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In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. James Redford, Jane Beckering, and Michael J. Kelly

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

HAMIN LORENZO DIXON,

Defendant-Appellant.

Supreme Court No. 162221

Court of Appeals No. 349631

Chippewa County Circuit Court
Case No. 17-003294-FH

APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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[1] This brief provides hyperlinks to all cited internet sources. The hyperlinks are embedded into the text, rather than noted in separate citations, in order to improve readability.

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QUESTIONS PRESENTED

1. Whether attempted violation of MCL 800.283a necessarily requires a score of 25 points for Offense Variable (OV) 19.

2. If not, whether there is sufficient evidence to score OV 19 at 25 points on this record.[2]

[2] The trial court, Court of Appeals, and appellee answered "yes" to both questions. The appellant urges this Court to answer "no."

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JURISDICTIONAL STATEMENT

This application is taken from a published opinion and order of the Court of Appeals dated September 10, 2020. JA70–74. Appellant Dixon's application for leave to appeal was received by the Clerk of this Court on November 9, 2020, but was deemed timely filed under the prisoner-mailbox rule provided in MCR 7.305(C)(5). This Court granted oral argument on the application in an order dated April 9, 2021. This Court therefore has jurisdiction under Const 1963, art 6, § 4; MCL 600.215(2), (3); and MCR 7.303(B)(1).

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INTRODUCTION

An offense variable score of 25 points is among the highest provided for any variable in the Michigan sentencing guidelines. See MCL 777.31 through MCL 777.49a. Eight of the offense variables do not even provide for so high a score, and are instead capped scores of 10, 15, or 20. Four of the variables require a score of 25 points for only the most serious offenses to which they apply. By way of example, OV 1 is scored at 25 points for offenses in which a "firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon." MCL 777.31(1)(a). Similarly, OV 3 is scored at 25 points only for serious offenses in which the "offender had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." MCL 777.36(1)(b). As another example, OV 11 is scored at 25 points when the victim of a sex-related crime is physically penetrated. MCL 777.41(1)(b).

In this case, the Court of Appeals added a new offense to the list of those warranting a 25-point offense variable score under the guidelines: attempted possession of a cell phone by a prison inmate. In particular, the Court of Appeals held that possession or attempted possession of a cell phone "threaten[s] the security of a penal institution" and therefore automatically warrants the highest possible score under OV 19. JA72; MCL 777.49(a). This means that the simple act of possessing a phone—without any evidence of how the phone was used or acquired—scores higher under OV 19 than crimes of witness tampering, extortion, and obstruction of justice. See MCL 777.49(b). It also scores the same as offenses involving guns, bombs, or other dangerous weapons in a prison or courtroom. See MCL 777.49(a); *People v Dickinson*, 321 Mich App 1, 24; 909 NW2d 24 (2017).

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The *per se* rule established by the Court of Appeals' decision is not only surprising in its results, but is also contrary to the text, structure, and purpose of OV 19. When properly construed, the 25-point criterion in OV 19 applies in the prison context only when a defendant's conduct creates a significant risk that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world. See discussion *infra* 8–13. Because cell phones "serve a legitimate purpose, and bear a harmless character," the act of possessing one does not, in and of itself, threaten the security of a penal institution. Cf *People v Dorrington*, 221 Mich 571, 574–575; 191 NW 831 (1923) (holding that the possession of house keys, an alarm clock, and knitting needles does not warrant an inference of an intent to commit burglary). Rather, the offense proscribed in MCL 800.283a is prophylactic in nature, encompassing both harmful and innocuous conduct. An inmate whose conduct falls in the latter category — such as one who possesses a cell phone solely to keep in touch with family and friends — does not personally pose a danger to the security of the prison. To the extent the presence of the cell phone poses a security threat, it is only because of the possibility of intervening conduct by a third party (*i.e.*, another inmate who wishes to steal the phone and use it for elicit purpose) and therefore is not the fault of "the offender by his or her conduct." See MCL 777.49(a)

For these reasons, the Court of Appeals erred in holding that OV 19 automatically applies in all cases involving an inmate's possession or attempted possession of a cell phone. This Court should grant leave to appeal and hold that a defendant convicted under MCL 800.283a should receive an OV 19 score of 0 where (as here) there is no evidence that he participated in smuggling the phone, acquired the phone by force, or intended to use the phone for illicit purposes. To do otherwise

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would allow the prosecution to carry its burden based on speculative inferences of a type this Court has previously rejected. See *Dorrington*, 221 Mich at 574.

STATEMENT OF FACTS

Mr. Dixon is an inmate in a medium security prison facility in Chippewa County. See JA12. This case involves a consecutive sentence of up to 30 months that was imposed after Mr. Dixon pled guilty to attempted possession of a cell phone by a prison inmate, in violation of MCL 800.283a and MCL 750.92. JA66.

According to a Department of Corrections (DOC) incident report, a corrections officer who was making routine late-night rounds found Mr. Dixon in a bathroom stall "with a cell phone." JA12. The incident report does not indicate how the corrections officer detected the phone from outside the stall. It also does not indicate whether any calls had ever been made using the phone, or whether there was any reason to believe that the phone had been used for other purposes. *Id.* After confiscating the phone, staff found a phone charger in Mr. Dixon's prison cell. *Id.*

Based on this incident, Mr. Dixon was charged as a habitual offender with one count of possession of a cell phone by a prison inmate and one count of attempted possession. JA10. Mr. Dixon ultimately pled guilty to the attempt charge in exchange for the prosecution's agreement to dismiss the possession charge and withdraw the request for habitual-offender sentencing. JA31–32. During his plea colloquy, Mr. Dixon testified that he "did not actually possess a cell phone but . . . did attempt to a possess a cell phone." JA35–36. The prosecution indicated that it was satisfied with the factual basis for the plea, and the trial court accepted it. JA36.

Following the plea, the DOC prepared a presentence investigation report (PSIR) that described Mr. Dixon's conduct in a manner nearly identical to the initial

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incident report. Compare JA12 with JA19. The PSIR did not include any additional facts regarding Mr. Dixon's acquisition or use of the cell phone. See JA15–29. Based solely on Mr. Dixon's admitted attempt to possess the phone, the PSIR recommended that the trial court assess Mr. Dixon 25 points under OV 19. JA18. When coupled with his prior record variable (PRV) score, the 25-point OV score resulted in a guideline range of 5 to 17 months. JA25. If OV 19 had been scored at 0 points instead of 25 points, the applicable guideline range would have been 0 to 17 months. See MCL 777.69.

During the sentencing hearing, defense counsel alluded to additional facts regarding the underlying cell phone incident. In particular, counsel indicated that Mr. Dixon's cellmate had signed an affidavit stating that the cell phone belonged to him, not to Mr. Dixon. JA 46. Counsel further indicated that the corrections officer did not find the cell phone on Mr. Dixon's person, but rather in close proximity to the bathroom stall that Mr. Dixon was using. *Id.* Mr. Dixon verbally verified both of these representations. *Id.* Defense counsel asked the court to sentence Mr. Dixon in the middle of the 5-to-17-month guideline range. JA43.

In response, the prosecutor noted that Mr. Dixon was the only inmate in the bathroom at the time of the incident. JA46. He also indicated that Mr. Dixon had the cell phone "on his person" when prison staff found it, *id.*, although there is no other statement in the record to that effect.[3] The prosecutor explained that the inmate who provided the affidavit was Mr. Dixon's friend and cellmate serving a life

[3] The Court of Appeals' decision echoes this statement and indicates that it was based on "information in the PSIR." JA69. However, the PSIR only states that Mr. Dixon had "a cellphone in his possession." JA19. We note this distinction only for the sake of accuracy, not to suggest that it has any bearing on the questions presented here.

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sentence, and that he came forward a year and a half after the incident. JA 46. Thus, while the prosecutor questioned the validity of the affidavit, he acknowledged that its existence was part of the reason for making the plea offer. See JA47. With respect to the appropriate length of the sentence, the prosecutor recounted Mr. Dixon's criminal history and indicated agreement with the assessment of 25 points under OV 19. JA47-48. After considering the presentations from both parties, the trial court adopted the DOC's recommended guideline range and sentenced Mr. Dixon to a minimum sentence of 11 months with a maximum of 30 months to be served consecutively to his current prison sentence. JA50; see also JA66.

Following the sentencing hearing, Mr. Dixon's newly assigned defense counsel filed a motion to correct an invalid sentence. The motion asserted that the Court of Appeals' recent decision in *People v Carpenter*, 322 Mich App 523; 912 NW2d 579 (2018) undermined the rationale for scoring 25 points under OV 19, since the Court indicated that OV 19 does not apply automatically simply because a crime occurred in a prison setting. JA56. Defense counsel argued that OV 19 requires the court to engage in an individualized evaluation of the defendant's conduct, including the lack of any evidence in this case suggesting that Mr. Dixon ever used the cell phone, or had any intent to use it for illicit purposes. JA56–57. Counsel also noted that inmates sometimes use cell phones for harmless purposes, referring to a recent case where an inmate had acquired a phone "because his kid was messing up in school and he was using it to contact his kid's school teacher." JA57.

The prosecutor responded by arguing that cell phones undermine the security of a prison by allowing inmates to make unmonitored contact with the outside world, which can be used to coordinate criminal activity. JA60. He further indicated that

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cell phones are used as currency for drug deals in prison and that inmates sometimes commit acts of violence against each other in order to acquire cell phones. *Id.*

After hearing arguments from both sides, the trial court denied Mr. Dixon's motion. JA9; JA65. In doing so, the trial judge analogized cell phones and weapons, stating that inmates can use both types of items to harm other inmates or corrections officers. JA9. The judge further suggested, without citing any evidence, that cell phones were more dangerous in a prison setting than illegal narcotics. *Id.*

Mr. Dixon appealed the trial court's ruling on the motion, and the Court of Appeals affirmed. In doing so, the Court of Appeals referred to earlier rulings indicating that possession offenses involving weapons and illegal drugs were sufficient to score 25 points under OV 19 because of the inherent risks that those items pose to the safety of prison inmates and staff. JA 71 (citing *People v Dickinson*, 321 Mich App 1, 24; 909 NW2d 24 (2017)). Like the trial court, the Court of Appeals analogized those items to cell phones, stating that it "is axiomatic that a prisoner's possession of contraband like a cell phone threatens the safety and security of the prison staff and prisoners because of the numerous ways in which a prisoner may use such a device for illicit purposes . . . ." JA71. Thus, the Court of Appeals held that 25 points can be assessed under OV 19 automatically any time an inmate is found guilty of possessing or attempting to possess a cell phone, regardless of whether there is any evidence suggesting that the defendant actually used or intended to use the phone to coordinate criminal activity. JA72.

Mr. Dixon filed a *pro se* application for leave to appeal the decision below. This Court then requested argument and supplemental briefing on the application.

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ARGUMENT

Leave to appeal is appropriate in cases where the Court of Appeals' "decision is clearly erroneous and will cause material injustice," and where the questions presented are of "major significance to the state's jurisprudence. MCR 7.305(3), (5)(a). This case satisfies both those standards. In affirming Mr. Dixon's sentence, the Court of Appeals held that a score of 25 points under OV 19 is required as a matter of law anytime an inmate is convicted of possessing or attempting to possess a cell phone. JA72. This *per* se rule is contrary to the text of OV 19, which requires an individualized inquiry into the degree of risk posed by the defendant's conduct. See MCL 777.49(a). Rather than evaluating the evidence of how Mr. Dixon actually used or intended to use the cell phone in question, both the trial court and the Court of Appeals held that simply attempting to possess the phone threatened the security of the prison because "a prisoner ***may*** use such a device for illicit purposes." JA71 (emphasis added); accord JA9. This analysis distorts the individualized nature of the guidelines and ignores the myriad legitimate uses of cell phones. It also results in a guideline scheme in which prison cell phone offenses are treated identically to weapon and drug offenses, in stark contrast to the federal sentencing guidelines.[4]

Under Michigan law, a trial court's factual determinations regarding sentencing factors are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). Whether

[4] Under the federal sentencing guidelines, contraband offenses are scored at 6 points "if the object was an alcoholic beverage, United States or foreign currency, a mobile phone or similar device, or a controlled substance (other than LSD, PCP, methamphetamine, or a narcotic drug)." USSG § 2P1.2(a)(3). Offenses involving narcotics or dangerous weapons are treated significantly more harshly, being scored at either 13 points or 23 points. USSG § 2P1.2(a)(1)–(2).

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the facts 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 that this Court reviews *de novo*. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

A. For purposes of OV 19, a defendant "threaten[s] the security of a penal institution" if he or she creates a significant risk that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world.

In the instant case, the trial court did not make any relevant factual findings regarding Mr. Dixon's offense variable score other than accepting the factual basis for his plea. See JA41–51. Accordingly, the questions presented in this application are purely legal in nature, turning on the proper interpretation of the 25-point scoring criterion for OV 19. [5]

This Court's goal in interpreting a statute, including the sentencing guidelines, "is to ascertain and give effect to the intent of the Legislature." *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature." *People v Harris*, 499 Mich 332, 345; 885 NW2d 832 (2016). Therefore, the Court starts by examining the words of the relevant provision, which "should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute." *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012).

[5] To the extent the trial court intended its statements regarding the comparative risks of prison contraband to constitute factual findings, those statements are not supported by any evidence in the record and should not be treated as such. See *Osantowski*, 481 Mich at 111 (explaining that facts found at sentencing must be supported by a preponderance of the evidence). Rather, the analogies the trial court and Court of Appeals drew between various types of prison contraband should be treated as legal reasoning subject to *de novo* review.

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MCL 777.49 governs the scoring of OV 19 and provides the following scoring criteria:

> (a) The offender by his or her conduct threatened the security of a penal institution or court ..... 25 points
>
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services ..... 15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice, or directly or indirectly violated a personal protection order ..... 10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force. ..... 0 points

Subsection (a), the relevant provision in this case, is unique to the Michigan sentencing guidelines and has only been addressed in a handful of appellate decisions.[6] Accordingly, it may be useful to closely examine the text and context of the provision in order to distill its operative meaning. When one undertakes this exercise, four key principles emerge.

First, the opening phrase, "the offender by his or her conduct," indicates that the provision focuses on things the offender has actually done, as opposed to things the offender or other individuals could conceivably do in the future. So, in evaluating

[6] While other states have sentencing guidelines that apply when an offense is committed "while in" a penal institution, see Wash Rev Code § 9.94A.533(5)(c), research did not reveal any comparable sentencing enhancement that applies only when an offender "threatened the security of a penal institution." The Court of Appeals has applied this unique phrase in two other published decisions, aside from the one currently on appeal. *People v Carpenter*, 322 Mich App 523; 912 NW2d 579 (2018); *People v Dickinson*, 321 Mich App 1; 909 NW2d 24 (2017).

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whether to score 25 points under OV 19, it is inappropriate to simply speculate about possible future occurrences. Rather, the trial court must consider only the conduct that the prosecution can establish by a preponderance of the evidence, as well as any reasonable inferences regarding intent that follow from that conduct. See, e.g., *Dorrington*, 221 Mich at 574–575 (indicating that when an offender's intent is relevant, a court can only make reasonable inferences of intent based on the conduct that has already occurred). In other words, if the evidence regarding the offender's conduct reasonably establishes an intent to do something else in the future, then the "threat" posed by the possible future conduct can be considered. But if the offender's future intent cannot be reasonably inferred from the actions the offender has already taken, the court cannot score points under OV 19 based on the mere possibility that the offender or others might take certain actions in the future.

Second, as this Court held in *People v Smith*, 488 Mich 193, 195; 793 NW2d 666 (2010), the defendant's relevant conduct for purposes of OV 19 is not limited to the sentencing offense. Rather, the text of subsection (a) expressly contemplates that OV 19 can be scored for aggravating conduct that occurred after the sentencing offense, since in most circumstances a defendant does not encounter a courthouse or a penal institution until the sentencing offense is complete. *Id.* at 200. So, in assessing whether a defendant has threatened the security of a penal institution, the trial court can consider conduct beyond what was required to establish guilt of the underlying offense. This type of sentencing inquiry is sometimes referred to as a "transactional approach," in contrast to the general rule that only the sentencing offense itself can be considered. See *id.* at 202–204 (Cavanaugh, J., dissenting).

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Third, as ordinarily understood, the phrase "security of a penal institution" refers to a condition in which inmates in a jail or prison are unlikely to escape, cause serious harm to themselves or other inmates or corrections officer, or commit a crime in the outside world. This meaning is consistent with common dictionary definitions of the word "security." For example, *The Oxford English Dictionary* (online edition) defines "security" as "the state or condition of being protected from or not exposed to danger," and alternatively as "the safety of an organization, establishment, or building from espionage, criminal activity, illegal entrance or escape." Similarly, *Merriam-Webster's Dictionary of Law* (1996) defines the term to mean "measures taken to guard against espionage or sabotage, crime, attack or escape." Other sources suggest that in the context of prisons and jail, where espionage is not so much a concern, the word "security" refers to the prevention of escape, physical harm to persons within the prison, and the coordination of criminal activity outside the facility. As evidence of this, the American Jail Association's *Code of Ethics for Jail Officers* (1993) indicates that a correction officer's primary responsibility is to "keep the institution secure so as to safeguard the community and the lives of the staff, inmates, and visitors on the premises." Accordingly, the phrase "security of a penal institution" focuses on the physical safety of persons occupying a prison or jail and on the protection of the broader community from crimes committed by inmates.

Fourth, once one understands the meaning of the phrase "security of a penal institution," it becomes clear that to "threaten[] the security of a penal institution" means to create a ***significant risk*** that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world. Stated

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otherwise, OV 19 requires an "actual threat," as opposed to a merely hypothetical one.[7]

This requirement of a significant elevation of risk — as opposed to a trivial or hypothetical increase — follows from the text, purpose, and structure of the guidelines. For one, the word "threaten" connotes a significant level of risk, perhaps to the point of making an adverse occurrence more probable than not. This is reflected in dictionary definitions, as *The Oxford English Dictionary* (online edition) states that the figurative sense of the term "threaten" is "to be ***likely*** to injure." (Emphasis added); accord *Cambridge Advanced Learner's Dictionary & Thesaurus* (4th ed, 2014) ("to be likely to cause harm or damage to something or someone").

Further, aside from the ordinary meaning of the term, the Legislature's use of the word "threatened" is telling in light of the other possible ways that the OV 19 could have been phrased. As noted above, other states have guidelines that apply to specified crimes committed "while in" a penal institution. See Wash Rev Code § 9.94A.533(5)(c). The phrase "while in" creates a bright line locational requirement, under which the guideline is scored automatically when the offense is committed while an offender is incarcerated. If the Michigan Legislature had intended to create a requirement that applies that broadly, it could have easily said so. Instead, the Legislature limited OV 19 to crimes that "threatened the security of a penal institution," indicating that the mere fact that a crime is committed while incarcerated is not enough to warrant 25 points under OV 19. In order to give

[7] See Michigan Judicial Institute, *Can you score 25 points under OV 19 where the defendant was convicted of prisons-prisoner possessing contraband and the defendant possessed Suboxone (buprenorphine)?* ("*Can you score?*") ("The language of MCL 777.49(a) appears to require an actual threat . . . .").

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operative meaning to the words the Legislature chose, trial courts cannot reflexively score OV 19 for all offenses that occur within a prison. Rather, the language of the statute requires courts to assess the baseline level of risk associated with crimes committed in a penal institution, and to score 25 points under OV 19 only when the specific facts of the defendant's offense create a more significant risk. Cf *Hardy*, 494 Mich at 442–443 (holding that OV 7 requires courts to compare the fear and anxiety induced by a defendant's conduct against the "baseline level" of fear and anxiety of the type of crime at issue).

Finally, the structure and context of OV 19 indicate that the word "threaten" carries a high level of gravity and seriousness. As described in detail in the introduction to this brief, threatening the security of a penal institution is the highest scoring criterion in OV 19 and is among the highest scoring criteria in the guidelines as a whole. This suggests that the criterion should not be scored for offenses that pose only an incidental or hypothetical risk of harm or escape. To do so would make OV 19 disproportionately harsh as compared to guidelines like OV 3, which adds 25 points for an offender's intent to kill, and OV 11, which adds 25 points when a crime involves sexual penetration. MCL 777.36(1)(b); MCL 777.41(1)(b).

B. Because cell phones are not inherently dangerous and have legitimate uses, the mere act of possessing one does not, in and of itself, threaten the security of a penal institution.

Prior to its decision in this case, the Court of Appeals applied something like the test articulated above to a number of crimes involving prison contraband. In its first published opinion on the topic, *People v Dickinson*, the Court considered an argument that OV 19 should be scored at 0 in cases involving the smuggling of drugs into a prison, because the use of the word "threatened" limits its application to

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offenses involving dangerous weapons. See *Dickinson*, 321 Mich App at 24. In rejecting that argument, the Court agreed that OV 19 would apply to weapons offenses due to the inherent risks that weapons pose to the safety of inmates and corrections officers. *Id.* The Court went on to hold that the same reasoning makes OV 19 applicable to serious drug offenses, since nothing in the text of OV 19 limits its application to weapons offenses alone. In doing so, the Court noted that heroin is an "unquestionably dangerous drug" and that smuggling it into a prison "creates serious problems for inmates and prison guards." *Id.*

In its next published decision on the topic, *People v Carpenter*, the Court of Appeals expounded upon the reasoning in *Dickinson*. The Court more specifically identified the "serious problems" it referred to in *Dickinson*, stating that: "The smuggling of controlled substances into a jail is certainly a threat to the security of a penal institution because of the dangers of controlled substances to the users and those around them." *Carpenter*, 322 Mich App at 531. Thus, the Court clarified that it is not just the act of smuggling that creates a risk of danger, but rather the continued presence of drugs within the penal institution after the smuggling occurs. That danger arises from the use of the drugs, which can potentially harm the inmates who use them or make those inmates more likely to physically harm others. See *id.*

While the Court of Appeals has not had an opportunity to address the issue, the rationale in *Dickinson* and *Carpenter* suggests that 25 points should be scored under OV 19 when a defendant is convicted of simply possessing illicit drugs in a penal institution, even when there is no evidence that the defendant participated in smuggling the drugs. See Michigan Judicial Institute, *Can you score?*, *supra* note 7. This is because, when a defendant possesses a drug like heroin while in prison, a court can

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reasonably infer that the either the defendant or another inmate intends to consume the drug and subject himself or herself to its "unquestionabl[e] danger[s]." See *Dickinson*, 321 Mich App at 24. This inference follows naturally from the fact of possession, since consuming drugs (the dangerous behavior that would threaten the security of the prison) is the only use to which drugs are commonly put. The same is true of dangerous weapons, which in the prison context are used almost exclusively for acts of violence. For this reason, the Court of Appeals has held that offenses involving the possession of a dangerous weapon inherently threaten the security of a penal institution. *People v Hill*, unpublished per curiam opinion of the Court of Appeals, issued October 20, 2016 (Docket No. 328466), p 5.

In this case, both the trial court and the Court of Appeals likened the risk posed by an inmate's possession of a cell phone to an inmate's possession of dangerous weapons or illegal drugs. Without citing any evidence or making any factual findings regarding the matter, the trial court went so far as to suggest that cell phone possession was more threatening than drug possession, since cell phones can be used to coordinate escapes or crimes of violence. JA9. The Court of Appeals echoed these concerns, citing the "numerous ways in which a prisoner ***may*** use such a device for illicit purposes." JA71 (emphasis added).

In drawing these analogies between cell phones and other types of prison contraband, the courts below overlooked a crucial distinction regarding the nature of cell phones. Unlike illegal drugs and dangerous weapons, cell phones are overwhelmingly used in ways that are not harmful to either the user or to others. Recent surveys show that over 97% of adults in the United States now own cell phones, making cell phones ubiquitous throughout American society. Pew Research

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Center, *Mobile Fact Sheet* (April 7, 2021). They are generally allowed in many of the most secure American institutions, including banks, schools, courthouses, and other government buildings. While cell phones — like anything else — can potentially be used for illicit purposes, their broad adoption throughout society suggests that criminal activity is a relatively low percentage of their total usage. This may be true even with respect to contraband cell phones in prisons, due to a variety of factors including usage restrictions for high service rates for prison payphones. See Jane C. Christie, Comment, *Disconnected: The Safe Prisons Communications Act Fails to Address Prison Communications*, 51 JURIMETRICS J. 17, at 33–40 (2010). As defense counsel described at the hearing on Mr. Dixon's motion to correct an invalid sentence, prison inmates are sometimes prosecuted for using cell phones to communicate solely about legitimate family-related matters. See JA57.

Even if it is not possible to determine the percentage of prison cell phone use that is harmful in nature, the fact that cell phones are not ***inherently harmful*** has important legal consequences. In *People v Dorrington*, this Court held that the mere possession of objects that "serve a legitimate purpose[] and bear a harmless character" cannot support an inference that the defendant intended to use the objects for illicit purposes. *Dorrington*, 221 Mich at 574–576. The specific issue in *Dorrington* was whether the evidence at trial supported a conviction for unlawfully possessing burglar's tools where the defendant was found with common house keys, an alarm clock, a battery, and knitting needles. *Id.* The prosecution argued that the conviction should be upheld because house keys could be used to unlock common locks, alarm clocks and batteries could be arranged to set off an explosive, and knitting needles could be used to push a key out of a lock. *Id.* at 573. While acknowledging that these

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were theoretically possible uses of the objects found in the defendant's possession, this Court rejected the prosecution's argument. In doing so, the Court explained:

> [H]ouse keys and an alarm clock with a battery to ring its bell and knitting needles in a home serve a legitimate purpose, and bear a harmless character, for they have been contrived for a useful purpose, and they afford no basis for an inference of possession for a criminal purpose. . . . It is not enough that they may be used in breaking and entering, but the intent to so employ them must appear in order to constitute the crime here charged. . . . There are cases where the tools and implements are so clearly contrived and adapted for breaking and entering as to warrant a finding that their possession could not possibly be for any other purpose, but house keys, an alarm clock, and knitting needles bear no such villainous character. [*Id.* at 574–575].

While *Dorrington* involved a different statue than the one at issue in this case, the Court's reasoning is directly on point. In order to assess whether an inmate who was convicted of a contraband offense "threatened the security of a penal institution," the trial court has to necessarily assess the inmate's intended use of the contraband. Without making that inquiry, it is impossible to conclude that the defendant posed an actual threat — as required by the statute (see *infra* 11–13) — or a merely hypothetical one. In other words, a trial court cannot accurately assess the degree of risk created by "the offender by his or her conduct," without evaluating the likelihood that the offender intended to use the contraband for a nefarious or harmful purpose.[8]

[8] This is not to suggest that OV 19 is a specific intent statute, requiring proof in every case that the defendant intended to threaten the security of a penal institution. That issue has divided justices of this Court in prior cases, see *People v Ward*, 483 Mich 1071; 765 NW2d 881 (2009) (concurring and dissenting opinions in an order denying leave to appeal), and the Court need not address it here. Rather, this case can be resolved on the principle that a trial court cannot properly evaluate the actual risk posed by certain types of conduct without assessing the defendant's underlying intent. Because OV 19 requires courts to determine the level of risk created by the defendant's conduct, evidence of intent is required in some circumstances.

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Under the reasoning in *Dorrington*, a trial court can properly infer that when an inmate possesses inherently dangerous items like weapons or drugs, he or she intends to use them in a manner that creates a substantial risk of harm. Thus, as the Court of Appeals suggested in *Dickinson* and *Carpenter*, 25 points can be properly scored under OV 19 when an inmate possesses dangerous weapons or drugs in a penal institution, without any further evidence of how the inmate intended to use those items.

The same cannot be said of cases involving contraband cell phones. While the Legislature may have had good reason to prohibit cell phones in prison as a matter of prophylactic crime prevention, it does not follow that every prisoner who possesses a cell phone poses an actual threat to the security of a penal institution. Like the innocuous items at issue in *Dorrington*, cell phones often "serve a legitimate purpose[] and bear a harmless character." As a result, they can be used in myriad ways that do not significantly increase the risk that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world. Accordingly, in order to determine whether to score 25 points under OV 19 based on the risk of illicit future conduct, trial courts must look beyond the mere fact of possession to determine whether an illicit intent can be inferred. For this reason, the Court of Appeals erred in concluding that 25 points should be scored automatically under OV 19 in all cases where a defendant is convicted of possessing or attempting to possess a cell phone. The Court of Appeal's *per se* rule is legally improper and should be replaced with a case-by-case analysis of the defendant's actual conduct.

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C. A defendant convicted under MCL 800.283a should receive an OV 19 score of 0 where (as here) there is no evidence that he participated in smuggling the phone, acquired the phone by force, or intended to use the phone for illicit purposes.

Having established the proper inquiry under OV 19, it nearly goes without saying that the evidence in this case was insufficient to warrant a 25-point score. As described above, the trial court did not make any factual findings regarding Mr. Dixon's offense variable score other than accepting the factual basis for his plea. JA41–51. As a result, all we know about Mr. Dixon's conduct is that he "did not actually possess a cell phone but . . . did attempt to a possess a cell phone" while in a bathroom stall. JA35–36. Based on this alone, the trial court could not have reasonably inferred that his conduct posed an actual threat of harm or escape warranting a 25-point score under OV 19. See *Dorrington*, 221 Mich at 574–576.

While this Court need not decide the precise scope of OV 19 as applied to cell phone contraband offenses, there are a few circumstances that would seem to rather obviously warrant an enhanced sentence. For one, a 25-point score would be appropriate in cases where the prosecution establishes to a preponderance of the evidence that the defendant used or intended to use the phone to coordinate an escape or other criminal activity. This might be done by introducing transcripts of text message conversations or social media communications, or audio recordings of messages left in the defendant's voicemailbox. Evidence that the defendant used the phone to contact known criminal associates could also be relevant.

Further, aside from evidence regarding the intended use of the cell phone, OV 19 might also be scored based on the circumstances under which the defendant

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acquired the phone. In circumstances where the defendant was involved in smuggling the phone into prison (especially if the smuggling involved physical breach of the prison's perimeter), or where the defendant forcibly took the phone from another inmate, a court might reasonably find that he or she threatened the security of the prison. Unlike simply possessing a cell phone, this type of conduct would seem to necessarily increase the risk of harm to the inmate or others. See *Carpenter*, 322 Mich App at 531 (upholding the scoring of 25 points under OV 19 in part based on the defendant's retaliatory attack on another inmate).

In sum, when applying the transactional approach to OV 19 that this Court articulated in *People v Smith*, there are a number of aggravating factors that might warrant scoring the 25-point enhancement. Those factors simply are not present in the instant case, however, since the trial court did not make any factual findings beyond those required for the acceptance of the guilty plea.

RELIEF SOUGHT

For the reasons stated above, Mr. Dixon respectfully requests that this Court grant the application for leave to appeal, vacate the judgment of the Court of Appeals, and remand the case to the trial court for resentencing under a proper calculation of the applicable guideline range.

Respectfully Submitted,

Dated: June 7, 2021

By: */s/ C. Nicholas Curcio*

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