STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAMACENO RICHARD ABREGO,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 320973

Lower Court No. 13H15796FH

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JUDGMENT /ORDER APPEALED FROM AND RELIEF SOUGHT

The People of the State of Michigan apply for leave to appeal the Court of Appeals decision in *People v Abrego*, unpublished opinion per curiam of the Court of Appeals, issued June 11, 2015 (Docket No. 320973) (attached as Appendix A). This Court has jurisdiction under Const 1963, art 6, §4 and MCR 7.301.

As noted by the dissent judge, "the majority opinion [took] the additional step of raising an issue that was not raised by defendant (and therefore not responded to by the prosecution), either here or in the trial court."[1] For all of the reasons explained by the dissenting judge, the majority's decision is clearly erroneous and will cause material injustice because defendant Abrego may receive an unwarranted sentence reduction.

This Court should grant People's the application or peremptorily reverse for the reasons stated by the dissent or grant any other relief that this Court deems appropriate.

[1] *Abrego*, unpub op (MURRAY, J., concurring in part, dissenting in part) at 1.

QUESTION PRESENTED

I. Defendant was convicted of operating while intoxicated, 2nd offense, with an occupant under age 16, after driving from a video store parking lot onto a roadway with his young sons. After raising the issue sua sponte, the Court of Appeals decided that the sentencing court clearly erred by scoring of 15 points for OV-8 (the victim was asported to another place of greater danger or to a situation of greater danger). Did the Court of Appeals clearly err when the statutory language has no requirement that the asportation not be incidental to sentencing offense, and, in any event, defendant asported the child to a situation or place of greater danger by leaving a parking lot and driving onto the roadway?

Plaintiff-Appellant says: "Yes."

Defendant-Appellee says: "No."

Court of Appeals said: "No."

Trial Court said: "Yes."

STATUTE INVOLVED

MCL 777.38 reads:

(1) Offense variable 8 is victim asportation or captivity. Score offense variable 8 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 asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense.....15 points

(b) No victim was asported or held captive.....0 points

(2) All of the following apply to scoring offense variable 8:

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

(b) Score 0 points if the sentencing offense is kidnapping.

STATEMENT OF PROCEEDINGS AND MATERIAL FACTS

Highly intoxicated, defendant drives drunk with his two young sons.

This was not the first time 49-year-old defendant Damaceno Abrego, whose license was suspended, drove drunk. It was the fifth. (Presentence Information Report [PSIR].)

This time, on Friday, June 7, 2013, at about 9:47 p.m., an off-duty police officer saw Abrego's car parked in front of Family Video in Berlin Township of Ionia County. (*Id.*) Although off-duty, the officer's attention was drawn to Abrego when the office watched Abrego sit with his leg outside of his driver's side door and finish off a bottle of Bud Light platinum beer. (*Id.*) Abrego then got out of his car and walked into the store with his 9- and 6-year-old sons. Abrego and his young boys soon returned. (*Id.*) Abrego then drove out of the parking lot and onto the roadway. (*Id.*)

Shortly after 10 p.m., an on-duty officer, who had been alerted by his off-duty counter-part, watched Abrego cross the center line, and, then, touch the fog line. (*Id.*) The officer turned on his lights and siren as Abrego continue to weave within his lane. (*Id.*) Abrego then turned on his right-turn signal, but, when the officer turned off his siren, Abrego continued driving. (*Id.*)

The officer pursued Abrego until he stopped. (*Id.*) Abrego's car smelled of alcohol. (*Id.*) Later, the police found 6-pack of Bud Light with 2 beers missing inside a bag in Abrego's car. (*Id.*) They also found an unknown clear bottle and, in Abrego's open ashtray, a metal smoking pipe. (*Id.*)

The police obtained a search warrant and determined that Abrego's blood-alcohol level was 0.14 (*id.*) – well above what Michigan law considers intoxicated. In fact, Abrego had four

prior drunk-driving convictions, and a record that included 1 prior high severity and 6 low severity felonies.

After being charged, defendant accepts a plea bargain.

The People charged Abrego with two counts of operating while intoxicated, 2nd, with a child under 16 (OWI2d < 16), MCL 257.625(7)(a)(*ii*), possession of marijuana, MCL 333.7403(2)(d), and operating while license suspended, 2nd offense, MCL 257.904d. After defendant's preliminary examination and bind over to circuit court, the People filed a habitual-offender fourth notice. See MCL 769.12 and MCL 769.13.

On September 13, 2013, Abrego pled guilty to one count of (OWI2d <16) and possession of marijuana.[2] In exchange, the People dismissed the second count of OWI2d <16, driving while license suspended 2nd, and the habitual offender fourth notice. Also, Abrego had a sentence recommendation of 12 months in the Ionia County Jail, with payment of court fines, costs, and any restitution.[3] The circuit court told Abrego that if he violated his bond, his plea would stand, but that the court "would not be obligated to go along with the one year jail cap."[4]

Defendant tests positive for alcohol and violates his bond.

While on bond Abrego had "a positive PBT and also a - - well, it was a positive PBT that the defendant disputed. So then he was sent to Comprehensive Testing where the lab results was [sic] a diluted screen."[5] At that point, Abrego admitted responsibility to "the positive test for alcohol via a PBT on October 26th, 2013"[6] and the circuit court revoked his bond.

[2] Plea Transcript dated September 17, 2013.
[3] Plea, p 3.
[4] Plea, p 6.
[5] Bond Violation Transcript dated November 26, 2013, p 3.
[6] BV, p 5.

At sentencing, the court determines that defendant asported his children to a situation or place of greater danger by driving drunk with them on the roadway.

At sentencing, Abrego raised two challenges to his sentencing guidelines scores – one for OV 8 and another for OV 19 (attempted interference with the administration of justice).

Abrego's attorney argued:

> In particular, OV8, your Honor, and OV19. OV8, the victim asportation or captivity, we disagree with the scoring of 15 points in this case. You know asportation implies forcible movement. There was no force in this case. The children were in the vehicle, yes. They were there willing passengers to go to the store with [Defendant-Appellee]. It wasn't against their wishes. It wasn't against their will. They were not taken to another place of danger. So, we believe it's been mis-scored, your Honor. They weren't held captive beyond any time necessary for the offense committed. We believe it should be scored at zero, not 15.[7]
>
> . . .
>
> Your Honor, I think it's a stretch to state that ending up at the video store under these facts and circumstances put them in greater danger. I don't believe that the facts of this case, as stated on the record as well as in the presentence report, support what the legislature intended OV8 to be used and scored for. I think it's mis-scored at 15. Certainly, if the Court disagrees, we want to make sure that that issue is preserved for appeal, your Honor.[8]

The circuit court rejected this argument, ruling:

> It is unique, but it does seem to fit within OV8. 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

[7] Sentencing Transcript dated January 21, 2014, p 6-7.
[8] ST, p 8.

> 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.[9]

The court then sentenced Abrego to 2 to 5 years' imprisonment for OWI2d < 16 and 12 months for possession of marijuana.

PROCEEDINGS BELOW

Defendant appeals.

Abrego filed a delayed application for leave to appeal with the Court of Appeals, challenging the circuit court's scoring decisions on both OVs. The Court of Appeals denied defendant's application with a dissent. *People v Abrego,* unpublished order of the Court of Appeals, entered on April 24, 2014 (Docket No. 320973).

Abrego then filed an application with this Court. This Court remanded for the Court of Appeals to consider Abrego's application as on leave granted. *People v Abrego,* 497 Mich 852; 852 NW2d 632 (2014).

The Court of Appeals, over a dissent, reverses and remands for resentencing on an issue it raised sua sponte.

On appeal, Abrego relied on *People v Johnson*, 202 Mich App 281; 508 NW2d (1993), which upheld a 15-point score under OV-8 where "the defendant **forced** the victim to accompany him from the bedroom, **throughout** the house and, eventually, to the **third floor** of the home."[10] Abrego's ***sole*** arguments in the Court of Appeals were that a victim was not taken to a greater place of danger and that force was not used to move the victim. The Court of Appeals found that "contrary to defendant's arguments, it is clear, that, by moving the children to his vehicle, which defendant then operated while intoxicated, defendant placed the children in a

[9] ST, p 8-9.
[10] Defendant-Appell[ee]'s Brief on Appeal (Court of Appeals Docket No. 320973), p 6 (emphasis in original).

'situation of greater danger' than the situation they faced in the relative safety of defendant's home or the video store."[11]

Despite ruling against Abrego on the argument he raised, the Court of Appeals nevertheless remanded his case for resentencing because "we are persuaded, albeit for reasons **not discussed** by defendant on appeal, that the trial court clearly erred in scoring OV 8."[12] The Court of Appeals reasoned that the

> 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.[13]

As the judge, who dissented in part on this point, explained, "the majority opinion [took] the additional step of raising an issue that was not raised by defendant (and therefore not responded to by the prosecution), either here or in the trial court."[14] Relying upon the dissenters' view in *People v Thompson*, 488 Mich 888, 889; 788 NW2d 677 (2010) (Young, J., joined by Corrigan, J.), the dissenting concluded that "there is no language within MCL 777.38 providing that asportation not be incidental to **the** underlying offense."[15]

The People now seek leave to appeal.

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[11] *People v Abrego*, unpublished opinion per curiam of the Court of Appeals, issued June 11, 2015 (Docket No. 320973), p 2.
[12] *Abrego*, unpub op at 2 (emphasis added).
[13] *Abrego*, unpub op at 3.
[14] *Abrego*, unpub op (MURRAY, J., concurring in part, dissenting in part) at 1.
[15] *Abrego*, unpub op (MURRAY, J., concurring in part, dissenting in part) at 2 (emphasis added).

ARGUMENT

I. Defendant was convicted of operating while intoxicated, 2nd offense, with an occupant under age 16, after driving from a video store parking lot onto a roadway with his young sons. After raising the issue sua sponte, the Court of Appeals decided that the sentencing court clearly erred by scoring of 15 points for OV-8 (the victim was asported to another place of greater danger or to a situation of greater danger). The Court of Appeals clearly erred because the victim was asported as OV-8's language has no requirement that a defendant's movement of his victim cannot be incidental to the commission of his crime.

A. Issue Preservation

Given that the Court of Appeals raised the issue it granted relief on sua sponte, the People preserved this issue by filing this application, and by arguing that OV 8 was correctly scored at sentencing and throughout the appellate process.

B. Standard of Review

When a challenge to the sentencing guidelines' scoring is preserved, "the 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."[16] "'To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish.'"[17] "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."[18]

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[16] *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).
[17] *People v Cheatham*, 453 Mich 1, 30 n 23; 551 NW2d 355 (1996) (quoting *Parts & Electric Motors, Inc. v Sterling Electric, Inc.*, 866 F2d 228, 233 (CA7 1988)).
[18] *People v Francisco*, 474 Mich 82, 84; 711 NW2d 44 (2006).

C. Analysis

The Court of Appeals' majority was legally wrong for the reasons detailed by the dissent for raising and granting relief on this issue sua sponte. In addition, the Court of Appeals was factually wrong because Abrego's continued driving was not incidental to his drunk driving. Abrego committed that crime when he assumed control of his car with his young sons inside. Because Abrego's continued driving onto the roadway was not incidental to the commission of his offense, he moved his boys to a situation or place of greater danger or held them captive longer than necessary to commit his crime. This Court should peremptorily reverse or grant leave to decide what OV 8's plain language requires.

After specifically rejecting Abrego's argument for relief, the Court of Appeals ordered resentencing on an issue it raised sua sponte. There is "the general and longstanding rule in Michigan that 'issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances.' The essential justification for this rule is fairness, **both to litigants**, who are best equipped to respond to alleged errors at the time they occur, and to the public, which must bear the cost of new trials that could have been avoided with a timely objection."[19] The present issue was not raised in the circuit court, or before the Court of Appeals. The Court of Appeals, sua sponte, raised the issue of whether the movement experienced by the victims was incidental to an underlying offense "without the benefit of briefing and oral argument from the parties."[20] Worse, it wrongly answered the question it raised.

[19] *People v Cain*, ___ NW2d ___, 2015 WL 4487744 (emphasis added)
[20] *Bradley v Saranac Community Schools Bd of Educ*, 455 Mich 285, 303; 565 NW2d 650 (1997).

Under MCL 777.38, sentencing courts are instructed to "[s]core offense variable 8 by determin[ing] which of the following apply and by assigning the number of points attributable to the one that has the highest number of points."[21] It then lists:

"(a) A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense . . . 15 points [or] (b) [n]o victim was asported or held captive . . . 0 points."[22]

Although the Michigan's sentencing guidelines are advisory, this Court directed sentencing courts to determine the applicable guidelines range and take it into account when imposing a sentence.[23]

In *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003), the defendant challenged the scoring of 15 points for OV 8, arguing that asportation required forcible movement of a victim. The Court of Appeals recognized that "[t]he term 'asportation' is not defined in the sentencing guidelines statute." It then noted that "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*."[24] It continued: "the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense."[25]

Thus, here, the Court of Appeals' majority held that

> 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 < 16. Consequently, movement of the children here cannot constitute 'asportation' for purposes of scoring OV 8, and

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[21] MCL 777.38(1).
[22] MCL 777.38(1)(a)-(b).
[23] *People v Lockridge*, ___ Mich ___; ___ NW2d ___ (Docket No. 149073) at 2.
[24] *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003) (emphasis added).
[25] *Spanke*, 254 Mich App at 647 (It is this quotation most commonly used from *Spanke*).

> the trial court thus clearly erred by considering asportation as a basis for assessing 15 points.[26]

And, the Court of Appeals later explained:

> the danger to the children was an inherent part of defendant's conviction under MCL 257.625(7)(a)(ii), ... Defendant's operation of the vehicle was, in short, one continuous event and any transportation of the children during this time was merely incidental to defendant's operation of a vehicle occupied by minors.[27]

But, as explained by the dissent, *Spanke's* discussion on the meaning of asportation (outside the question of whether force was necessary) is dicta, and wrong.[28] Moreover, the dissent is correct that it is odd that the Legislature would silently incorporate a definition for a crime excluded from scoring OV 8.[29] And, as the dissent explains, using the legal definition of asportation, defendant's conduct is captured.

In fact, this Court has recognized that "common-law larceny and robbery required asportation."[30] Any movement of the property being taken constitutes asportation.[31] Here, there was certainly movement of Abrego's children because Abrego drove out of the parking lot and onto the roadway. Indeed, this definition of asportation is consistent with the dictionary definition the dissent provides.

Finally, in *City of Plymouth v Longeway*, the Court of Appeals held:

> that defendant operated the vehicle within the meaning of MCL 257.625(1) because she had 'actual physical control' of the vehicle as set forth in MCL 257.35a. A person clearly has actual physical control of a vehicle when starting

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[26] *People v Abrego*, unpublished opinion per curiam of the Court of Appeals, issued June 11, 2015 (Docket No. 320973), p 3.
[27] *Abrego*, unpub op at 4.
[28] *Abrego*, unpub op (MURRAY, J., concurring in part; dissenting in part)
[29] *Abrego*, unpub op (MURRAY, J., concurring in part; dissenting in part)
[30] *People v Williams*, 491 Mich 164, 181; 814 NW2d 270 (2012).
[31] *People v Randolph*, 466 Mich 532, 541; 648 NW2d 164 (2002), quoting *People v Turner*, 120 Mich App 23, 28; 328 NW2d 5 (1982), overruled by *Randolph*; *People v McGuire*, 39 Mich App 308, 314-315; 197 NW2d 469 (1972); *People v Royce Alexander*, 17 Mich App 30, 32-33; 169 NW2d 190 (1969).

> the engine, applying the brakes, shifting the vehicle from park to reverse, and then shifting back to park.[32]

In other words, whether the vehicle "remained stationary is immaterial."[33] This means that the Court of Appeals' majority further erred as the movement of the vehicle should not be construed as an "inherent part of defendant's conviction under MCL 257.625(7)(a)(ii)." Instead, the offense was completed once the highly intoxicated Abrego put his foot on the brake to shift into drive. Thus, the sentencing court's scoring was proper as Abrego not only moved his young boys to a situation or place or greater danger by driving onto the roadway, but he also "held [them] captive beyond the time necessary to commit the offense" – the third alternative for scoring OV 8.[34]

Although the Court of Appeals decision here was unpublished, it will undoubtedly be cited to sentencing courts as forbidding the scoring of OV-8 for all offenses involving operating while intoxicated. This injustice becomes even more substantial considering "the majority opinion [took] the additional step of raising an issue that was not raised by defendant (and therefore not responded to by the prosecution), either here or in the trial court."[35]

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[32] *City of Plymouth v Longeway*, 296 Mich App 1, 2; 818 NW2d 419 (2012), lv den *People v Longeway*, 492 Mich 868; 819 NW2d 577 (2012).
[33] *Longeway*, 296 Mich App at 8.
[34] MCL 777.38.
[35] *Abrego*, unpub op (MURRAY, J., concurring in part, dissenting in part) at 1.

RELIEF REQUESTED

Forty-nine-year-old defendant Damaceno Abrego is a five-time drunk driver, who drove from his home to a video store parking lot, and, later, onto the roadway, with his young sons in tow. The Court of Appeals remanded his case for resentencing after sua sponte raising an issue it said required resentencing. For the reasons stated by the judge who dissented, the Court of Appeals' majority was wrong. And, the sentencing court was correct when it ruled that Abrego asported his boys to a situation or place of greater danger by driving them onto the roadway from the video store parking lot.

Accordingly, the People of the State of Michigan respectfully ask this Court to grant their Application, or to peremptorily reverse the decision of the Court of Appeals erroneous ruling, or to grant any other relief it deems appropriate.

Respectfully Submitted,

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APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMACENO RICHARD ABREGO,

Defendant-Appellant.

UNPUBLISHED
June 11, 2015

No. 320973
Ionia Circuit Court
LC No. 2013-015796-FH

Before: HOEKSTRA, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Defendant appeals by leave granted his sentence for Second-Offense Operating While Intoxicated (OWI-2nd), MCL 257.625(7)(a)(ii) (occupant under age 16); and Possession of Marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to two to five years' imprisonment for OWI-2nd, and 12 months for possession of marijuana. On appeal, defendant does not challenge his convictions, but instead asserts only that he is entitled to resentencing due to the trial court's error in scoring offense variables (OV) 8 and 19. Because the trial court clearly erred in the scoring of OV 8, we vacate defendant's sentence and remand for resentencing under properly scored sentencing guidelines.

On June 7, 2013, defendant drove while intoxicated with two children under the age of 16 in his vehicle. In particular, defendant transported his daughter and her half-sister from his home to a video store, and they were driving back to defendant's home when a police officer activated his emergency lights as a signal for defendant to stop his vehicle. Defendant did not stop. After the officer activated his siren, defendant activated his vehicle's turn signal, but did not pull over. The officer then turned his siren off, but defendant continued driving. When the officer reactivated his siren, defendant finally stopped. Defendant's blood alcohol level was .14, over the legal limit of .08 as set forth in MCL 257.625(1)(b). Defendant also had marijuana in his possession. Defendant pled guilty to OWI-2nd and possession of marijuana, pursuant to a plea offer involving a *Killebrew*[1] cap of one year in jail and dismissal of a second count of OWI involving an occupant under 16, as well as dismissal of a charge of driving with a suspended

[1] *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982).

license. Defendant later lost the benefit of this agreement when he violated his bond terms. The trial court sentenced defendant as noted above.

On appeal, defendant challenges the trial court's assessment of 15 points for OV 8 and 10 points for OV 19 for his OWI-2nd count. Specifically, defendant maintains on appeal that OV 8 should not have been scored because defendant did not use force to move the children and because he was transporting the children to his home which was not a place of "greater danger." Defendant also argues that OV 19 should not have been scored because defendant's failure to pull over was not an effort to flee from police; rather, because defendant was inebriated, he claims his reaction times were slowed and consequently there was an unintended delay in his efforts to find a safe place to stop.

Defendant objected to the scoring of OV 8 and OV 19 at sentencing, and thus preserved his claims for appeal. MCR 6.429(C); *People v Gibbs*, 299 Mich App 473, 491; 830 NW2d 821 (2013). We review the trial court's factual determinations for clear error and its determinations regarding the scoring of sentencing variables must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "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." *Id.*

In this case, it is defendant's contention that both OV 8 and OV 19 should have been scored at zero points. As currently scored, defendant's total OV score is 45 points, resulting in an OV level of IV under the minimum sentence ranges for a class E offense. See MCL 777.12f; MCL 777.66. An error in the scoring of either one of the challenged variables would reduce defendant's OV level to III, and if both variables were scored incorrectly defendant's OV level would be II. See MCL 777.66. Thus, an incorrect scoring of one or both variables would alter defendant's minimum recommended sentence under the legislative sentencing guidelines and entitle defendant to resentencing. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

OV 8 accounts for victim asportation or captivity, and MCL 777.38(1)(a) directs trial courts to assess 15 points where "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." For purposes of scoring OV 8, "each person who was placed in danger of injury or loss of life" should be counted "as a victim." MCL 777.38(2)(a). Contrary to defendant's arguments on appeal, asportation "can be accomplished without the employment of force against the victim," *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003), and "may occur even when the victim voluntarily accompanied the defendant to a place or situation of greater danger[,]" *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013). Moreover, contrary to defendant's arguments, it is clear, that, by moving the children to his vehicle, which defendant then operated while intoxicated, defendant placed the children in a "situation of greater danger" than the situation they faced in the relative safety of defendant's home or the video store.

Nonetheless, 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.[2] OV 8 should have been scored at zero points. MCL 777.38(1)(b).

In reaching our conclusion, we disagree with the prosecutor's assertion that OV 8 could be scored at 15 points because the movement of the children continued for longer than was necessary to commit the offense. In making this argument, the prosecution analogizes to *People v Chelmicki*, 305 Mich App 58, 70; 850 NW2d 612 (2014). In that case, this Court concluded that a defendant could be scored under OV 8 for holding a victim captive in relation to the commission of unlawful imprisonment because unlawful imprisonment occurs "when the victim is held for even a moment" and the restraint on the victim for more than a moment thus constituted captivity for "longer than the time necessary to commit the offense of unlawful imprisonment." *Id.* However, in likening the present movement of the children to the captivity in *Chelmicki*, the prosecution ignores the distinction between captivity and asportation expressed in the plain language of MCL 777.38(1)(a), which indicates that OV 8 should be scored when a victim "was asported to another place of greater danger or to a situation of greater danger or was held captive *beyond the time necessary to commit the offense*." (Emphasis added). Under the last antecedent rule,[3] "beyond the time necessary to commit the offense" modifies only the phrase "held captive." See generally *Chelmicki*, 305 Mich App at 70. It follows that captivity beyond the time necessary to commit an offense should be scored under OV 8 as described in *Chelmicki*, but that whether defendant can be scored for asportation of the children is not necessarily dependant on whether the movement continued for a longer time than necessary to commit OWI-2nd involving an occupant under 16. Instead, as discussed, for purposes of defining asportation

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[2] In particular, the trial court scored OV 8 based on the conclusion that "every inch" the vehicle moved placed the children in "greater and greater" danger because there was a "drinking and driving person behind the wheel." The trial court further reasoned that the danger to the children escalated when the police tried to stop defendant and he initially refused to stop the vehicle. On appeal, neither party provides much analysis of the trial court's reasoning. We see no reason to discuss the trial court's rationale in further detail, but note merely that, like the parties, the trial court failed to acknowledge that any movement of the children was incidental to the underlying offense and that incidental asportation cannot be scored under OV 8.

[3] Under the 'last antecedent' rule, a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent unless something in the statute requires a different interpretation." *People v Brantley*, 296 Mich App 546, 557; 823 NW2d 290 (2012).

relative to OV 8, "the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense." *Spanke*, 254 Mich App at 647.

We likewise disagree with the prosecution's assertion that defendant's specific transportation of the children from the video store parking lot to the open road involved a "secreting" of the children as described in *Spanke* such that driving from the parking lot to the road may be perceived as "asportation" to a more dangerous location. As a factual matter, we see no indication in the record evidence that the children were less visible while defendant drove on the road as opposed to driving in the parking lot. And, in any event, the danger faced by the children arose from defendant's intoxication while operating a motor vehicle, regardless of where he operated that vehicle, and, in this context, their visibility or lack thereof did not place them at a greater risk of danger. Cf. *Spanke*, 254 Mich App at 648 (finding victim was asported to situation of greater danger when "secreting" of the victim enabled the commission of criminal sexual conduct). In other words, the danger to the children was an inherent part of defendant's conviction under MCL 257.625(7)(a)(ii), and this danger arose once defendant "put the vehicle in motion, or in a position posing a significant risk of causing a collision," and it continued, regardless of the location of the vehicle or the children's visibility, until defendant returned the vehicle "to a position posing no such risk." See *People v Wood*, 450 Mich 399, 405; 538 NW2d 351 (1995). Defendant's operation of the vehicle was, in short, one continuous event and any transportation of the children during this time was merely incidental to defendant's operation of a vehicle occupied by minors. Because any movement of the children in this case was incidental to defendant's commission of OWI-2nd involving an occupant under 16, the trial court clearly erred in scoring OV 8 on the basis of defendant's transportation of the children. Because the proper score of zero points for OV 8 would alter defendant's appropriate legislative sentencing guidelines, he is entitled to be resentenced. See *Francisco*, 474 Mich at 89 n 8.

Regarding OV 19, this variable accounts for interference with the administration of justice. MCL 777.49 directs trial courts to assess 10 points where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" MCL 777.49(c). Interference with the administration of justice "has broad application" and "encompasses more than just the actual judicial process," embracing "[c]onduct that occurs before criminal charges are filed, acts that constitute obstruction of justice, and acts that do not necessarily rise to the level of a chargeable offense[.]" *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013) (citation omitted). Because police officers are "an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order[,]" interference with a police officer's duties may constitute interference with the administration of justice. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). An assessment of 10 points for OV 19 is appropriate where a defendant fails to obey a police officer's order to freeze or pull over. See *People v Ratcliff*, 299 Mich App 625; 831 NW2d 474 (2013), vacated in part on other grounds *People v Ratcliff*, 495 Mich 876; 838 NW2d 687 (2013); *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003), overruled on other grounds by *People v McGraw*, 484 Mich 120, 133 n 42; 771 NW2d 655 (2009). "Fleeing from police can easily become 'interference with the administration of justice' particularly where . . . there was an effective command for the vehicle to stop, in the form of the police activating their lights and sirens." *Ratcliff*, 299 Mich App at 633.

In this case, a police officer observed defendant driving erratically, for example, weaving in his lane and crossing the center line. In light of this conduct, the officer gave defendant a lawful and clear signal to pull over, but defendant failed to do so and he thus interfered with the administration of justice. The trial court therefore properly assessed 10 points for OV 19 based on a preponderance of the evidence. Defendant has not shown that the trial court clearly erred, and thus is not entitled to resentencing as a result of the scoring of OV 19.

In sum, the scoring of OV 19 at 10 points was proper, but OV 8 should have been scored at zero points and, because the proper scoring of OV 8 alters defendant's recommended minimum sentencing range under the legislative guidelines, he is entitled to resentencing. See *Francisco*, 474 Mich at 89 n 8.

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMACENO RICHARD ABREGO,

Defendant-Appellant.

UNPUBLISHED
June 11, 2015

No. 320973
Ionia Circuit Court
LC No. 2013-015796-FH

Before: HOEKSTRA, P.J., and O'CONNELL and MURRAY, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

In his brief on appeal defendant argues that the trial court incorrectly scored both offense variables (OV) 8 and 19. Defendant specifically argues that OV 8 was improperly scored because the children who were in the car with defendant (their father) when he was arrested for Operating While Intoxicated Second-Offense (OWI 2d) were not asported by defendant to a place of greater danger. With respect to OV 19, defendant argues that the evidence does not support that he interfered with the lawful administration of justice. I concur in the majority's decision to reject the arguments defendant raised with respect to both of these offense variables.

Because these are the only issues raised by defendant, we should be affirming the trial court's sentences. However, the majority opinion takes the additional step of raising an issue that was not raised by defendant (and therefore not responded to by the prosecution), either here or in the trial court. Although there is no doubt we have the power to raise and decide issues on our own, see *People v McDade*, 301 Mich App 343, 359; 836 NW2d 266 (2013), in my view it is preferable not to raise and decide issues sua sponte, as we should not be in the business of litigating the cases for the parties—especially without their input. See, e.g., *People v Michielutti*, 266 Mich App 223, 230-231; 700 NW2d 418 (2005) (MURRAY, P.J., *concurring in part, dissenting in part*), reversed in part 474 Mich 889 (2005). But because the majority opinion has chosen to do so, I will respond to the merits of this newly raised issue.

The issue raised by the majority is that the trial court erred in scoring OV 8 on the basis that asporting the children was merely incidental to committing the underlying offense of OWI-2nd, relying upon *People v Spanke*, 254 Mich App 642; 658 NW2d 504 (2003). The portion of *Spanke* that the majority relies upon is dicta, and even if it was not, it is simply incorrect. In *Spanke* defendant argued that OV 8 should not have been scored 15 points because the victims were moved voluntarily and without force, and thus, according to defendant, they were not

asported. *Id.* at 645. The holding of the *Spanke* Court was that the term "asportation" as used in MCL 777.38(1)(a) "can be accomplished without the employment of force against the victim." *Id.* at 647. With that conclusion, the defendant's argument was addressed and the sentence was affirmed. Anything additional said by the Court on this issue-and what was additionally said is addressed below-was undoubtedly dicta. *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003).

In the course of its discussion of the meaning of asportation, the *Spanke* Court looked to how asportation had been judicially defined for use under the kidnapping statute, MCL 750.359, which was that asportation, i.e., the movement of the victim, could not be "incidental to committing the underlying offense," quoting *People v Green*, 228 Mich App 684, 696-697; 580 NW2d 444 (1998) (defining the judicially created element of asportation for use in the kidnapping statute). Since then, our Court on at least one occasion has said when addressing OV 8 that to "establish asportation, the movement of the victim must 'not be incidental to committing an underlying offense.' " *People v Dillard*, 303 Mich App 372, 380; 845 NW2d 518 (2013), quoting, of course, *Spanke*, 254 Mich App at 647. There are several legal problems with the "incidental to committing the underlying offense" dicta from *Spanke*.

First, as recognized by the dissenting opinion in the order case of *People v Thompson*, 488 Mich 888, 889; 788 NW2d 677 (2010) (YOUNG, J., joined by CORRIGAN, J., *dissenting*), there is no language within MCL 777.38 providing that asportation not be incidental to the underlying offense. Absent any such language from the Legislature limiting the provisions of OV 8, it should not be imported by judicial fiat. Second, in attempting to define asportation the *Spanke* Court looked to the case law definition of that term that was judicially imported into the kidnapping statute, which is rather peculiar given that (1) we typically look to the legal dictionary for the definition[1] to undefined terms that have a peculiar legal connotation, *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998), and (2) kidnapping is the one crime that *cannot* be scored under OV 8. To assume (as the *Spanke* Court did) that the Legislature silently adopted the case law definition of asportation used under a statute not even applicable or related to the one at issue is an assumption that I cannot make.

As a result, I would simply affirm the trial court's scoring of OV 8 and OV 19 because the arguments raised by defendant were without merit.

/s/ Christopher M. Murray

[1] *Black's Law Dictionary* (7th ed) defines "asportation" as "the act of carrying away or removing (property or a person)."

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAMACENO RICHARD ABREGO,

Defendant-Appellee.

/

Supreme Court No.

Court of Appeals No. 320973

Ionia County Circuit Court No. 2013H15796FH

NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL

By the filing of this notice, the People state that they have filed an application for leave to appeal in the above-captioned case with the Michigan Supreme Court.

Respectfully submitted,

RONALD J. SCHAFER (P56466)
Ionia County Prosecuting Attorney

By: _____

Adam M. Dreher (P79246)
Ionia County Assistant Prosecuting Attorney
Attorney for Plaintiff-Appellant
100 W. Main St.
Ionia, Michigan 48846

Dated: August 5, 2015

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAMACENO RICHARD ABREGO,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 320973

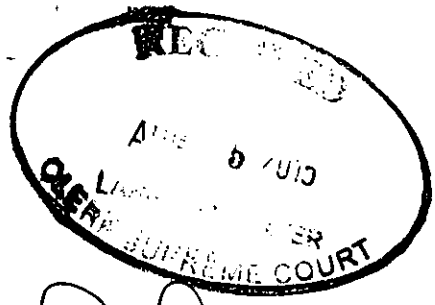
Lower Court No. 13H15796FH

PROOF OF SERVICE

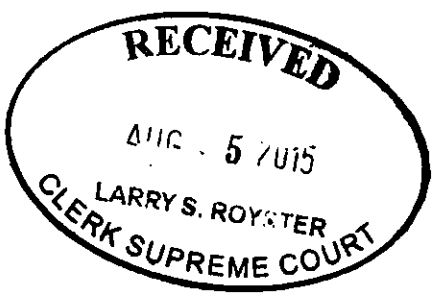
The undersigned certifies that on August 5, 2015, he served a copy of Notice of Filing Application for Leave to Appeal upon the Michigan Court of Appeals and the Ionia County Circuit Court by mailing same in an envelope bearing postage fully prepaid, plainly addressed as follows:

Michigan Court of Appeals
Hall of Justice
925 W. Ottawa St.
P.O. Box 30022
Lansing, MI 48909

Ionia County Circuit Court
100 W. Main St.
Ionia, MI 48846



Adam M. Dreher



STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

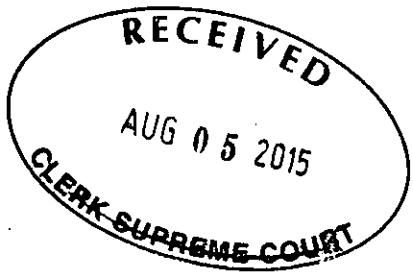
DAMACENO RICHARD ABREGO,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 320973

Ionia County Circuit Court No. 2013H15796FH



NOTICE OF HEARING

TO: Richard W. Glanda
Attorney for Defendant
6368 Peach Tree Court
Rochester, MI 48306

PLEASE TAKE NOTICE that the foregoing will be brought on for hearing before the Michigan Supreme Court in the City of Lansing, State of Michigan, on Tuesday, September 1, 2015.

Respectfully submitted,

RONALD J. SCHAFER (P56466)
Ionia County Prosecuting Attorney

By: _____

Adam M. Dreher (P79246)
Ionia County Assistant Prosecuting Attorney
Attorney for Plaintiff-Appellant
100 W. Main St.
Ionia, Michigan 48846

Dated: August 5, 2015

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAMACENO RICHARD ABREGO,

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 320973

Lower Court No. 13H15796FH

PROOF OF SERVICE

The undersigned certifies that on August 5, 2015, he served a copy of Plaintiff-Appellant's Application for Leave to Appeal and Notice of Hearing upon the within named defendant by mailing same in an envelope bearing postage fully prepaid, plainly addressed as follows:

Richard W. Glanda
6368 Peach Tree Ct
Rochester, MI 48306-3351

Adam M. Dreher