

STATE OF MICHIGAN  
IN THE SUPREME COURT

\*Pros

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

v

Supreme Court  
No.

STEVEN MICHAEL CARTER

Defendant-Appellee.

Court of Appeals No. 270195

Third Circuit Court No. 05-011783

Ok  
Cpa 7-3-07  
Wayne CR7 v. Mossey Jr

134687

APP

9/18

31996

APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

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## JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The People apply for leave to appeal from that part of the July 3, 2007, opinion and order of the Court of Appeals which remands for the trial court to consider Defendant's ability to pay the assessed fees for appointed counsel and for resentencing. The Court of Appeals did not retain jurisdiction.<sup>1</sup>

The Court of Appeals' decision regarding attorney fees ordered as a condition of probation presents a legal issue of significance to the public and to the state's jurisprudence. It perpetuates the erroneous rule generated by *People v Dunbar*<sup>2</sup> — that because the Constitution requires an inquiry into a defendant's ability to pay before sanctions are imposed, the same inquiry is required by the Constitution when there is no evidence that the state has collected any money, or that the defendant faces any sanctions for a failure to pay. It perpetuates not only needless additional expenditure of judicial time and resources, but needless additional cost and risk to public safety as inmates are transported back to court for the trial court to comply with orders of remand or resentencing.<sup>3</sup> And, it ignores the strictures of the plain error rule where, as here, Defendant forfeited the claim by his failure to timely object.

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<sup>1</sup> Appendix A.

<sup>2</sup> *People v Dunbar*, 264 Mich App 240, 254-255 (2004)

<sup>3</sup> Defendant has been returned to the Department of Corrections to serve the sentence for which he had been paroled when he committed the instant offense. See <http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=198018>

The Court of Appeals decision requiring resentencing for Defendant's Criminal Sexual Conduct — Fourth Degree,<sup>4</sup> (CSC 4) conviction is also one of legal significance, as it ignores both the plain error rule and the statutory prohibition against vacating a valid sentence. Defendant's sentence of probation, with the first twelve months served in jail, did not exceed the Sentencing Guidelines, and error of law made by the trial court did not prejudice Defendant, and he will receive no benefit from resentencing.

It is undisputed that the legislative guidelines apply and that Defendant's scoring placed him at PRV level D and OV level 1 on Sentence Guidelines grid G.<sup>5</sup> If Defendant had not been a Habitual Offender – Second Offense, the guidelines range would have been 0 – 11 months. But Defendant's Habitual Offender status was not disputed.<sup>6</sup> He *is* a Habitual Offender – Second Offense,<sup>7</sup> and the minimum sentence range is, as a matter of law, 0 to 13 months. As a matter of law, his sentence of probation, with the first twelve months in jail, was within the Guidelines, and the trial court was not required to articulate substantial and compelling reasons for the sentence.

The trial court plainly intended to sentence Defendant to the *longest* minimum term possible within the applicable statutory Guidelines. Its mistake of law— that the habitual offender enhancement could not apply to CSC 4 — did not cause the trial court to impose an intermediate sanction jail term longer than the law allowed.

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<sup>4</sup> MCL 750.520e(1)(b)

<sup>5</sup> See Grid G, attached as Appendix B.

<sup>6</sup> The trial court was aware that Defendant was on parole status at the time he committed the instant offense. 4/27/06, 14-16

<sup>7</sup> MCL 769.10; See Information and Habitual Offender notice (Appendix C)

The 12-month jail term was still within the appropriately scored Guidelines. A sentence within the correctly scored Guidelines is valid, and a valid sentence may not be vacated.<sup>8</sup> The Court of Appeals clearly erred in ordering resentencing.

The People request that this Court grant leave to appeal and determine (1) that *Dunbar* incorrectly concluded that before ordering reimbursement, a trial court must consider a defendant's ability to pay and the hardships he would endure if repayment is required, and (2) that Defendant is not entitled to resentencing because his sentence was within the appropriately scored guidelines.

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<sup>8</sup> *People v Babcock*, 469 Mich 247, 261 (2003); *People v Francisco*, 474 Mich 82, 91 (2006); MCL 769.34(10)

**STATEMENT OF QUESTIONS PRESENTED**

- I. **The statutes authorizing reimbursement for costs of appointed counsel do not require that the court make findings regarding a defendant's ability to pay. Here, Defendant neither timely objected to the order of reimbursement nor claimed a future inability to pay. Did the Court of Appeals clearly err in remanding for a determination of Defendant's ability to pay?**

The trial court was not presented with this issue.

The Court of Appeals said: No.

Defendant says: No.

The People say: Yes.

- II. **A sentence within the appropriately scored guidelines must be affirmed. Defendant's sentence was within the Habitual Offender guidelines and Defendant challenges neither the scoring nor his habitual offender status. Did the Court of Appeals clearly err in ruling that the sentence exceeded the guidelines?**

The trial court was not presented with this issue.

The Court of Appeals said: No.

Defendant says: No.

The People say: Yes.

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant was charged in this case (05-11783) with Criminal Sexual Conduct — Fourth Degree,<sup>9</sup> (CSC 4) arising from a November 7, 2005 offense in which he forcefully grabbed the buttocks of LaShaunda Randall-Dowery, a stranger to him, as she was leaving a Church's Chicken.<sup>10</sup> Defendant was convicted following a jury trial.

Scoring for the Prior Record Variables (PRV) and Offense Variables (OV) was not disputed at sentencing or on appeal. Defendant's score placed him in PRV level D and OV level 1 on Sentence Guidelines grid G.<sup>11</sup> If Defendant had not been a habitual offender, the Guidelines range would have been 0 – 11 months. As a Habitual Offender – Second Offense,<sup>12</sup> Defendant's minimum sentence range is 0 to 13 months.

Intermediate sanctions<sup>13</sup> were applicable to the minimum sentence ranges for the first offender sub-cell (0 – 11 months) and to the Habitual Offender – Second Offense sub-cell (0 – 13 months). The trial court intended to sentence Defendant to the longest term of incarceration possible (initially proposing a term of 16 months), but recognized that a jail term could be no longer than 12 months.<sup>14</sup>

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<sup>9</sup> MCL 750.520e(1)(b)

<sup>10</sup> 4/5/06, 96-100

<sup>11</sup> Appendix B

<sup>12</sup> MCL 769.10; See Information and Habitual Offender notice (Appendix C)

<sup>13</sup> MCL 769.31(b)

<sup>14</sup> 4/27/06, 12-14

The trial court mistakenly believed that a sentence for CSC 4 could not be enhanced by the habitual offender statutes,<sup>15</sup> and imposed a sentence of two years probation, with the first 12 months to be served in jail.<sup>16</sup> The Order of Probation directs Defendant to pay \$50.00 in Crime Victim Assessment (CVA) fees, \$600.00 in costs, \$45.00 in “State Minimum Costs,” and \$730.00 in expenses incurred in providing legal assistance to Defendant.

Defendant did not assert an inability to pay when these fines, costs, and fees were imposed at sentence. The Judgment of Sentence itself does not contain these provisions for payment, but refers to the separate Order of Probation. Defendant signed the probation order and agreed to comply with its terms.<sup>17</sup>

Defendant was held in jail between his arrest on November 8, 2005, and his sentence on April 27, 2006. At sentencing, Defendant said he might have been “discharged” from his previous sentence and parole before or following his arrest, but the Michigan Department of Corrections (MDOC) indicated that he was not, and that Defendant remained under MDOC’s jurisdiction.<sup>18</sup> To date, Defendant has served his jail term and has been returned to the MDOC to continue serving the sentence for which he had been paroled when he committed the instant offense.<sup>19</sup>

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<sup>15</sup> 4/27/06, 12

<sup>16</sup> 4/27/06, 14-16

<sup>17</sup> Appendix B

<sup>18</sup> 4/27/06, 14-15

<sup>19</sup> <http://www.state.mi.us/mdoc/asp/otis2profile.asp?mdocNumber=198018>

Defendant appealed his conviction and sentence, raising several trial and sentence issues. On July 3, 2007, the Court of Appeals rejected all Defendant's claims save for two relating to sentence. Regarding Defendant's claim that he was improperly required to reimburse the cost of appointed counsel, the Court of Appeals concluded that the matter should be remanded for the trial court "to consider these assessments in light of defendant's current and future financial circumstances."<sup>20</sup>

The Court of Appeals also agreed with Defendant's claim that his sentence exceeded the appropriate guidelines range, and because the trial court did not articulate reasons for departing from that range, the Court remanded for resentencing.<sup>21</sup> The People apply for leave to appeal from these provisions of the opinion and order of the Court of Appeals.

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<sup>20</sup> Appendix A, pp 6-7.

<sup>21</sup> Appendix A, p 7.

## ARGUMENT

### I

**THE STATUTES AUTHORIZING REIMBURSEMENT FOR COSTS OF APPOINTED COUNSEL DO NOT REQUIRE THAT THE COURT MAKE FINDINGS REGARDING A DEFENDANT'S ABILITY TO PAY. HERE, DEFENDANT NEITHER TIMELY OBJECTED TO THE ORDER OF REIMBURSEMENT NOR CLAIMED A FUTURE INABILITY TO PAY. THE COURT OF APPEALS CLEARLY ERRED IN REMANDING FOR A DETERMINATION OF DEFENDANT'S ABILITY TO PAY.**

#### *Standard of Review*

The plain error standard of review applies to Defendant's unpreserved challenge to the order for reimbursement of attorney fees.<sup>22</sup>

#### *Discussion*

Defendant failed to timely object to the order requiring reimbursement of the cost of appointed counsel, but instead signed the order of probation that provided for that assessment. The trial court's order directing Defendant to pay the cost of appointed counsel did not constitute plain error affecting his substantial rights, and the Court of Appeals clearly erred in remanding the matter to the trial court to consider Defendant's ability to pay that cost.

The Order of Probation directed Defendant to pay \$730.00 in expenses incurred in providing legal assistance to Defendant.<sup>23</sup> Several statutes provide authority for the trial court's order, and none of those statutes require that the trial court consider a defendant's ability to pay when determining whether a defendant has incurred the obligation.

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<sup>22</sup> *People v Carines*, 460 Mich 750, 763, 774 (1999)

<sup>23</sup> The probation order assessed other costs, which the Court of Appeals affirmed.

MCL 771.3(2) and (5) explicitly permit a trial court to assess the cost of providing appointed counsel as a condition of probation. In addition, the assessment was authorized by MCL 769.34, which governs sentences for all enumerated felonies committed on or after January 1, 1999.<sup>24</sup> CSC 4 is such an enumerated felony,<sup>25</sup> and this offense was committed November 7, 2005. MCL 769.34(6) provides: “As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments.” The County’s payment to appointed counsel is a “cost,” as defined<sup>26</sup> by the Revised Judicature Act of 1961, which also permits waiver of penalties upon request of the defendant.<sup>27</sup> And, MCL 769.1k(1)(b)(iii) explicitly provides that the trial court may assess the expenses of providing appointed counsel. The trial court’s assessments were firmly grounded in statutory authority.

In *People v Music*,<sup>28</sup> and *People v Hill*,<sup>29</sup> this Court held that, absent objection, a trial court need not inquire into a defendant’s ability to pay before imposing costs and restitution as conditions of probation. This Court reached that conclusion even though the statute then in effect provided that the court could not require repayment unless the probationer was or would be able to pay during the

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<sup>24</sup>MCL 769.34(1).

<sup>25</sup>MCL 777.16y.

<sup>26</sup> MCL 600.4801(a)

<sup>27</sup> MCL 600.4803(1)

<sup>28</sup> *People v Music*, 428 Mich 356 (1987)

<sup>29</sup> *People v Hill*, 430 Mich 898 (1988)

term of probation.<sup>30</sup> In *People v Grant*,<sup>31</sup> this Court reached the same conclusion when considering an order of restitution under the version of the crime victim's rights act then in effect, which similarly required consideration of a defendant's ability to pay.

As this Court agreed in *Music*, the probation statute distinguishes between *imposition* and *payment* of costs. A probationer may not be punished for failing to pay what he cannot afford, but sufficient protection is afforded by allowing a defendant who feels unable to pay, when required to do so, to come before the trial court to seek relief just as the probation department may do if the defendant does not pay when required to do so,<sup>32</sup> and the probation statute itself provides this procedural protection.<sup>33</sup> There is no reason to require that reimbursement of attorney fees be treated any differently than payment of restitution and costs.

In *People v Nowicki*,<sup>34</sup> the Court of Appeals held (in the absence of specific statutory authorization for reimbursement) that a trial court had the authority to require a defendant to reimburse a county for the cost of appointed counsel by means of an order that is not part of the sentence. *Nowicki* did not address the effect of a defendant's ability or inability to pay.

In *People v Dunbar*,<sup>35</sup> the Court of Appeals concluded that before ordering reimbursement, a trial court must consider a defendant's ability to pay and the hardships he would endure if

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<sup>30</sup> *Music*, supra, 358

<sup>31</sup> *People v Grant*, 455 Mich 221, 224, n 4 (1997)

<sup>32</sup> *Music*, supra, 360-361

<sup>33</sup> MCL 771.3(6)(b) and (8)

<sup>34</sup> *People v Nowicki*, 213 Mich App 383 (1995)

<sup>35</sup> *People v Dunbar*, 264 Mich App 240 (2004)

repayment is required.<sup>36</sup> *Dunbar* determined that the trial court must provide some indication that it considered ability to pay but need not make a specific finding on the record unless a defendant objects.<sup>37</sup> Further, although the Court remanded for reconsideration in *Dunbar*, it acknowledged that “in most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment.”<sup>38</sup>

Except insofar as it acknowledges that challenges will be premature when a defendant has not faced sanctions for failing to pay, the *Dunbar* analysis was incorrect in 2004, and is untenable under the probation statute,<sup>39</sup> and current versions of 769.34(6) and MCL 769.1k(1)(b)(iii). Although this Court has issued orders that appear consistent with *Dunbar*, it has not yet addressed the constitutional underpinnings of *Dunbar* or the effect of the statutory changes. See, e.g., *People v DeJesus*, 477 Mich 996, 997 (2007); *People v Arnone*, 478 Mich 908 (2007).

Neither the reimbursement statutes nor constitutional provisions<sup>40</sup> require consideration of a defendant’s ability to pay before a defendant actually faces sanctions for failing to pay. The case relied on by *Dunbar* for that proposition, *Alexander v Johnson*,<sup>41</sup> mistakenly concluded that United

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

<sup>37</sup> *Id.*, 254-255

<sup>38</sup> *Id.*, 256

<sup>39</sup> MCL 771.3(2) and (5)

<sup>40</sup> U.S. Const., Am. VI; Const. 1963, art. 1, § 20; *Dunbar*, *supra*, 253 referred to due process rights.

<sup>41</sup> *Alexander v Johnson*, 742 F2d 117 (CA 4, 1984)

States Supreme Court precedent dictates such an inquiry. The mistake arises from an expansive reading of *Fuller v Oregon*,<sup>42</sup> in which the Supreme Court considered a challenge to an Oregon recoupment statute. The Oregon statute permitted a court to order a convicted defendant to repay costs of appointed counsel if he either was able to pay the expenses or would be able to pay them in the future. The statute also allowed a defendant to petition the court for remission of the costs if payment would impose manifest hardship on him or his family. The Court rejected the constitutional challenge, reasoning that:

- The Oregon statute did not contain the infirmity held to violate the Equal Protection Clause in *James v Strange*<sup>43</sup> because defendants retained all the exemptions accorded other judgment debtors.<sup>44</sup>
- The statute permissibly treated defendants who had been convicted differently from those who had not.<sup>45</sup>
- The statute did not infringe on defendant's right to counsel because it merely provided that a convicted person who later became able to pay his counsel might be required to do so.<sup>46</sup>

In reaching the third conclusion, the Court explained that the reimbursement statute in no way affected a defendant's eligibility to obtain counsel and was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those

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<sup>42</sup> *Fuller v Oregon*, 417 US 40, 94 S Ct 2116, 40 L Ed 2d 642 (1974)

<sup>43</sup> *James v Strange*, 407 US 128, 92 S Ct 2027, 32 L Ed 2d 600 (1972)

<sup>44</sup> *Fuller*, supra, 46-48

<sup>45</sup> *Id.*, 48-50

<sup>46</sup> *Id.*, 54

who actually become able to meet it . . .”<sup>47</sup> *Fuller*, however, did not hold that prior consideration of ability to pay is constitutionally required.<sup>48</sup> It does not purport to prescribe minimum standards that must be met. While some courts have suggested otherwise,<sup>49</sup> better reasoned opinions have concluded that the Constitution does not require inquiry into ability to pay at the time of sentencing.<sup>50</sup>

The relevant time for that inquiry is instead at the point of collection and when sanctions are sought for nonpayment, because the right protected is the right to not be punished merely because one is impoverished.<sup>51</sup> Absent a timely assertion of an inability to pay, a trial court is not required to inquire into a defendant’s ability to pay before imposing fines and costs.<sup>52</sup> And, “a defendant who does not timely challenge the amount of costs waives the right on appeal to challenge an order for costs that appears on its face to be a reasonable approximation of the costs permitted by MCL 771.3(4) [now renumbered as (5)].”<sup>53</sup>

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<sup>47</sup> *Id.*, 53-54

<sup>48</sup> Indeed, in *Strange*, *supra*, 133, the Court noted that state recoupment laws differed significantly in their particulars and observed that “any broadside pronouncement on their general validity would be inappropriate.”

<sup>49</sup> E.g. *Alexander*, *supra*; see *Alaska v Albert*, 899 P2d 103, 109-110 (1995) (cases collected).

<sup>50</sup> *Albert*, *supra*, 109; *Washington v Blank*, 131 Wash2d 230, 241-242, 930 P2d 1213 (1997). The *Blank* Court noted that its conclusion was also supported by common sense because “it is nearly impossible to predict ability to pay over a period of 10 years or longer.” *Id.*, 242.

<sup>51</sup> *Blank*, *supra*, 242. A court cannot revoke probation for failure to pay costs, absent evidence that the defendant is responsible for the failure or that alternative forms of punishment are inadequate, *Bearden v Georgia*, 461 US 660, 672, 103 S Ct 2064, 76 L Ed 2d 221 (1983), and the State cannot increase confinement beyond the maximum term fixed by statute because of a defendant’s failure to satisfy the monetary provisions of his sentence. *Williams v Illinois*, 399 US 235, 240-241, 90 S Ct 2018, 26 L Ed 2d 586 (1970).

<sup>52</sup> *Music*, *supra*, 361-362; *People v Grant*, *supra* (the same rule applies to imposition of restitution).

<sup>53</sup> *Music*, *supra*, 363

Defendant argued, and the Court of Appeals agreed, that *Dunbar* requires a showing that the trial court considered Defendant's present or likely future ability to pay before requiring reimbursement of the money expended for his legal representation, although the showing need not be more than the trial court's statement that it had "reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay."<sup>54</sup>

Here, the record does not disclose any statement by the trial court particular to the financial and employment sections of the PSIR, although it is evident that the trial court had reviewed the PSIR as a whole.<sup>55</sup>

*Dunbar* provides that where the record is silent as to whether a trial court considered a defendant's ability to pay, the defect can be remedied by remand to the trial court not for an evidentiary hearing, but for the trial court to state whether it did consider the defendant's ability to pay, or to make the determination anew on the record.<sup>56</sup>

However, remand is not required here. It does not appear that Defendant has been required to commence payment, and neither the Judgment of Sentence nor the Order of Probation indicates a date that payments shall commence.<sup>57</sup> Because Defendant has not been required to commence

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<sup>54</sup> *Dunbar*, supra, 254-255

<sup>55</sup> 4/27/06, 4, 6, 12, 15

<sup>56</sup> *Dunbar*, supra, 255

<sup>57</sup> *Dunbar*, supra, 256 n 15 states that repayment of attorney fees may not be imposed as part of the sentence because no statutory scheme authorizes this assessment. Regardless of whether the conclusion reached was analytically correct in the context of the prison sentence imposed in *Dunbar*, it is inapplicable in the context of a condition of probation, since the probation statutes permit and address repayment of attorney fees. MCL 771.3(5), et seq.

payment, his challenge to the order to reimburse attorney's fees is premature, and remand is not required.<sup>58</sup> If and when he is ordered to commence payments, Defendant may assert an inability to pay should probation revocation be sought for his failure to submit payment.<sup>59</sup>

Given the holdings in *Music*, *Hill*, and *Grant*, it is anomalous to hold that a trial court must indicate that it has considered the defendant's ability to pay when ordering reimbursement of attorney fees under a statute that does not expressly require consideration of that factor. It wastes resources and needlessly imposes public safety risks<sup>60</sup> to remand case after case to the trial court for the judge to determine or predict a defendant's ability to pay where no money has yet been collected and no sanction sought for non-payment.

In this case, Defendant did not timely object to the imposition of costs at the sentencing hearing, but instead signed the probation order, which set forth the assessments to which he later objected. Defendant received what the Sixth Amendment guaranteed when he was provided counsel in the trial court. The Sixth Amendment does not include a right to be forever exempt from an obligation to repay the State for the costs of providing that representation,<sup>61</sup> nor that trial courts must either predict the future or forfeit the right of the funding unit to recover the cost of providing legal representation. Defendant does not claim that he has actually paid anything, or that he has suffered any sanction for not paying. Even if the trial court had determined that he will likely be able to pay

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<sup>58</sup> *Dunbar*, supra, 256

<sup>59</sup> MCL 771.3(8); *Bearden v Georgia*, supra.

<sup>60</sup> Many cases, including this case, involve defendants who are currently prison inmates requiring transport to the trial court for sentencing issues.

<sup>61</sup> See generally *Fuller*, supra at 52-53.

in the future, Defendant retains his right to assert an inability to pay, should that be the case, if sanctions are sought for his failure to submit payment.

Defendant did not timely object to the order of reimbursement and has failed to establish that his unpreserved claim constitutes plain error affecting his substantial rights.<sup>62</sup> This Court should overrule *Dunbar* and reverse the decision of the Court of Appeals in this case. Defendant's sentences should be affirmed.

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<sup>62</sup> *Carines, supra*

## II

**A SENTENCE WITHIN THE APPROPRIATELY SCORED GUIDELINES MUST BE AFFIRMED. DEFENDANT’S SENTENCE WAS WITHIN THE HABITUAL OFFENDER GUIDELINES AND DEFENDANT CHALLENGES NEITHER THE SCORING NOR HIS HABITUAL OFFENDER STATUS. THE COURT OF APPEALS CLEARLY ERRED IN RULING THAT THE SENTENCE EXCEEDED THE GUIDELINES.**

### *Standard of Review*

Because Defendant did not claim at sentencing that his sentence was outside the guidelines range, this claim on appeal is reviewed for plain error affecting Defendant’s substantial rights.<sup>63</sup> Whether CSC 4 is a felony for purposes of habitual offender sentence enhancement is a question of law that this Court reviews de novo.<sup>64</sup>

### *Discussion*

As a matter of law, Defendant’s sentence of two years probation, with the first twelve months in jail,<sup>65</sup> was within the appropriately scored guidelines. The Court of Appeals clearly erred in ordering resentencing.

The legislative Sentencing Guidelines apply to Defendant’s sentence and the scoring for the Prior Record Variables (PRV) and Offense Variables (OV) is not disputed. Defendant’s score placed him in PRV level D and OV level 1 on Sentence Guidelines grid G. If Defendant had not been a Habitual Offender – Second Offense, the Guidelines range would have been 0 – 11 months. But Defendant indisputedly *is* a Habitual Offender – Second Offense,<sup>66</sup> and the minimum sentence range is, as a matter of law, 0 to 13 months (See Grid G, attached as Appendix B).

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<sup>63</sup> *People v Kimble*, 470 Mich 305, 310-312 (2004)

<sup>64</sup> *People v Webb*, 458 Mich 265, 274-275 (1998)

<sup>65</sup> 4/27/06, 16

<sup>66</sup> MCL 769.10; See Information and Habitual Offender notice (Appendix C)

Intermediate sanctions<sup>67</sup> were applicable to the minimum sentence ranges for the first offender sub-cell (0 – 11 months) and to the Habitual Offender – Second Offense sub-cell (0 – 13 months). Intermediate sanctions limit imposition of any term of incarceration to a jail term at the upper end of the range, or 12 months, whichever is less.<sup>68</sup>

Although the trial court sentenced Defendant to a term of two years probation, with the first 12 months in the county jail, it intended to sentence Defendant to the longest term of incarceration possible (initially proposing a term of 16 months). The trial would have imposed a term longer than 12 months, but recognized that the guidelines limited incarceration to a jail term, and a jail term could be no longer than 12 months.<sup>69</sup>

The trial court also mistakenly concluded that the habitual offender sub-cell could not be applied to the CSC4 sentencing offense.<sup>70</sup> The applicability of the habitual offender sub-cell is not affected by this mistake of law. In fact, since CSC 4 is punishable by imprisonment for more than one year, it is a felony for sentencing purposes and subject to enhancement pursuant to the habitual offender statutes.<sup>71</sup> Despite the trial court's incorrect assumption, Defendant was sentenced within the range of the correct sub-cell. The sentence was not only legally correct, it was in perfect harmony with the trial court's intent to sentence Defendant to the highest permissible term of incarceration.

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<sup>67</sup> MCL 769.31(b)

<sup>68</sup> MCL 769.34(4)(a)

<sup>69</sup> 4/27/06, 12-14

<sup>70</sup> 4/27/06, 12

<sup>71</sup> MCL 761.1(g); *People v DeLong*, 128 Mich App 1, 4 (1983); *People v McGill*, 131 Mich App 465, 477 (1984)

The 12– month jail sentence<sup>72</sup> imposed by the trial court was within the Guidelines range for the Habitual Offender – Second Offense sub– cell, and fully compliant with the intermediate sanction requirement and the trial court’s intent. The sentence must be affirmed because it is within the appropriate guidelines range, and Defendant does not claim errors in scoring or trial court reliance on inaccurate information.<sup>73</sup>

Defendant suffered no prejudice as a result of the trial court’s misunderstanding. Given that the trial court intended to sentence Defendant to the longest term of incarceration possible within the guidelines range, and the fact that the intermediate sanctions provision limits this term to 12 months in jail despite the 13– month upper limit of the habitual offender sub–cell, the sentence Defendant received was not only exactly what the trial court intended and within the appropriately scored guidelines, but it is exactly what the trial court would impose again on remand.<sup>74</sup>

The Court of Appeals clearly erred in determining that the sentence exceeded the properly scored guidelines and, because the trial court did not articulate reasons for departure, remanding for resentencing. A sentence within the correctly scored Guidelines is valid, and a valid sentence may not be vacated.<sup>75</sup> And, although the trial court erred regarding whether CSC 4 permitted it to apply the habitual offender sub–cell, Defendant was not prejudiced as a result — the error did not affect Defendant’s substantial rights, and remand for resentencing would provide no benefit to Defendant. This Court should reverse the Court of Appeals decision requiring resentencing.

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<sup>72</sup> Defendant does not contest the 2– year probation provision the trial court imposed in conjunction with incarceration in jail.

<sup>73</sup> MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348 (2000)

<sup>74</sup> *People v Mutchie*, 468 Mich 50, 51 (2003)

<sup>75</sup> *Babcock*, supra, 261; *Francisco*, supra, 91; MCL 769.34(10)

**RELIEF**

WHEREFORE, the People request that this Court grant the People's application for leave to appeal, reject the *Dunbar* rule, reverse the Court of Appeals order, and affirm Defendant's sentences.

Respectfully submitted,

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