

**STATE OF MICHIGAN**

**SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

Supreme Court  
No.134244

-vs-

Court of Appeals  
No. 264368

ANDREW PAUL OSANTOWSKI,  
Defendant-Appellant,

Macomb Circuit  
No. 05-0314-FH

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**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF TO RESPONSE TO  
APPLICATION FOR LEAVE TO APPEAL**

ERIC J. SMITH P46186  
PROSECUTING ATTORNEY  
MACOMB COUNTY, MICHIGAN

ROBERT BERLIN P27824  
CHIEF APPELLATE LAWYER  
BY:

JOSHUA D. ABBOTT P53528  
ASSISTANT PROSECUTING ATTORNEY  
MACOMB COUNTY ADMINISTRATION BLDG.  
1 SOUTH MAIN, 3RD FLOOR  
MT. CLEMENS, MICHIGAN 48043  
(586) 469-5350

\*\*\*\*\*

ATTORNEY FOR DEFENDANT-APPELLANT:

MARLA MCCOWAN P57218

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## **I. INTRODUCTION**

This Court granted oral argument on the defendant's application for leave to appeal regarding the scoring of OV 20 ("Terrorism"). The Court directed the parties to file supplemental briefs on the issue of "whether, under MCL 777.49a, a threat must *itself* constitute an 'act of terrorism,' as defined by MCL 750.543b, in order for 100 points to be assessed under OV 20."

## **II. COUNTERSTATEMENT OF FACTS**

The prosecution incorporates the COUNTERSTATEMENT OF FACTS as set forth in its answer to the defendant's application for leave to appeal.

## **III. LAW AND ARGUMENT**

This Court's Order focuses on MCL 777.49a, or OV 20 ("Terrorism"). The proper interpretation and application of the statutory sentencing guidelines is a legal question that this Court reviews *de novo*. *People v. Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). In construing a statute, this Court's primary goal is to give effect to the intent of the Legislature as manifest in the plain, unambiguous language of the statute. *People v. Houston*, 473 Mich 399, 404, 702 NW2d 530 (2005). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative

intent. *People v. Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999).

The statute, MCL 777.49a, reads, in pertinent part:

(1) Offense variable 20 is terrorism. Score offense variable 20 by determining which of the following applies and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender *committed an act of terrorism by using or threatening to use* a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device . . . 100 points

...

(2) As used in this section:

(a) "Act of terrorism" and "terrorist" mean those terms as defined in section 543b of the Michigan penal code, 1931 PA 328, MCL 750.543b.

Moreover, MCL 750.543b(a) defines an "act of terrorism" as:

a willful and deliberate act that is all of the following:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

The statute defines a "terrorist" as "any person who engages or is about to engage in an act of terrorism." MCL 750.543b(g). Further, a "violent

felony” includes “the use, attempted use, or threatened use of . . . an explosive device, or an incendiary device.” MCL 750.543b(h).

In its Order, this Court poses the question: “Under MCL 777.49a, must a threat *itself* constitute an ‘act of terrorism,’ as defined by MCL 750.543b, in order for 100 points to be assessed under OV 20?” In short, the answer is no.

As indicated, the relevant statute, MCL 777.49a(1)(a), instructs the trial court to score 100 points for OV 20 if the defendant “committed an act of terrorism by using or *threatening to use* . . . [an] incendiary device, or explosive device.” By its own terms, the statute requires the trial court to assess 100 points for OV 20 if the defendant either commits an act of terrorism by using an incendiary or explosive device or threatens to use an incendiary or explosive device. Any other judicial construction effectively removes the phrase “or threatening to use” from the statute. When construing a statute, this Court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory. *Borchard-Ruhland, supra* at 285. If possible, effect should be given to each provision. *Id.* Given the circumstances, the Legislature’s use of the phrase “or threatening to use” evinces its intent that the trial court assess 100 points for OV 20 if the defendant commits an act of terrorism using an incendiary or explosive device or makes a terrorist threat to use an incendiary or explosive device.

If the Legislature had intended that the threat itself amount to an “act of terrorism,” it would not have needed to employ the language “or threatening to use.” Instead, the statute would have simply directed the trial court to score 100 points if the defendant “committed an act of terrorism by using . . . [an] incendiary device, or explosive device.” Additionally, the Legislature would have included a provision stating that either OV 20 is not to be scored for convictions under MCL 750.543m (“Making Terrorist Threat or False Report of Terrorism”) or that OV 20 is only to be scored for convictions under MCL 750.543f (“Terrorism”). Viewing the statute as a whole, this Court should interpret MCL 777.49a(1)(a) in such a way as to give effect the Legislature’s purposeful inclusion of the phrase “or threatening to use.” Thus, under MCL 777.49a(1)(a), a threat need not *itself* amount to an “act of terrorism” in order for the trial court to score 100 points for OV 20.

However, even if this Court were to interpret this statute as requiring a threat to *itself* constitute an “act of terrorism” in order to assess 100 points under OV 20, the trial court in the instant case erred in failing to score 100 points. Such an interpretation of MCL 777.49a(1)(a) would mean that the trial court must score 100 points under OV 20 if the defendant either: (1) commits an act of terrorism by using an incendiary or explosive device; or (2) commits an act of terrorism by threatening to use an incendiary or explosive device. The Court of Appeals’ opinion appears to have adopted this reasoning:

Taking the specific language of MCL 777.49a(1)(a) to score 100 points for the commission of “an act of terrorism by using or threatening to use” an “explosive device,” in conjunction with the definitions in MCL 750.543b, which recognize that the elements comprising an act of terrorism or an individual being identified as a terrorist comprise not only acts but threats to engaged in precluded acts . . . See Opinion (3/8/07)- COA No. 264368.

In other words, a defendant’s threatened use of an incendiary or explosive device can, in fact, constitute an act of terrorism within the meaning of MCL 777.49a(1)(a) and Michigan’s Anti-Terrorism Act.

As the Court of Appeals’ opinion subsequently observed, the trial court erred in failing to score OV 20 because the defendant’s terrorist threats in the case at bar rose to the level of an act of terrorism as contemplated by the relevant statutes. In one of his numerous Internet person-to-person conversation with Celia McGinty (“Celia”) that was relayed to the Clinton Township Police Department and Chippewa Valley High School, the defendant boasted: “see ... I know another important thing ... leaving a legacy ... that’s why i make homemade videos ... me test firing weapons, building pipe bombs, showing people where i store my arsenal ... etc ...” He told Celia: “im making an audio cd entitled ... ‘bombthreat before she blows.’” In another conversation with Celia, the defendant typed: “START THE CLOCK NOW ... LETS SEE WHEN THIS BOMB GOES OFF ... I WIRED MYSELF FOR DETONATION UPON TOUCHING OF FILTHY LOVING JEWS THAT THINK THEY OWN ME.” The Court of Appeals’ opinion concluded that “[t]hese statements support

scoring 100 points under OV 20 for defendant's threatened use of an explosive device." *See* Opinion (3/8/07)- COA No. 264368.

Moreover, the defendant's threats, conveyed to Celia and soon reaching Clinton Township on September 16, 2004, resulted in the cancellation of after-school activities, evacuation of the school, and an elaborate search of the building by the Clinton Township Police Department. The subsequent dissemination of the threats through the community and the involvement of the media created a local hysteria during the evening and into the next day. The police search of the defendant's bedroom uncovered most of the components necessary for assembling a functional pipe bomb, along with about a dozen pipe bombs in various stages of assembly. According to Michigan State Police Lieutenant David Vroman, an expert in the field of explosive devices, such pipe bombs can devastate property and be fatal to persons. The defendant did not make these terrorists threats in a vacuum; ultimately, his threats terrorized Clinton Township and Chippewa Valley High School. Given the surrounding circumstances, the defendant committed an act of terrorism by threatening to detonate one of his pipe bombs inside Chippewa Valley High School.

**IV. RELIEF REQUESTED**

Based on the foregoing, the prosecution respectfully requests that this Court either **DENY** the defendant's application for leave to appeal or **AFFIRM** the decision of the Court of Appeals.

Respectfully submitted,

Eric J. Smith P46186  
Prosecuting Attorney  
Macomb County, Michigan

Robert Berlin P27824  
Chief Appellate Attorney  
By:



Joshua D. Abbott P53528  
Assistant Prosecuting Attorney

DATED: January 10, 2008.