup>61</sup>10/15/04, 6-7.

<sup>62</sup>The trial court’s Departure Evaluation Form stated the court’s reasons for departing from the guidelines:

“Defendant served as child care provider for nine years and molested the victim over a 15 month period.

Defendant threatened to evict the child victim and her family if she told anyone about the CSC.

Child victim was forced to undergo a painful physical exam as a result of the incident.”

<sup>63</sup>10/15/04, 6-8.

Further, Judge Kenny's found that Defendant's abuse was compounded by forcing the complainant undergo a frightening gynecological examination at such a tender age.<sup>64</sup> Since there factors were given inadequately weight by the guidelines, Judge Kenny decided that a departure would result in a more proportionate sentence. Accordingly, he sentenced Defendant to a term of 30 to 50 years.<sup>65</sup>

The Court of Appeals, deferring to Judge Kenny's "direct knowledge of the facts and familiarity with the offender," properly held that Judge Kenny's reasons to exceed the minimum sentencing guidelines complied with the statute.<sup>66</sup> Moreover, the Court of Appeals also ruled that Judge Kenny's sentence was proportionate to defendant and the seriousness of the offense. The fact that Defendant had no prior record did not tip the scale in Defendant's favor in light of "serious and reprehensible nature" of his conduct in committing this crime.<sup>67</sup> Citing *Milbourn*, the Court of

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<sup>64</sup>10/15/04, 7.

<sup>65</sup>10/15/04, 7-8. The trial court's Departure Evaluation Form stated the court's reasons for departing from the guidelines:

"Defendant served as child care provider for nine years and molested the victim over a 15 month period.

Defendant threatened to evict the child victim and her family if she told anyone about the CSC.

Child victim was forced to undergo a painful physical exam as a result of the incident."

<sup>66</sup>The Court of Appeals also rejected Defendant's claim, suggested by his original appellate counsel, that Judge Kenny had a hidden reason for exceeding the guidelines. Counsel asserted that Judge Kenny's real reason for exceeding the guidelines was because, in the middle of trial, it was discovered that Defendant's wife, Carol Smith, called the police and alleged that the trial prosecutor was using cocaine in her car during a lunch break. The Court of Appeals found no support for this argument and ruled it was based on mere speculation.

But more than meritless, appellate counsel's claim that Judge Kenny *lied* about his reasons to exceed the sentencing guidelines are reprehensible and scandalous. Accordingly, that portion of Defendant's brief should be stricken from the record pursuant to MCR § 2.115.

<sup>67</sup> See *People v Piotrowski*, 211 Mich App 527, 533(1995).

Appeals held that the circumstances surrounding this Defendant's conviction placed him in the most threatening class with respect to this particular crime.<sup>68</sup> Accordingly, Defendant's sentence did not violate the principle of proportionality.<sup>69</sup>

The Legislature has given the trial court's the discretion and responsibility of making difficult decisions concerning criminal sentencing, largely on the basis of what has taken place in its direct observation.<sup>70</sup> Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case.<sup>71</sup>

In this case, Judge Kenny's substantial and compelling reasons justified the degree of his sentence departure. Speaking from his considerable experience, Judge Kenny regarded the reprehensible nature of this Defendant's actions and the long-term damage to this child as reasons worthy of his decision to sentence Defendant to twice the minimum guideline range.

To second-guess Judge Kenny's discretion by holding that another degree of departure would be more appropriate in this case would violate the standard set forth in *Babcock* and simply strip him of the discretion imposed by the Legislature.<sup>72</sup>

Because Judge Kenny's choice was within the permissible principled range of outcomes, the Court of Appeals correctly affirmed Defendant's sentence and that ruling should not be disturbed.

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<sup>68</sup>*Milbourn, supra*, 435 Mich at 654.

<sup>69</sup>*Babcock, supra*, 469 Mich at 264, 273.

<sup>70</sup>*Babcock, id*, 469 Mich at 268.

<sup>71</sup> *Id.*; *People v Reincke*, 261 Mich App 264, 267-269 (2004).

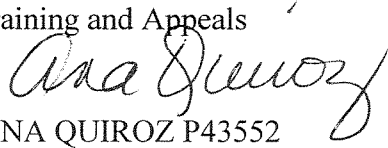
<sup>72</sup>See *Milbourn, supra*, 435 Mich at 687.

**RELIEF**

**WHEREFORE**, the People request that this Court either deny Defendant's application for leave to appeal or rule that the trial court fulfilled its statutory obligations in sentencing Defendant and did not abuse its discretion.

Respectfully submitted,  
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