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STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff/Appellee

SC No. 161589
COA No. 344603
Macomb County CC. 2015-003884-FC

vs.

ROBERTO MARCELLO DUPREE,

Defendant/Appellant.
_____/

Defendant/Appellant's Reply Brief

BY: SUZAN GABBARA P76633

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Dated: April 18, 2022

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Issue Preservation.

If a defendant wishes to challenge the scoring of the sentencing guidelines, he must first make this challenge at the trial court before raising the issue on appeal. To preserve the issue, a defendant must bring it to the attention of the trial court at sentencing by a properly filed motion within the time allowable for filing a motion for new trial, or by a timely filed motion to remand in the Court of Appeals. MCR 7.211(C)(1). While Mr. Dupree's trial counsel did not object to the scoring of offense variables (OV) 1 and 2 at sentencing he filed a timely motion to remand in the Court of Appeals to properly preserve this issue.

The plain and unambiguous language of OVs 1 and 2 requires at least one co-defendant to assess points in a multiple offender situation.

The plain and unambiguous language of OVs 1 and 2 requires that there be at least one co-defendant for Mr. Dupree to be properly assessed points under OVs 1 and 2 in a multiple offender situation. The prosecution argues because Mr. Dupree was convicted under an aiding abetting theory, the scoring of OVs 1 and 2 was appropriate and cites to *People v White*, No. 162136, 2022 WL 1012166 (Mich. Apr. 4, 2022), in support. (Prosecutor's brief at 13). First *People v White* addressed a venue issue i.e., which county could prosecute the defendant, and did not address the scoring of sentencing guidelines. Second, while Mr. Dupree was convicted for armed robbery under as an aider and abettor, the scoring of the guidelines is not addressing the theory of liability rather the scoring addresses the circumstances of the specific offense.

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The prosecution attempts to distinguish the cases cited in Mr. Dupree's brief, yet fails to address that in all cases, every time OVs 1 or 2 were scored, there were multiple offenders charged or convicted. The prosecution cannot point to a case where OVs 1 and 2 were scored when there was one defendant i.e., not a multiple offender situation. The plain language of the statute requires that there be multiple offenders, i.e., more than one. "In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders must be assigned the same number of points." MCL 777.31(2)(b).

Because the Court's primary goal is to give effect to the intent of the Legislature when construing a statute, the plain language would only suggest that there must be at least one-co-defendant before OVs 1 and 2 can be scored. *People v Phillips*, 469 Mich 390, 395, 666 NW2d 657 (2003). No other offender can be assessed any points for OVs 1 and 2 because Mr. Dupree is the only offender charged. As this Court previously held in *People v Morson,* multiple offenders must be assessed the same points for OV1, suggesting that there must be at least one co-defendant to assess the same number of points for OVs 1 and 2; i.e., a multiple offender situation.

Relief Requested:

Mr. Dupree respectfully request that this Court grant his application for leave to appeal.

BY: */s/ Suzan Gabbara*

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