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STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. ROBERTO MARCELLO DUPREE, Defendant-Appellant.	Supreme Court Case No. 161589 Court of Appeals Case No. 344603 Circuit Court Case No. 15-3884-FC

PEOPLE'S BRIEF FOR MINI-ORAL ARGUMENT ON THE APPLICATION

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STATEMENT OF QUESTIONS PRESENTED

ISSUE I

WHETHER THE TRIAL COURT PLAINLY ERRED BY SCORING 15 POINTS FOR OV 1 AND 5 POINTS FOR OV 2 WITHOUT THE PROSECUTION OF OTHER DEFENDANTS?

Court of Appeals' Answer: "No"

Plaintiff-Appellee's Answer: "No"

Defendant-Appellant's Answer: "Yes"

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS[1]

In December of 2012, Mohamed Zamzani ("Zamzani") was working in a family-owned smoke shop at 37557 Harper in a Clinton Township strip mall. See Defendant's Appendix A, TR3 at 117-19. The smoke shop is a family business that primarily sold cigarettes, cigarettes, and lottery tickets. Id. at 118. It is open from 9 a.m. until 8 p.m. *Id.* The smoke shop has both external and internal surveillance cameras. *Id.* at 119-121.

On the morning of December 15, Zamzani was working alone at the cash register. *Id.* at 118-21. An individual entered the store and asked Zamzami "for cigars." *Id.* at 122-23. The individual was "[a] black man" of "[m]edium height." *Id.* at 122. He was wearing "sunglasses and a hat." *Id.* at 122. The individual "was talking on the phone with somebody else." *Id.* at 123. As soon as Zamzani "tr[ied] to show him the cigars," the individual "pulled out [a] gun" and told Zamzani: "[D]on't move!" *Id.* at 123-24. The individual pointed the gun "[r]ight to [Zamzani's] face." *Id.* at 124.

Zamzani raised his hands in the air. *Id.* At this point, two more individuals ("[o]ne black and one white") entered the smoke shop, pushed Zamzani to the back door of the store near the storage area, and "tape[d]" him up with duct tape as he lay on the ground. *Id.* at 124-27, 129. The white male individual was bald and "[a] little bit heavy." *Id.* at 125, 137, 140. Zamzani's assailants "asked [him] for the keys for the back door" and Zamzani gave them his keys. *Id.* at 127-128. The individual with gun remained Zamzani and

[1] The People stipulate to the appendix filed by the appellant.

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"tried to take the money from [his] pocket." *Id.* at 127. Also, he hit Zamzani in the head with his gun, instructing him not to move. *Id.* at 129. Ultimately, Zamzani's assailants attempted to leave through the back door, which was a steel commercial door. *Id.* at 127-28. Zamzani's keys, however, did not include the key needed to unlock the big lock on this door. *Id.* at 128. Instead, they left the smoke shop through the front door. *Id.* at 129. After a few moments, Zamzani got the duct tape off him and "call[ed] the police right away." *Id.* at 129-30, 137-38.

The assailants made a "mess" of the smoke shop. *Id.* at 133, 139. They took all the money contained in the cash register, totaling between $500.00 and $1,000.00. *Id.* at 143-144. Zamzani sustained an injury to his head for which he did not seek medical attention. *Id.* at 136. Zamzani had not seen any of his assailants prior to this date. *Id.* at 136-137.

Sergeant Deena Terzo ("Sergeant Terzo") of the Clinton Township Police Department ("CTPD") was on road patrol when, at about 10:30 a.m., she received a call from dispatch for the "armed robbery" at the smoke shop on Harper. TR4 at 92-93. Sergeant Terzo was the first CTPD officer to arrive at the crime scene. *Id.* at 93. She spoke with Zamzani inside the store. TR3 at 144-45; TR 4 at 94-96. Zamzani "had some abrasions and a bump on his left forehead near his hairline." TR4 at 105.

With Zamzani, Sergeant Terzo watched the footage of the armed robbery from the external and internal surveillance cameras. *Id.* at 95-96, 105. Sergeant Terzo "observed one male who pointed a gun at [Zamzani]." *Id.* at 96.

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This individual "looked thin, around 25 to 30 years of age, black male." *Id.* at 96. He had "no gloves on" and "no mask on." *Id.* As Sergeant Terzo watched, "within a couple seconds, two male came into the store and went behind the counter area." *Id.* One of these individuals was "heavyset . . . around 250 to 300 pounds." *Id.* at 97. Sergeant Terzo had difficulty telling "from the video if it was a black male or lightskinned or some type of ethnic descent." *Id.* The third individual was "a medium build black male, approximately thirty-ish or so." *Id.* The heavyset individual "had nothing covering him" and was bald. *Id.* at 97, 125. The heavyset individual wore a type of rubber or latex glove. *Id.* at, 125-26, 128, 130. The third individual wore a glove with "a white color on the top of the hand" and "a black or dark color" on the palm. *Id.* at 125. Sergeant Terzo secured the scene, summoned an evidence technician, and requested a K-9 from another police department. *Id.* at 98-100.

Soon, Deputy David Quartuccio ("Deputy Quartuccio") of the Macomb County Sheriff's Office, a K-9 handler, arrived at the crime scene with his German Shepherd, Baxter. *Id.* at 139-48. Deputy Quartuccio started Baxter tracking "just outside the [front] door" of the smoke shop where he "was informed that the suspect[s] w[ere] fleeing on foot." *Id.* at 151, 194-95. Baxter headed "slightly north" and "turned and started to head eastbound across the front of the buildings towards Harper." *Id.* at 195, 215-16. Baxter was "pulling [Deputy Quartuccio] . . . to the scent" and was "on track." *Id.* Baxter passed in front of two or three storefronts and "switched over to grass and continued in a northeast direction." *Id.* In this area, just northeast of the smoke shop, Baxter

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picked up "[s]ome latex gloves" with his mouth. *Id.* at 197-98, 215. Deputy Quartuccio immediately commanded Baxter to drop the gloves and did. *Id.* at 198. Baxter "continue[d] tracking" but he stopped soon thereafter because "[t]here was no more scent." *Id.* at 198-99. Deputy Quartuccio notified a CTPD officer about the latex gloves. *Id.* at 200-01.

CTPD Officer Paul Collins ("Officer Collins"), an evidence technician, responded to the crime scene that morning. *Id.* at 227-32. Officer Collins photographed the entire area, both outside the smoke shop around the strip mall and inside the smoke shop itself. *Id.* at 234. He took photographs of Zamzani's injuries. *Id.* at 234-235. Officer Collins took photographs of the duct tape used to bind Zamzani and collected it as evidence. *Id.* at 236-237. He viewed a $20.00 bill on the counter by the cash register, which was "slightly open." *Id.* at 241, 249-250). Officer Collins dusted this area for latent fingerprints. *Id.* at 265-267.

As he processed the crime scene, another CTPD officer informed Officer Collins that "the K-9 officer arrived at the scene" and that "they had hit on an item." *Id.* at 252. Officer Collins viewed a pile of "off-white" rubber gloves on the ground. *Id.* Officer Collins took photographs of the gloves and collected them as evidence. *Id.* at 253-57. Subsequently, at the police station, he swabbed the gloves, as well as the duct tape, "[t]o try to collect DNA evidence." *Id.* at 237, 258-61).

Later, on December 21, 2012, with Zamzani's assistance, CTPD Detective Jeffrey Barbera ("Detective Barbera"), using his cellular telephone, recorded

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eight video clips and five still images from the footage of the armed robbery from the external and internal surveillance cameras. TR3 at 145-46; TR4 at 81; TR5* at 71-78.[2] At the police station, Detective Barbera transferred the video clips from his department issues cellular telephone to his computer where it was later saved onto a disc and placed into evidence. TR5 at 75-78.

Monica Barylski ("Barylski"), a forensic scientist in the Biology Unit of the Michigan State Police's Northville crime laboratory, received the swabs from the duct tape and the rubber gloves, as well as a buccal swab from Zamzani. *Id.* at 119-129. She extracted DNA from the duct tape swabs but it was "insufficient for comparison purposes." *Id.* at 129. Barylski extracted DNA from the rubber glove swabs that was "consistent with a mixture of DNA from at least two individuals," including "a major DNA profile from an unidentified male." *Id.* at 129-30. She "compare[d] that major DNA profile, which was from an unidentified male, to the buccal swab from Mohamad Zamzani and he was excluded as being the major donor to that sample." *Id.* at 130-31. The sample from the minor donor "was not sufficient for [DNA] comparison. *Id.* at 130.

In October of 2014, CTPD Detective Bryan Gilbert ("Detective Gilbert") took over the investigation into this armed robbery. *Id.* at 152-54. Detective Gilbert soon "developed a lead on a suspect" named Roberto Dupree ("Dupree"). *Id.* at 154. Detective Gilbert collected photographs from the Secretary of State

[2] "TR5" refers to Defendant-Appellant's Appendix A transcript dated 5-22-18. Defendant-Appellant's Brief contains a typographical error referring to TR5 as "5-2-18." See Defendant-Appellant's Brief at 1, n1. It is undisputed that the trial began on May 15, 2018.

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("SOS") of Dupree and compared to those to the video clips collected by Detective Barbera. *Id.* at 154-56. Dupree was "a heavier set, light complected [sic] black male." *Id.* at 155. SOS records described Dupree as 5' 8" and "250-some pounds." *Id.* at 158. Ultimately, in mid-2016, Detective Gilbert obtained a search warrant for Dupree's DNA, procuring buccal swabs from him. *Id.* at 157-58. Detective Gilbert forwarded Dupree's buccal swab to the Michigan State Police for DNA comparison. *Id.* at 159-61.

Andrea Young ("Young"), a forensic scientist in the Biology Unit of the Michigan State Police's Northville crime laboratory, received Dupree's buccal swab and generated a DNA profile. *Id.* at 209-14; TR6 at 9-10. Young compared the DNA profile from this sample to the DNA profile from the rubber gloves swabs generated by Barylski a few years earlier. TR5 at 214-15; TR6 at 13-14. Dupree "matched the major donor types from the rubber glove swabs." TR6 at 15-20.

The prosecution charged Dupree with Armed Robbery, contrary to MCL 750.529. After a trial before Macomb County Circuit Court Judge Carl J. Marlinga ("Judge Marlinga") in May of 2018, a jury convicted Dupree as charged. TR7 at 189-91. On June 28, 2018, Judge Marlinga sentenced Dupree, as a fourth-offense violent habitual offender, to a term of 30 to 60 years' imprisonment. TR8 at 15-17.

Dupree appealed as of right. The Michigan Court of Appeals unanimously affirmed his conviction and sentence. See *People v Dupree*, unpublished per curiam opinion of the Court of Appeals, issued February 6,

2020 (Docket No. 344603), p 5. Defendant subsequently filed an application for leave to appeal with this Court. This Court considered the application for leave to appeal and "DIRECT[ED] the Macomb County Prosecuting Attorney to answer the application for leave to appeal within 28 days of the date of this order," indicating that, '[i]n particular, the prosecutor shall address Issues III and VII in the defendant's application for leave to appeal." See Order (4/2/21) - MSC No. 161589. On January 14, 2022, after receiving briefs, this Court ordered the parties to file briefs delving deeper into "whether the defendant was properly assigned 15 points for Offense Variable (OV) 1 and 5 points for OV 2." *People v Dupree,* 967 NW2d 833 (Mem) (Mich, 2022).

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ISSUE I

THE TRIAL COURT DID NOT PLAINLY ERR BY SCORING 15 POINTS FOR OV 1 AND 5 POINTS FOR OV 2 WITHOUT THE PROSECUTION OF OTHER DEFENDANTS.

STANDARD OF REVIEW

Defendant did not object to scoring of OVs 1 and 2 at sentencing. TR8 at 3. Because defendant did not properly preserve this issue in the trial court, this Court applies plain error review. *People v Kimble,* 470 Mich 305, 312; 684 NW2d 669 (2004) (stating that, even though there is no specific preservation requirement to challenge an above-guidelines sentence generally, unpreserved challenges based on a scoring error are subject to plain error review). Under plain error review, defendant must show that:

> 1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* (omission in original) (quotation marks and citation omitted).

In addition, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (quotation marks and citation omitted).

The issues in this case also concern the proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 et seq., which

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are legal questions that this Court reviews de novo. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003).

ARGUMENT

When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. *People v Lewis*, 503 Mich 162, 165; 926 NW2d 796, 797 (2018). This Court begins by construing the language of the statute itself. Where the language is unambiguous, this Court gives the words their plain meaning and applies the statute as written. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). A necessary corollary of this principle is that a "'court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003), quoting *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 63; 642 NW2d 663 (2002). Furthermore, when the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional. *People v McFall*, 309 Mich App 377, 385-86; 873 NW2d 112 (2015).

Defendant's position that an aider and abettor can never be scored without the principal charged is a misunderstanding of the role of an aider and abettor. The Michigan Legislature abolished the distinction between principals and accessories:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as

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> if he had directly committed such offense. [MCL 767.39.]

In an opinion decided on April 4, 2022, this Court held, "[u]nder this law, aiding and abetting is not a distinct criminal act; rather, it is a theory of prosecution that imposes vicarious criminal liability on an accomplice for the acts of the principal." *People v White* ___ Mich ___;___ NW2d (2022) (Docket No. 162136); see also *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).

Over 20 years ago, this Court held in *People v Greaux*, 461 Mich 339, 344-45; 604 NW2d 327 (2000):

> The aiding and abetting statute does not create a distinct crime; rather, it allows an aider and abettor to be convicted of, for example, armed robbery, even though that person did not hold the gun or take the money. When the time for sentencing arrives, the guidelines for armed robbery are to be used. See *People v Spicer*, 216 Mich App 270, 273-76; 548 NW2d 245 (1996).

In *Spicer*, the Court of Appeals reviewed the issue of whether guidelines were applicable to an aider and abettor. At that time, there were no published opinions regarding this issue and the panel reviewed the matter as one of first impression. *Spicer*, 216 Mich App at 274. Pursuant to MCL 767.39, the *Spicer* Court "conclude[d] that the guidelines do not include any reference to aiding and abetting because any such reference would be *unnecessary*." *Id.* (emphasis added). *Spicer* held "that the trial court incorrectly concluded that the guidelines did not apply to defendant's armed robbery conviction." *Id.* at 275.

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"Determining whether a trial court properly scored sentencing variables is a two-step process." *People v Rhodes*, 495 Mich 938; 843 NW2d 214 (2014). First, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "The clear error standard asks whether the appellate court is left with a definite and firm conviction that a mistake has been made." *Rhodes*, 495 Mich at 938. Second, the appellate court considers de novo "whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *Hardy*, 494 Mich at 438. "The trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable." *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012), overruled in part on other grounds by *People v White*, 501 Mich 160; 905 NW2d 228 (2017), citing *People v Haacke*, 217 Mich App 434, 436; 553 NW2d 15 (1996).

Applying these principles to the case at bar, defendant's suggestion a distinction between an aider and abettor to the principal offender is contrary to the plain language of the statute and intent of the Legislature. The *Dupree* Court of Appeals panel properly held that OVs 1 and 2 require "all offenders to receive the same score, without regard to whether the other offenders were prosecuted and convicted." See *Dupree*, unpub op, p 4.

Defendant maintains that the trial court clearly erred in assessing 15 points for OV 1 because he did not have a gun and no one else has been charged or convicted of the armed robbery. OV 1 assesses the "aggravated use

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of a weapon." MCL 777.31(1). The trial court may score 15 points where "[a] firearm was pointed at or toward a victim." MCL 777.31(1)(c). Further, "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." MCL 777.31(2)(b).

Defendant argues "[t]here was no evidence that any other offender was prosecuted." See Defendant's Brief at 5. Defendant blankly claims that the "plain and unambiguous language of OV-1 requires multiple offenders to be at least charged before points can be assed [sic] with Dupree as an aider and abettor." *Id.* Defendant's position is against the plain language of the statute. There is nothing in the statute forbidding sentencing of one offender before the prosecution or the conviction of other offenders. Defendant's argument requires this Court add language to the statute.

Regardless, defendant avers this Court's opinion in *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004), is "instructive." *Id.* In *Morson*, one co-defendant received 25 points for OV 1 and the other received 15. The issue in *Morson* was whether a defendant in a multiple defendant prosecution could receive additional OV 1 points at sentencing when compared to the points received by the co-defendant convicted of the exact same crime. See *Morson*, 471 Mich at 251. Defendant correctly states this Court's holding the "all offenders shall be assessed the same number of points." *Id.* at 259. Defendant has failed to show how *Morson* applies or conflicts with the case at bar.

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Importantly, the *Dupree* Court of Appeals panel did not contradict *Morson* and the prosecution is not challenging *Morson*. See *Dupree*, unpub op. Instead, defendant cursorily concludes that *Morson* "suggests that the scoring of OV 1 is only permissible when multiple offenders are charged." See Defendant's Brief at 6. There is nothing in *Morson* or any case cited by defendant to support this assertion. Defendant seeks for this Court to read unwritten language into the statute. Defendant asks this Court to usurp the role of the legislature to add language not found in the statute. Changes to the language of the statute are properly reserved to the legislature.

Defendant references *People v Libbett*, 251 Mich App 353, 366–67; 650 NW2d 407 (2002), as case with facts and issues readily distinguishable from those present here. *Lippett* reviewed incorrect scoring errors among convicted co-defendants at sentencing. "[I]t is *undisputed* that the five points initially assessed to [co-defendant] were scored incorrectly because both parties and the trial court recognized that the proper score under MCL 777.31(1) and the facts of this case would be fifteen points." *Libbett* at 367 (emphasis added).

Next, defendant claims "there had to be a co-defendant charged before the trial court could score OV 1 under a multiple offender theory." See Defendant's Brief at 7. Defendant relies on this Court's opinion *People v Johnston*, 478 Mich 903; 732 NW2d 531 (2007). Defendant's claim that *Johnston* "stands for the proposition that if the trial court scores OV 1 for a defendant based on the multiple-offender rule, there must be multiple offenders charged" is wholly misplaced and readily refuted by this Court's

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holding. See Defendant's Brief at 7. *Johnston* stands for the proposition that OVs 1 through 3 should be scored the *same* when multiple offenders are all convicted of the same offenses. *Johnston*, 478 Mich at 903. *Johnston* does not hold that points may not be scored for a single defendant where his or her accomplices were never charged and convicted. *Id.* Under defendant's proposed rule, an aider and abettor should be rewarded at sentencing merely because the principal evaded capture. In the present case, the jury found that defendant aided or abetted the commission of an armed robbery, which included the use of a firearm pointed at or toward the victim. Despite defendant's assertions, the trial court can properly score OVs 1 and 2 under an aiding and abetting theory without the prosecution of the principal. Therefore, the trial court did not err in assessing 15 points for OV 1.

Furthermore, the trial court in this case was not barred from scoring 15 points for OV 1 simply because defendant's accomplices had not yet been prosecuted, considering that the criminal transaction involved a firearm being pointed at or toward a victim, MCL 777.31(1) (c). Instead, subsection 2(b) of MCL 777.31 merely reinforces that a score of 15 points is proper even when a defendant did not possess the firearm being pointed at a victim. For a trial court to rule otherwise would make the sequence of prosecutions and sentencings in multiple-offender situations a defining (and perhaps, unworkable) characteristic in regard to what score a defendant receives on OV 1, which clearly was not the intent of the Legislature. In the instant case, the trial court was correct in scoring OV 1. Merely because defendant was the

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"first, and might be the only, offender identified, charged, and convicted of the armed robbery is irrelevant for purposes of scoring OV 1." See *Dupree*, unpub op, p 4.

With respect to OV 2, five points is scored for OV 2 when "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). Here, defendant was scored 5 points. As in OV 1, OV 2 also states that "[i]n multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points." MCL 777.32(2). Defendant repeats his position that he cannot be "vicariously assessed" under OV 2. See Defendant's Brief at 7. However, as referenced above, this Court stated on April 4, 2022, that "aiding and abetting is not a distinct criminal act; rather, it is a theory of prosecution that imposes *vicarious criminal liability* on an accomplice for the acts of the principal." *White* ___ Mich at ___ (Docket No. 162136) (emphasis added).

Defendant's argument that he cannot be scored under OV 2 because he constructively possessed the weapon is against the plain language and legislative intent of the statute. Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Hill,* 433 Mich 464, 469-71; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if its location is known to him and if it is reasonably accessible to him; actual possession is not necessary. *Id.* at 470-71. Thus, while defendant did not have actual possession of the firearm, it is undisputed that he

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constructively possessed the firearm. Therefore, OV 2 was properly scored. The Court of Appeals summarized this issue appropriately:

> Defendant raises a similar argument with regard to the trial court's assessment of five points for OV 2. [. . .] For the reasons discussed with respect to OV 1, the ***trial court did not err in scoring five points for OV 2 on the basis of the unidentified principal's use of a pistol***. *Dupree*, unpub op, p 5 (emphasis added).

In sum, the trial court did not err when scoring OVs 1 and 2. Defendant's arguments are against the plain language of the statute and intent of the Legislature. Instead, defendant asks this Court to circumvent the plain language of the statute and usurp the role of the legislature. This case is not a vehicle to the bright line rule defendant seeks concerning scoring of OVs 1 and 2 for crimes involving multiple offenders. "A defendant is entitled to be sentenced by a trial court on the basis of accurate information." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). If a sentence is based on inaccurate information, it is invalid. *Id.* The defendant bears the burden of proving that the information is inaccurate. See *People v Odom*, 327 Mich App 297, 314; 933 NW2d 719 (2019). Here, defendant's guidelines would not change because the trial court sentenced defendant as a fourth offense habitual offender, which requires a mandatory minimum sentence of 25 years. MCL 769.12(1)(a). Even if this Court were to vacate points for OV's 1 and 2, resentencing is unnecessary. Therefore, leave should be denied and defendant's conviction and sentence should be affirmed.

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RELIEF REQUESTED

Accordingly, the People respectfully urge this Honorable Court to **DENY** this Application for Leave to Appeal.

Respectfully Submitted,

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DATED: April 11, 2022