STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

RYAN RAY DEWEERD

Defendant-Appellant
_____/

Supreme Court No. 162966

Court of Appeals No. 349353

Lower Court No. 16-10107, 16-010108

CASS COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

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_____

SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

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Statement of Question Presented

I. Is Mr. Deweerd entitled to resentencing because the trial court incorrectly scored OV 19 at ten points, in violation of Mr. Deweerd's rights under statutory law and constitutional due process? Alternatively, was defense trial counsel constitutionally ineffective for failing to object to the improper scoring?

Court of Appeals answers, "No."

Ryan Ray Deweerd answers, "Yes."

Statement of Facts

On August 8, 2016, Mr. Deweerd pled guilty to several offenses, arising out of two different incidents. In the first incident, which occurred on October 6, 2015, Mr. Deweerd woke up in the Cass County Road Commission garage, unsure how he had gotten there. (24a) Hungry and cold, he took a jacket and a thermos from two different trucks parked in the garage. (24a-25a; see also PSIR,[1] pp. 7-8) He also possessed marijuana. (25a) Mr. Deweerd was charged, as a habitual fourth offender, with the following offenses:

I. Breaking and entering a building with intent to commit a felony (MCL 750.110)
II. Breaking and entering a vehicle with intent to steal property valued below $200 (MCL 356A(2)(a))
III. Breaking and entering a vehicle with intent to steal property valued below $200 (MCL 356A(2)(a))
IV. Possession of marijuana (MCL 333.7403(2)(d))

In the second incident, which occurred on March 4, 2016, Cass County police officers received an anonymous tip that methamphetamine was being produced at Mr. Deweerd's girlfriend's apartment. (PSIR, p. 7) The police obtained a warrant and arrived at the apartment to execute the search. (PSIR, p. 7) Mr. Deweerd, his girlfriend, and another guest were present. (PSIR, p. 7) All three occupants were detained at the time of the search. (PSIR, p. 7) The officers seized several items used for the manufacture of methamphetamine during the search, as well as a shotgun. (PSIR, p. 7)

[1] The document cited as PSIR includes several reports (PSIR, PSI, BIR, SIR). These reports are cited according to their location in the 24-page document, as opposed to the pagination in the individual documents.

Police officers interviewed Mr. Deweerd and his girlfriend at the scene. (PSIR p. 7) Mr. Deweerd denied using methamphetamine and denied any knowledge of the production of methamphetamine in the apartment. (PSIR, p. 7) His girlfriend admitted to using methamphetamine but declined to answer questions pertaining to production. (PSIR, p. 7) She also told police Mr. Deweerd had been living at her apartment for two months. (PSIR, p. 7)

Mr. Deweerd was charged as a habitual fourth offender with the following offenses:

I. Operating / maintaining a lab involving methamphetamine (MCL 333.7401c(2)(f)
II. Felon in possession (MCL 750.224f)
III. Maintaining a drug house (MCL 333.7405(d))
IV. Possession of marijuana (MCL 333.7403(2)(d))
V. Felony firearm (MCL 750.227b)

The prosecution agreed to dismiss one of the misdemeanor breaking and entering counts from Case No. 16-010108, as well as the felon in possession and felony firearm counts from Case No. 16-010107, in exchange for Mr. Deweerd's guilty plea to the remaining charges as a habitual fourth offender. (16a-18a) Mr. Deweerd pled guilty in accordance with the agreement. (20a-26a)

On September 1, 2016, the Honorable Mark A. Herman from the Cass County Circuit Court sentenced Mr. Deweerd to three years of probation with a number of conditions, including completion of the Swift and Sure program, and associated

costs.[2] (42a) Aside from two minor violations, Mr. Deweerd was well on his way to successfully completing his probation.[3] Most importantly, he graduated from the Swift and Sure Program. (101a)

Despite Mr. Deweerd's progress, in April 2018, a team of probation agents and police officers executed a random search of Mr. Deweerd's apartment and his mother's car, which he had been driving that day. (Updated PSIR, pp. 4-5)[4] They located methamphetamine in the drink holder and several items used for smoking methamphetamine in the vehicle. (Updated PSIR, pp. 4-5)

Probation was revoked and Mr. Deweerd was resentenced. The Cass County Circuit Court scored only one offense variable: ten points for Offense Variable ("OV") 19, interfering with the administration of justice. (PSIR, p. 22) This ten-point assessment elevated Mr. Deweerd's OV level from I to II. *Id.* His guidelines range rose from 72-240 months to 78-260 months. *Id.* The court sentenced Mr. Deweerd to the low-end of the guidelines: 78 months (6.5 years) to 40 years. (111a)

Mr. Deweerd filed a timely motion for resentencing in the trial court, which

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[2] The court sentenced Mr. Deweerd to two concurrent three-year terms of probation for operating/maintaining a lab involving methamphetamine and breaking and entering with the intent to commit a felony. (42a-43a) The court sentenced Mr. Deweerd to time served for the other offenses. (43a-44a)

[3] In May 2017, Mr. Deweerd failed to report to his probation agent. (53a) In June 2017, he briefly spoke with a woman who was also in the Swift and Sure Program but in a different class, contrary to a condition of his probation. (65a-66a)

[4] Mr. Deweerd's conviction and subsequent probation revocation regarding these facts were the subject of a separate appeal, COA Case No. 345832.

was denied after a hearing on May 23, 2019. (140a) Judge Herman acknowledged some uncertainty as to whether OV 19 should be scored based on one's initial denial of wrongdoing to the police, and indicated he agreed with the defense position, to some degree. (127a, 130a, 132a-133a) Nevertheless, Judge Herman denied the motion based on this Court's precedent in *People v Barbee*, 470 Mich 283; 681 NW2d 348 (2004), as well an unpublished per curiam opinion from the Michigan Court of Appeals cited by the prosecution during the hearing, *People v McCormick*, issued June 26, 2012 (Docket No. 300554). (133a-134a)

In an order dated July 24, 2019, the Court of Appeals denied Mr. Deweerd's application for leave to appeal. (141a) Presiding Judge Christopher Murray, however, would have granted leave to appeal. (141a) On February 4, 2020, this Court remanded to the Court of Appeals for consideration as on leave granted. (142a)

On March 11, 2021, the Michigan Court of Appeals issued an unpublished opinion (Docket No. 349353) affirming the scoring of OV 19 and, accordingly, Mr. Deweerd's sentence. (143a) The court disagreed with the defense's characterization of Mr. Deweerd's conduct as "nothing more than maintaining his innocence," and instead concluded that Mr. Deweerd "deliberately lied to law enforcement regarding the ownership and production of methamphetamine which would have hampered the investigation." (145a) The court further concluded Mr. Deweerd interfered with the administration of justice "by providing specific, misleading, and dishonest information to investigating officers," which "constituted interference with the

administration of justice." (145a)

This Court granted leave to consider "whether a defendant who has generally disavowed knowledge of unlawful activity should be considered to have 'interfered with or attempted to interfere with the administration of justice . . . .' MCL 777.49(c)." *People v Deweerd,* ___ Mich ___; 970 NW2d 665 (2022). (147a)

I. Mr. Deweerd is entitled to resentencing because the trial court incorrectly scored OV 19 at ten points, in violation of Mr. Deweerd's rights under statutory law and constitutional due process. Alternatively, defense trial counsel was constitutionally ineffective for failing to object to the improper scoring.

Standard of Review and Issue Preservation

This issue was preserved by the timely filing of a motion for resentencing in the trial court. There is a mixed standard of review for challenges to the scoring of the sentencing guidelines. When an appellate court reviews a claim that the scoring of the sentencing guidelines was erroneous, the trial court's findings of fact, if any, 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). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

Ineffective assistance of counsel claims are mixed questions of fact and law. *Strickland v Washington,* 466 US 668, 698; 104 S Ct 2052 (1984); *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). Trial court findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id*.

Discussion

This case asks what it means to interfere with a police investigation. Specifically, does one's denial of knowledge of a crime when questioned by police constitute interference? A plain reading of the statute, grounded in our state and

federal constitutions, dictates the answer must be "no." Mr. Deweerd did not interfere, or attempt to interfere, with the police investigation when he denied culpability. Resentencing is required.

Mr. Deweerd has a due process right to be sentenced based on accurate information. *Townsend v Burke,* 334 US 736; 68 S Ct 1252 (1948); see also, Const 1963, art 1, § 17. Correct guidelines are an important consideration at sentencing, even if they are advisory. Sentencing guideline variable scoring must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438.

Mr. Deweerd should have been scored zero points under OV 19, rather than ten. This requires resentencing under *People v Francisco,* 474 Mich 82; 711 NW2d 44 (2006), because the guidelines change after correction of the scoring error. See also, *People v Wine*, 500 Mich 859; 884 NW2d 576 (2016). Defense counsel's failure to object to the improper scoring of OV 19, which resulted in a higher guidelines range, deprived Mr. Deweerd of his Sixth Amendment right to the effective assistance of counsel. *Glover v United States*, 531 US 198; 121 S Ct 696 (2001); see generally, *Strickland, supra.*

"The OVs are a procedural mechanism for courts to individualize sentencing to the offense and the offender." *People v Dixon,* ___ Mich ___; ___ NW2d ___ (2022) (Docket No. 162221); slip op at *4. The guidelines "help[] to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *People v Lockridge,* 498 Mich 358, 391; 870 NW2d 502 (2015).

The statute at issue in this appeal, MCL 777.49(c), provides that OV 19 should be scored at ten points where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." The phrase "administration of justice" is not limited to the judicial process itself and includes the investigation of a crime. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Conduct that occurs after an offense is complete may be considered because "OV 19 specifically provides for the 'consideration of conduct after completion of the sentencing offense.'" *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010) (internal citation omitted).

Mr. Deweerd was assessed ten points for OV 19 based on the following summary from the investigating officer, which was included in the pre-sentence investigation report:

> DeWeerd denied to police that he used meth, was not aware of anything that was taking place in the residence, and did not know there was any kind of meth components or labs in the home. DeWeerd told police that with his past history of two prior meth manufacturing charges, he would have left the residence if he knew meth was being manufactured. This was found to be an untruthful statement to police. [PSIR, p. 7]

(118a-120a, 132a)

Neither these facts nor any other facts established in this case warranted the scoring of ten points under OV 19. Mr. Deweerd did little more than assert his innocence. His comments did not interfere with the administration of justice, nor did they establish his intent to interfere. To interpret OV 19 as permitting increased punishment for someone merely denying culpability when questioned by police would deprive the variable of its meaning by making a 10-point score nearly automatic in

every case.

Nothing in the record established that Mr. Deweerd's professed innocence had an impact on the police investigation. Indeed, he was arrested on the scene despite denying culpability and remained in custody until sentencing. (PSIR, p. 2, 7) The critical question, then, is whether Mr. Deweerd attempted to interfere with the investigation when he denied using methamphetamine or knowing that methamphetamine was being produced in the apartment. (PSIR, p. 7)

In *Barbee*, this Court granted leave to consider whether a defendant's conduct before charges were filed could warrant a ten-point scoring for OV 19. *Barbee*, 470 Mich at 284. The defendant in that case provided the police a false name when pulled over for suspected drunk driving. *Id.* at 285. Based on that conduct, the trial court scored OV 19 at ten points over defense objection. *Id.* The defense maintained that actual obstruction was required to establish an attempt to interfere with the administration of justice. *Id.* This Court interpreted the plain language of the statute "broad[ly]" and confirmed that pre-charge conduct could be considered when scoring OV 19, and actual obstruction was not necessary. *Id.* at 286-288.

This Court applied a "broad" interpretation of the statutory language in *Barbee* to conclude a defendant's behavior could interfere with the administration of justice even where the behavior did not establish obstruction of justice. *Id.* at 286-288. Problematically, the scope of that interpretation has expanded to cases such as Mr. Deweerd's, where a simple denial of wrongdoing resulted in a finding of

interference with the administration of justice and thus a higher guidelines range.

Three years after issuing its opinion in *Barbee*, a 4-3 majority of this Court denied leave to appeal in *People v Spangler,* 480 Mich 947, 948; 741 NW2d 25 (2007). Justice Markman[5] observed:

> In this case, defendant hid himself and items used in methamphetamine production in a closet when the police arrived at the house to investigate a crime committed by another person. For doing so, he was scored ten points under OV 19. Given that it would be extraordinary for a criminal perpetrator not to attempt to hide evidence of his or her crime or to make such crime less detectable, it would seem that OV 19 would almost always be scored under the trial court's interpretation. Perhaps this is consistent with OV 19, but, if that was the Legislature's intention, it would seem that it would have simply increased the base level for theft offenses and other criminal offenses involving contraband. Because the guidelines are more than hortatory, and must be construed in the same fashion as any other binding law of this state, I would grant leave to enable a closer review of the Legislature's intentions. [*Spangler*, 480 Mich at 948 (MARKMAN, J., dissenting).]

Even after this Court established in *Barbee,* that "'interfered with or attempted to interfere with the administration of justice' is a broad phrase," *Spangler* presented a close case, where three Justices would have granted leave to consider whether the defendant's behavior constituted interference. The defendant in *Spangler* was scored ten points for OV 19 because he hid in a closet with evidence of methamphetamine production while the police searched the premises. In comparison, the assessment of points against Mr. Deweerd, based on his general denial of criminal responsibility, demonstrates the expansion of OV 19 scoring in recent years, resulting in unfairly aggravated sentences.

[5] Justices Cavanagh and Kelly likewise would have granted the defendant leave to appeal in this case but did not specify on which grounds. *Spangler*, 480 Mich at 947.

This Court should adopt a rule that precludes the assessment of ten points for OV 19 where a defendant generally denied criminal responsibility in response to police questioning. Such a rule would comport with published authority from this Court and the Court of Appeals, as well as with the state and federal constitutional right to trial and to put the prosecution's evidence to the test through confrontation and compulsory process. US Const, Am VI; Const 1963, art 1, § 20. As this Court has recognized,

> [a] sentencing court, cannot, in whole, or in part, base its sentence on a defendant's refusal to admit guilt. *People v Wesley,* 428 Mich 708, 711; 411 NW2d 159 (1987); *People v Yennior,* 399 Mich 892; 282 NW2d 920 (1977). Nor can a defendant be punished for exercising his right to trial. *United States v Jackson,* 390 US 570; 88 S Ct 1209; 20 L Ed 2d 138 (1968); *People v Courts,* 401 Mich 57; 257 NW2d 101 (1977).

People v Jackson, 474 Mich 996; 707 NW2d 597 (2006). Moreover, "[s]tatutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharmaceuticals,* 468 Mich 1, 6; 658 NW2d 127 (2003).

A finding of interference, or an attempt to interfere, is appropriate where a suspect tries to conceal evidence or flee from the police. It is also appropriate where a suspect presents false evidence to investigating officers, such as a false name. Those acts indicate a clear intent to derail the criminal investigation. But a finding of interference is not appropriate where, as here, a suspect merely denies criminal responsibility. To hold otherwise would punish a criminal defendant for maintaining his innocence and exercising his right to trial.

In *People v Hershey,* 303 Mich App 330, 342-344; 844 NW2d 127 (2013), the

Michigan Court of Appeals sought to interpret the meaning of the phrase "interfere[] with the administration of justice," as used in OV 19, applying the rules of statutory interpretation. In so doing, the panel turned to the dictionary definitions[6] of relevant terms to interpret "the plain and ordinary meaning" of the phrase:

> The plain and ordinary meaning of "interfere" is "to come into opposition or collision so as to hamper, hinder, or obstruct someone or something[.]" The plain and ordinary meaning of "administration" is "the act or process of administering." And "justice" is defined as "judgment of individuals or causes by judicial process: *to administer justice*." *Id.* Therefore, the plain and ordinary meaning of "interfere with the administration of justice" for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process. [*Id.* at 342-343 (internal citations omitted.)]

Courts have routinely relied on this definition when assessing challenges to OV 19. See, e.g., *People v Sours*, 315 Mich App 346; 890 NW2d 401 (2016); *People v Baskerville,* 333 Mich App 276; 963 NW2d 620 (2020); *People v Deweerd,* unpublished opinion of the Court of Appeals, dated March 11, 2021 (Docket No. 349353). (145a)

Those courts which have affirmed the scoring of ten points for OV 19 based on a general denial of culpability have applied an overly broad interpretation of the statute's plain meaning, far beyond this Court's interpretation in *Barbee*. For instance, a general denial of criminal responsibility does *hinder* a police investigation to some degree. If every guilty suspect admitted her wrongdoing on

[6] The panel cited the definitions from Random House Webster's College Dictionary (2005).

the spot, investigations would be completed and verdicts would be rendered with greater precision. But simply *hindering* the process in that sense does not constitute interference because it does not *oppose* the administration of justice. One's right to maintain his innocence and require the prosecution to prove its case beyond a reasonable doubt is, in fact, a critical component of our justice system. The presumption of innocence is not *in opposition to* the administration of justice.

Mr. Deweerd did not *interfere* with or *oppose* the administration of justice when he denied criminal responsibility. He was already detained and thus squarely within the administration of justice when he denied culpability to the police. His statements did not connote an intent to *interfere* or derail the investigation by putting forth any false evidence. He simply asserted his innocence, presumably in response to police questioning.

Previous cases examined by this Court, affirming the assessment of ten points for OV 19, have involved conduct beyond a mere assertion of innocence or denial of culpability. In each of these cases, the defendant's conduct affirmatively established an intent to thwart a criminal investigation.

For example, providing the police a false name during a traffic stop was "certainly inference" because the suspect sought to misdirect the police by requiring them to search their database for a different person. *Barbee,* 470 Mich at 288. Attempting to discourage an incriminating eyewitness from talking to the police constituted interference with the administration of justice as that conduct sought to prevent the discovery of relevant evidence. *Smith*, 488 Mich at 195-196. Discarding

evidence during a traffic stop reflected the defendant's intent to interfere with the investigation because he tried to prevent the discovery of incriminating evidence. *People v Cooley*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 292942), issued October 19, 2010, lv den 490 Mich 985; 807 NW2d 46 (2012). Fleeing a murder scene and remaining at large despite knowing the police were looking for him demonstrated the defendant's intent to interfere by avoiding detention and apprehension. *People v Williams,* unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 299484), issued January 19, 2012, lv den 493 Mich 965; 828 NW2d 684 (2013).

Published authority from the Court of Appeals, affirming the ten-point scoring for OV 19, has likewise involved a clear intent by the defendants to interfere with an investigation. These acts include attempting to flee from the police despite a command to stop, *People v Ratcliff,* 299 Mich App 625; 831 NW2d 474 (2013), vacated in part on other grounds 495 Mich 876; 838 NW2d 687 (2013), hiding from police during a search, *People v Smith,* 318 Mich App 281; 897 NW2d 743 (2016), and moving the deceased victim's body in an attempt to conceal it, *People v Baskerville*, 333 Mich App 276; 963 NW2d 620 (2020).

The critical distinction between Mr. Deweerd's denial of culpability and the defendants' conduct in these cases is that Mr. Deweerd did not engage in any specific deception in opposition to the administration of justice. There are, of course, many things Mr. Deweerd could have done which would have constituted interference. For instance, ten points would have been warranted if Mr. Deweerd

tried to flee from the scene, provided the police a false name, attempted to discard or conceal the methamphetamine from being discovered by the police, or discouraged his girlfriend from speaking with the police.

He did none of these things. He simply denied knowledge of the criminal activity that the police had discovered, with the emphasis that his past convictions for drug use reinforced that denial. There was nothing to derail because at the time Mr. Deweerd made his statements, the investigation was virtually complete. The officers had already seized the contraband and apparently asked him if he knew about it. He denied knowledge, as would be expected, lest he convicted himself on the spot by admitting culpability.

This Court's recent opinion in *Dixon,* ___ Mich ____; slip op at *6, which reversed a 25-point scoring for OV 19, underscores the requirement of a fact-specific analysis when assessing points for this variable. OV 19 is appropriately scored at 25 points where "[t]he offender by his or her conduct threatened the security of a penal institution or court." MCL 777.49(a). The defendant in *Dixon* was incarcerated and found in constructive possession of a cell phone, in violation of state law. *Id.* at ___; slip op at *3-4. This Court held that the defendant's constructive possession alone was insufficient to score 25 points. *Id.* at ___; slip op at *5. To justify a scoring of 25 points, a court must find the defendant engaged in conduct that actually threatened the security of the institution. *Id.* at ___; slip op at *5. Possession of some items, such as illegal drugs or guns, are inherently threatening. *Id.* at ___; slip op at *5. However, to determine whether possession of a cell phone threatens the security of

an institution, a court must assess the conduct beyond mere possession. *Id.* at ___; slip op at *6.

This fact-specific analysis applies to a ten-point scoring for OV 19 as well. To find that a defendant had an intent to interfere with the administration of justice, a court must find more than just a general denial of culpability. To justify a ten-point score, there must be some affirmative conduct or specific false evidence presented by a suspect with the intent to interfere, or "to oppose so as to hamper, hinder, or obstruct" the administration of justice. *Hershey,* 303 Mich App at 342-343.

To consider Mr. Deweerd's conduct in this case an attempt to interfere with the administration of justice would require scoring OV 19 in any case where a person maintained his innocence, either initially or through the disposition of his case. Under this theory, anything a defendant does could warrant scoring OV 19, short of turning himself into law enforcement and/or making a full confession on the spot. If OV 19 can be scored ten points any time a defendant denies culpability, "the OV becomes boundless." *Dixon*, ___ Mich ___; slip op at *6. As Judge Herman noted when ruling on Mr. Deweerd's motion for resentencing: "that's the problem I always have with OV 19 because it's how far do you stretch it… if it's after trial, if anyone has denied it, you could say well, he lied, therefore… even a general denial means if you're convicted, that you get 10 points…" (130a-131a)

Mr. Deweerd did not oppose the administration of justice when he denied criminal responsibility. Rather, he insisted upon it. Therefore, OV 19 should have been scored at zero points. Resentencing is required.

Summary and Relief

WHEREFORE, for the foregoing reasons, Mr. Deweerd respectfully requests that this Court remand to the trial court for resentencing and direct the trial court to score OV 19 at zero points.

Respectfully submitted,

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