STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ALONZO CARTER

Defendant-Appellant.
_____/

Supreme Court No. 156606

Court of Appeals No. 331142

Lower Court No. 15-0831-01

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APPELLANT'S SUPPLEMENTAL BRIEF

APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **i**

JUDGMENT APPEALED FROM AND RELIEF SOUGHT ..... **ii**

STATEMENT OF QUESTION PRESENTED ..... **iv**

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS **1**

ARGUMENT

I. OV 12 SHOULD HAVE BEEN SCORED 0 POINTS, NOT 10, BECAUSE THERE WAS NO EVIDENCE OF ANY "CONTEMPORANEOUS FELONIOUS ACTS" THAT WERE NOT PART OF THE BODY OF EVIDENCE UPON WHICH THE CONVICTIONS WERE BASED. **5**

SUMMARY AND RELIEF **10**

ADDENDUM, MCL 777.42 ..... **11**

APPENDIX

Attachment 1: Supplemental Appendix (presentence report)

Attachment 2: People v Peno Washington

DWB*MSC Supp Brf.docx*28735
Alonzo Carter

TABLE OF AUTHORITIES

Cases

People v Avant, 235 Mich App 499 (1999) 8
People v Blevins, 314 Mich App 339 (2016) 8
People v Francisco, 474 Mich 82 (2006) 9
People v Harmon, 248 Mich App 522 (2001) 9
People v Hershey, 303 Mich App 330 (2013) 5
People v Joeseype Johnson, 407 Mich 196 (1978) 9
People v Light, 290 Mich App 717 (2010) ..... passim
People v Lilley, 43 Mich 521 (1880) 9
People v Morson, 471 Mich 248 (2004). 5
People v Nelson, 491 Mich 869 (2012) 5
People v Sanford, 402 Mich 460 (1978) 9
People v Wakeford, 418 Mich 95 (1983) 4

Statutes and Court Rules

MCL 6.429(C) 5
MCL 750.224f 1
MCL 750.227b 1
MCL 750.82 ..... 1, 8
MCL 750.84 ..... 1, 8
MCL 777.34(10) 5
MCL 777.42 ..... passim
MCL 777.65 9

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Following a trial in the Wayne Circuit Court at which Judge Vonda R. Evans presided, a jury convicted defendant-appellant Alonzo Carter of assault with intent to do great bodily harm less than murder (AWIGBH), felon in possession of a firearm, intentional discharge of a firearm at a dwelling or potentially occupied structure, felonious assault, and felony-firearm.[1] Judge Evans later sentenced him to serve a controlling prison term of five-to-ten years for AWIGBH and a consecutive five-year term for felony-firearm.

In the Court of Appeals, Mr. Carter argued that three sentencing guidelines variables were misscored. The Court agreed about two of the variables, but affirmed the scoring of the third. Because correcting just the two incorrect scores would not affect the applicable guidelines range, the Court did not order resentencing.

Mr. Carter now seeks this Court's leave to review the Court of Appeals' decision with respect to the variable it concluded was properly scored, Offense Variable 12. This Court should grant his application because the Court of Appeals' decision was plainly wrong, is in conflict with its own case law, and will sow confusion if allowed to stand uncorrected.

At issue is whether an act may be considered "contemporaneous" for purposes of OV 12 if it was part of the body of evidence used to convict of the sentencing offense. MCL 777.42.

Mr. Carter was found guilty of five offenses after shooting three times through the door of an apartment with the intent to injure a man named Lawrence Sewell, whom Mr. Carter thought to be on the other side of the door. Also in the apartment were a woman and her child. OV 12 was scored 10 points to reflect "two contemporaneous felonious criminal acts involving crimes against a person," MCL 777.42(1)(b), that "ha[ve] not resulted, and will not result, in . . .

[1] The jury acquitted Mr. Carter of assault with intent to murder (AWIM).

separate conviction[s]," MCL 777.42(2)(a)(ii). The Court of Appeals held that this score was justified because

> [t]he evidence indicates that the victims were shot at three times. Each time defendant pulled the trigger was a separate act, and only one was needed to convict him. Thus, the other two acts of pulling the trigger would be contemporaneous felonious criminal act[s], because defendant's actions would not result in separate convictions and the acts occurred within 24 hours of the sentencing offense.

Tr. 5-7-15 at 22.

Mr. Carter argues that where the prosecutor pointed to the three shots as proof of the extent of Mr. Carter's intent to harm Sewell, all three shots—whether viewed as three separate acts or one—were part of the body of evidence used to convict him of AWIGBH, and so none of them could be counted as separate, "contemporaneous" acts for purposes of OV 12. The Court's decision misapplies the established rule that "the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense." *People v Light*, 290 Mich App 717, 726 (2010).

STATEMENT OF QUESTION PRESENTED

I. SHOULD OV 12 SHOULD HAVE BEEN SCORED 0 POINTS, NOT 10, BECAUSE THERE WAS NO EVIDENCE OF ANY "CONTEMPORANEOUS FELONIOUS ACTS" THAT WERE NOT PART OF THE BODY OF EVIDENCE UPON WHICH THE CONVICTIONS WERE BASED?

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-appellant Alonzo Carter was convicted after a jury trial in Wayne Circuit Court, Judge Vonda R. Evans presiding, on charges of assault with intent to do great bodily harm (AWIGBH),[2] felonious assault,[3] felon-in-possession-of-a-firearm,[4] discharging a firearm at or in a dwelling, and felony-firearm.[5] Judge Evans sentenced Mr. Carter to serve a controlling prison term of five-to-ten years for AWIGBH and a consecutive five-year term for felony-firearm.[6]

Mr. Carter appealed by right to the Court of Appeals. Pointing to three claimed guidelines-scoring errors, he asked for resentencing. The Court acknowledged two of the errors, but denied the third claim and denied resentencing.

Mr. Carter then sought this Court's leave to appeal. In an order issued June 1, 2018, this Court ordered him to file a supplemental brief "addressing whether the defendant was properly assigned 10 points under Offense Variable 12 (OV 12), MCL 777.42. See *People v Light*, 290 Mich App 717 (2010)."

This is that brief.

The prosecution's trial evidence

The prosecution's case against Alonzo Carter was based primarily on the testimony of Lawrence Sewell, Mr. Carter's fourth-floor neighbor in a Detroit apartment building. 150a.

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[2] MCL 750.84.

[3] MCL 750.82.

[4] MCL 750.224f.

[5] MCL 750.227b.

[6] The other sentences were one-to-ten-years imprisonment for discharging in a dwelling, one-to-five years for felon-in-possession, and one-to-four years for felonious assault, all concurrent to the AWIGBH sentence and consecutive to the felony-firearm sentence. Judge Evans originally imposed a two-year sentence for felony firearm, but on June 12, 2015, vacated that sentence and instead imposed the mandatory five-year term for a second felony-firearm offense.

Sewell testified that he had invited a young woman and her young child to live with him in his apartment temporarily (155a). 147-49a. On January 11, 2015, sometime in the morning (171a), he was outside his apartment when Mr. Carter walked by, "cussin'," and said, "You people better stay outa' my business."[7] 149a. Sewell asked "Who you talking to?" The two men were alone in the hallway. Carter answered, "You and them." Sewell told him not to "walk up on" him, and Carter headed down the stairs. 149a, 151a.

That evening (186a), Sewell was in his apartment. The young woman, Dymond Washington, was there too. 167a. Her baby was lying on an inflatable mattress near the front entrance. 164a, 167a.

Sewell heard a banging on the door. This was unusual; visitors typically called first. 186a. Sewell called out, "Who is it?" A voice answered, "It's Mike, open the door." 156a.

Mike did maintenance work in the building, and Sewell had known him over twenty years. The voice in the hallway didn't sound like his. 156a.

Suspicious, Sewell looked through the door's peephole. He saw a man holding a gun and wearing a knit hat with a mask that he pulled down over his face as Sewell watched. 159-60a. Sewell recognized the man: Alonzo Carter. 157a.

Again, the man outside said to open the door. Sewell moved away from the door, his back to the wall. 162a. Saying, "Okay," he reached over and hit the door latch. 163a. The man outside immediately fired three gunshots through the door, about chest high. 163-64a. Two shots skipped off the floor and through a window. 164a. The third punctured the air mattress on which the child was sleeping. 164a, 167a.

Sewell heard the man run downstairs. 164a. He called 9-1-1. 165a.

[7] On cross-examination, Sewell claimed Mr. Carter ended his sentence with the words, "before I fuck one a y'all up." 179a.

Meanwhile, Dymond Wilson, who'd "holler[ed] 'Oh, my baby,'" when the shooting started, ran over to pick up her child. 167-68a.

The apartment manager (206a), Darlene Romero, was in her downstairs apartment with the door cracked when she heard gunshots. 209-10a. She opened the door more. She soon heard someone running down the stairs. 210a. She looked and saw it was a man wearing a ski mask that didn't cover his eyes. She recognized him as her tenant, Alonzo Carter. 211a. She asked him what happened. 212a. He said, "It sounds like someone was shootin'." She asked, "Do you know what floor it came from?" He answered, "I think it came from the second floor." 212a.

She watched as Mr. Carter continued outside, then paused there with his hands on his knees, as if out of breath. 212a.

Romero walked upstairs. She saw nothing on the second and third floors. 212a. On the fourth floor, she saw shell casings on the floor outside Sewell's apartment. 212-13a. There were three bullet holes in Sewell's door. 215a.

A detective who later came to Sewell's apartment noted the holes in the door as well as a deflated air mattress inside the apartment. 247-48a.

Neither Dymond Wilson nor the officer who collected evidence at Sewell's apartment testified. Neither Wilson nor the officer, who'd since retired, could be located. 251-52a.

The jury's verdict

The jury acquitted Mr. Carter of the most serious charge he faced, assault with intent to murder, but convicted him of the remaining charges. 307-08a.

The sentencing guidelines

The guidelines as prepared for sentencing yielded a range of 38-76 months. 326a. Trial counsel made no objection to any of the scoring decisions. Appellate counsel, though, filed a

motion to remand objecting to the 10-point score for Offense Variable (OV) 4 ("serious psychological injury"), the 10-point score for OV 12 ("contemporaneous felonious criminal acts"), and the 75-point score for Prior Record Variable (PRV) 1 ("prior high severity felony convictions"). 313-15a.

The Court of Appeals agreed that OV 4 and PRV 1 were misscored. 10-11a. The Court concluded, though, that OV 12 was correctly scored. It gave the following reasons:

> The evidence indicates that the victims were shot at three times. Each time defendant pulled the trigger was a separate act, and only one was needed to convict him. Thus, the other two acts of pulling the trigger would be contemporaneous felonious criminal act[s], because defendant's actions would not result in separate convictions and the acts occurred within 24 hours of the sentencing offense. See *People v Wakeford*, 418 Mich 95, 111-112; 341 NW2d 68 (1983) (indicating that here defendant's action would only support one conviction of assault with intent to murder because only one person was assaulted). Accordingly, the trial court did not err when it assessed 10 points for two contemporaneous felonious criminal acts under OV 12.

Because corrected scores for OV 4 and PRV 1 would not by themselves change the guidelines range, the Court did not order resentencing.[8] 11a.

[8] An additional correction to OV 12 would reduce the guidelines range to 34-67 months.

I. OV 12 SHOULD HAVE BEEN SCORED 0 POINTS, NOT 10, BECAUSE THERE WAS NO EVIDENCE OF ANY "CONTEMPORANEOUS FELONIOUS ACTS" THAT WERE NOT PART OF THE BODY OF EVIDENCE UPON WHICH THE CONVICTIONS WERE BASED.

Introduction and issue preservation

The issue was preserved by inclusion in Mr. Carter's proper motion to remand. See 313-315a; see also MCL 777.34(10); MCL 6.429(C); *People v Hershey*, 303 Mich App 330, 346 (2013).

Standard of review

The proper interpretation and application of the statutory sentencing guidelines are legal questions that Michigan appellate courts review de novo. *People v Morson*, 471 Mich 248, 255 (2004). Scoring decisions, which must be supported by a preponderance of evidence, are otherwise reviewed for clear error. *People v Nelson*, 491 Mich 869 (2012).

Argument

OV 12 assesses points for the "[n]umber of contemporaneous felonious criminal acts" that "ha[ve] not and will not result in a separate conviction." MCL 777.42(1) & (2)(a)(ii). A 10-point score, as was assessed here, is warranted when the defendant has either committed two such acts involving crimes against a person or three or more such acts involving other crimes. MCL 777.42(1)(b)&(c). A 5-point score is warranted for a single contemporaneous act involving a crime against a person, or for two contemporaneous acts involving other crimes. MCL 777.42(1)(d)&(e). A 1-point score is warranted for one contemporaneous act involving other crimes. MCL 777.42(1)(f).

The Court of Appeals correctly recognized that " 'when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense.' " 10a (quoting *People v Light*, 290 Mich App 717, 723 [2012]).

When interpreting a statute, a reviewing court's "primary goal is to ascertain and give effect to the Legislature's intent." *People v Sharpe*, ___ Mich ___, ___ (2018) (Docket No. 155747). If the statute's language is clear and unambiguous, the court assumes the Legislature intended its plain meaning and enforces the statute as written. *Id*.

MCL 777.42, as written, clearly and unambiguously directs a sentencing court to score OV 12 on the basis of acts separate from the sentencing offense. By the statute's plain terms, a felonious criminal act is "contemporaneous" (and thus qualifies for scoring under OV 12) if "the act occurred within 24 hours of the sentencing offense" and "will not result in a separate conviction." MCL 777.42(2)(a)(i)&(ii).[9] That the Legislature distinguished between the "act" and the "sentencing offense" signified its intent to "draw a distinction between the two words." *Light*, 290 Mich App at 723. The language of OVs 11[10] and 13[11] lend further support to this reading. *Id*. And this Court has itself recognized the Legislature's "unambiguous" intent that, with OV 12, "behavior outside the offense being scored is to be taken into account." *People v Sargent*, 481 Mich 346, 349 (2008) (quoted approvingly by *People v McGraw*, 484 Mich 120, 125 [2009], and *Light*, 290 Mich App at 722). *Light* thus was correct to observe that with OV 12, "the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense." *Light*, 290 Mich App at 726.

Though the Court of Appeals here identified the correct rule of decision, it misapplied it to uphold a scoring decision based on behavior the prosecution used to "establish the sentencing

[9] The statute in its entirety appears in an addendum to this brief.

[10] MCL 777.41(2)(a) instructs sentencing courts to score sexual penetrations "arising out of the sentencing offense," and subd. (2)(b) adds that penetrations "extending beyond the sentencing offense" may be scored in offense variables 12 and 13. See *Light*, 290 Mich App at 723.

[11] MCL 777.43 instructs sentencing courts to score for patterns of "felonious criminal activity" and distinguishes between "activity" and "sentencing offense." See *Light*, 290 Mich App at 723.

offense." *Light*, 290 Mich App at 723. The Court wrongly concluded that, by firing three shots through the door at Sewell, Mr. Carter committed two contemporaneous crimes against a person not accounted for by the conviction offenses. The Court reasoned that only one of the gunshots was necessary to make Mr. Carter guilty of assaulting complainant Lawrence Sewell:

> The evidence indicates that the victims were shot at three times. Each time defendant pulled the trigger was a separate act, and only one was needed to convict him. Thus, the other two acts of pulling the trigger would be contemporaneous felonious criminal act[s], because defendant's actions would not result in separate convictions and the acts occurred within 24 hours of the sentencing offense.

11a.

This was obvious error. While one gunshot might hypothetically have been enough to convict Mr. Carter of AWIGBH, in fact he was charged with and convicted for *all three*. As the prosecution's trial arguments made clear, the body of evidence against Mr. Carter for the assault on trial included all three gunshots. The prosecutor pointed to the number of gunshots as reason to conclude that Mr. Carter intended to physically injure Mr. Sewell, that he had the ability to injure him, and that he intended to kill him:

> So, for the first count of assault with intent to murder, I have to show you, first, that the defendant tried to physically injure another person.
>
> I submit to you that that is obvious. If you ***shoot three times***, through a door, chest level, right after the latch on the door has clicked, you are trying to ph[y]sically injure another person.
>
> Second, that when the defendant committed the assault, he had the ability to cause an injury, or at least believed he had the ability to cause an injury.
>
> ***Three shots*** to the chest is the ability to cause an injury to somebody. . . .
>
> And then, third, that the defendant intended to kill the person he assaulted.
>
> Again, as I have already pointed out to you, the defendant waited. He's banging on the door. He says: Come to the door. And he waits, and you heard a minute or so, banging on the door. Come

> to the door, come to the door. He waits until he hears the latch on the door click. He waits until he knows someone's at that door. The latch clicks and then: Boom, boom, boom, ***three shots***, chest level, through that door. What else is he trying to do other than kill somebody, shooting them at chest level?
>
> ****
>
> Now, the second count, it's a lesser. It's called assault with intent to do great bodily harm less than murder. You can consider this if for some reason you don't think his intent was murder. It's basically the same charge, other than you think he intended to commit great bodily harm less than murder instead of murder. But, again, as I submitted to you, ***three shots***, chest level, through a door. You're trying to kill somebody. This count two is something you can consider, instead, if you think his intent was to commit great bodily harm less than murder.

264-66a (emphasis added).

In other words, whether viewed as one act or three, all three gunshots were part of the body of evidence against Mr. Carter and all three contributed to his conviction. They were each part of the sentencing offense. None of the gunshots were unaccounted for. None failed to "result in a . . . conviction." MCL 777.42(2)(a)(ii); see also *Light*, 290 Mich App 71 at 726. All were used to "establish the sentencing offense.[12] *Light*, 290 Mich App at 723.

Nor did Mr. Carter commit any other felonious criminal act for which he was not convicted. Though he was acquitted of AWIM, that charge was based on the same "criminal act" that supported his convictions for AWIGBH, felonious assault, and discharging a firearm in a building. Thus, it could not count toward OV 12. See *Light*, 290 Mich App at 726.

The only other conceivable behavior that (i) might be characterized as criminal and (ii) did not result in a separate conviction was Mr. Carter's threat to Sewell earlier in the day ("You

[12] Moreover, the prosecution did not contend or provide any evidence to show that Mr. Carter intended to harm anyone other than Mr. Sewell. See MCL 750.84; *People v Blevins*, 314 Mich App 339, 357 (2016) (AWIGBH requires proof of intent to do great bodily harm), and MCL 750.82; *People v Avant*, 235 Mich App 499, 505 (1999) (felonious assault requires proof of intent to injure or place victim in reasonable apprehension of immediate battery).

people better stay out of my business . . . before I fuck one a y'all up"). A threat can sometimes amount to an assault, if it is made with the intent to injure or to place the victim in reasonable apprehension of an *immediate* battery. An assault "is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Joeseype Johnson*, 407 Mich 196, 210 (1978) (quoting *People v Sanford*, 402 Mich 460, 479 [1978] [emphasis added]). But a conditional threat, like Mr. Carter's, does not arouse fear of an immediate battery, and so does not amount to an assault. *See People v Lilley*, 43 Mich 521, 525-26 (1880) ("[t]hreats are not sufficient; there must be proof of violence actually offered, and this within such a distance as that harm might ensue if the party was not prevented"). And in any event, a simple assault is a misdemeanor, and therefore not a "*felonious* criminal act." MCL 777.42 (emphasis added).

The proper score was 0 points, not 10.

Finally, the error requires resentencing. Resentencing is required when guidelines-scoring errors affect the sentencing range. *People v Francisco*, 474 Mich 82, 91-92 (2006). Correcting OV 12 would change the guidelines range. Without the correction, the OV total is 50 points, and the OV Level is V. 11a. Reducing the OV total by 10 points would reduce the OV Level to IV, and change the sentence range from 38-76 months to 34-67 months. *See* MCL 777.65. Resentencing is therefore required.[13]

[13] The Court of Appeals agreed that two other guidelines-scoring errors were made, but because correcting those errors would not change the guidelines range the Court ordered no relief. This was error, too. The Court should at least have remanded for ministerial correction of the Sentencing Information Report so that the inaccurate scores did not improperly affect Mr. Carter's chances for parole. See, eg, *People v Washington*, unpublished opinion per curiam of the Court of Appeals issued June 19, 2012 (Docket No. 300630) (attached); cf *People v Harmon*, 248 Mich App 522, 534 (2001) (remanding "for the ministerial task of correcting the presentence investigation report").

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave to appeal or appropriate peremptory relief.

Respectfully submitted,

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