2013 WL 8022613 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,
v.
Gordon Benjamin WILDING, Defendant-Appellant.

No. 147675.
September 5, 2013.

Court of Appeals No. 309245

Application for Leave to Appeal

Livingston County Prosecutor, for plaintiff-appellee.

Jeanice Dagher-Margosian (P35933), for defendant-appellant, State Appellate Defender Office, Assistant Defender, State Appellate Defender Office, 101 North Washington, 14th Floor, Lansing, MI 48913.

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CASES

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Gordon Benjamin Wilding applies for leave to appeal the July 16, 2013 opinion of the Court of Appeals opinion affirming his conviction for probation violation, and asks this Court to reverse his conviction.

***v** STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Livingston County Circuit Court by plea of guilty and was sentenced on September 1, 2011. Defendant-Appellant requested the appointment of appellate counsel on September 7, 2011. The offenses occurred after the effective date of the November, 1994 ballot Proposal B that eliminated the right to file a claim of appeal from plea-based convictions. The Court of Appeals denied leave to appeal on June 1, 2012. On February 6, 2013, the Michigan Supreme Court remanded to the Court of Appeals as on leave granted. On July 16, 2013, the Court of Appeals issued an opinion affirming the conviction and sentence. This Court has jurisdiction to consider this application for leave to appeal pursuant to MCR 7.301(A)(2).

***vi STATEMENT OF QUESTIONS PRESENTED**

I. DOES DEFENDANT CHALLENGE THE SCORING OF OV 3, 4, 8, 9, & 10, BECAUSE THE SCORES ASSESSED DO NOT COMPORT WITH THE FACTS, APPLICABLE LAW, OR DUE PROCESS GUARANTEES?

Trial Court answers, “No”.

Defendant-Appellant answers, “Yes”.

Plaintiff-Appellee answered, “No”.

Court of Appeals answered, “No”.

II. WAS THE DEFENDANT IMPROPERLY ASSESSED COSTS & ATTORNEY'S FEES AND SHOULD THOSE FEES BE VACATED? ADDITIONALLY, IS THE 20% LATE FEE IMPOSED ON DEFENDANT UNCONSTITUTIONAL BECAUSE IT CONSTITUTES AN IMPERMISSIBLE MEANS OF ENFORCEMENT THAT EXPOSES CRIMINAL DEFENDANTS WHO HAVE HAD THE ASSISTANCE OF APPOINTED COUNSEL TO MORE SEVERE COLLECTION PRACTICES THAN ORDINARY CIVIL DEBTORS?

Trial Court answers, “No”.

Defendant-Appellant answers, “Yes”.

Plaintiff-Appellee answered, “No”.

Court of Appeals answered, “No”.

A. WAS THE IMPOSITION OF COURT FEES IN THIS CASE JUST AN ARBITRARY ASSESSMENT AND NOT SUPPORTED BY STATUTE OR CASE-LAW; THEREFORE, MUST THE COURT COSTS BE VACATED?

Trial Court answers, “No”.

Defendant-Appellant answers, “Yes”.

Plaintiff-Aellee answered “No”.

,Court of Appeals answered, “No”.

B. HAS THE DEFENDANT BEEN CHARGED ATTORNEY FEES WITHOUT A COURT ASSESSMENT OF HIS ABILITY TO PAY, AND THEREFORE MUST THE ATTORNEY FEES BE VACATED UNTIL A PROPER ASSESSMENT HAS BEEN CONDUCTED?

Trial Court answers, “No”.

Defendant-Appellant answers, “Yes”.

Plaintiff-Appellee answered, “No”.

Court of Appeals answered, “No”.

***vii** C. DOES IMPOSING A 20% LATE FEE PURSUANT TO MCL 600.4803(1) CONSTITUTE AN IMPERMISSIBLE MEANS OF ENFORCEMENT THAT EXPOSES CRIMINAL DEFENDANTS WHO HAVE HAD THE ASSISTANCE OF APPOINTED COUNSEL TO MORE SEVERE COLLECTION PRACTICES THAN ORDINARY CIVIL DEBTORS?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answered, "No".

Court of Appeals answered, "No".

III. WAS APPELLANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS, US CONST, AM VI; CONST 1963, ART 1, § 20, WHERE HIS TRIAL ATTORNEY FAILED TO MAKE APPROPRIATE OBJECTIONS TO THE ERRORS IN THIS CASE?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answered, "No".

Court of Appeals answered, "No".

*1 STATEMENT OF FACTS

Defendant pled guilty to Criminal Sexual Conduct 3rd Degree on June 11, 2010. See Plea Transcript June 11, 2010 [hereinafter PT1]. He was then sentenced on August 5, 2010 to HYTA status including the first year in the county jail and the second year on electronic monitoring. See Sentence Transcript August 5, 2010 [hereinafter ST1]. Defendant violated the terms of his probation on or around July 2, 2011 by using marijuana and over the counter cold medication. See Plea Transcript August 11, 2011 [hereinafter PT2]. Defendant pled guilty to this probation violation on August 11, 2011. Id. Defendant was then sentenced to 85 months to 15 years in the Michigan Department of Corrections and was ordered to pay a total of $3,333.60. See Sentence Transcript September 1, 2011 [hereinafter ST2]; Judgment of Sentence (signed 9/7/2011) [hereinafter JOS]. The breakdown of the costs/fees is as follows:

- Court Costs - $1,800.00
- Circuit Court Attorney Fees - $850.00
- Crime Victim Assessment - $60.00
- State Costs - $68.00
- 20% Late Penalty Fee - $555.60. See JOS.

Although there are some discrepancies in accounts underlying the CSC charge, the basic facts upon which most account concur is as follows. On December 12, 2008 Gordon Wilding, James Witgen, Amanda Cangialosi, Sarah Travis, and Whitney Combs were all attending the "battle of the bands" and accompanying dance. See Livingston County Sheriff Incident Report 08-0015068 [hereinafter IR] at 4, 6 (Attached). At some point in the evening, Amanda and Sarah approached Gordon and James and asked

if they would be able to buy alcohol for the girls. IR 4, 6-7 (Sarah told the police that "Amanda first asked Gordy and James if they could get them any alcohol." However, ***2** in Amanda's account to the police, she stated that "Gordy suggested getting alcohol." Id. But then in her CARE interview, she states that "she asked the person she knew as Gordy if he could get her some alcohol." CARE Interview of Amanda Cangialosi, page 1 of 2 (attached)). James said "yes" and left to go buy alcohol with the $20 that Amanda had given him. IR at 4, 7. Amanda also indicated in her interview that at some point she told Defendant she was 16 before they engaged in sex. IR at 8.

James called Gordon when he got back and Gordon, Amanda, and Sarah went outside to James' van and poured the fifth of Raspberry Smirnoff Vodka in two water bottles, so they could take it back in to the center and not get caught. IR at 4-5, 7. Both Amanda and Sarah said that between the two of them they drank the entire fifth of the course of about an hour, but no more than two hours. IR 5, 7. Later in the evening Amanda left the dance with Gordon and James, and went out to the van. Id.

Sarah came out at some point after this. She got into the van where she found James in the front seat and Amanda and Gordon in the back. IR at 5. She further stated that she remembered seeing "Gordy on top of Amanda in the back of the van but that she could not see over the seat, so could not see any details of what was going on." Id. After James made a pass at Sarah and she refused, Sarah left the van and proceeded to pass out on a nearby snow-bank. IR at 8. Whitney then came out to the parking lot looking for Amanda and Sarah found Amanda in the back of the van with no pants on and a guy on top of Amanda having sex with her. Id. The original presentence report, at 3, states that Sarah and Amanda were taken to St. Joe's Livingston County for medical attention, but this was not the case; Amanda was taken to the hospital by her mother the next day. See Presentence Report [hereinafter PSR]; ***3** IR, Interview with Ruth Cangialosi, 2 of 3. The complaint, however, was not filed until September 29, 2009. See Complaint.

The State Appellate Defender Office was appointed to perfect an appeal and/or pursue post-conviction remedies on September 26, 2011. Defendant filed a motion for resentencing in the trial court. He also filed a motion to file a supplemental brief, since all issues could not be property briefed, in the opinion of appellate defense counsel, within the 20 pages allowed for trial court briefs under the Michigan Court Rules, MCR 2.119. Both motions were denied following a hearing on March 8, 2012. See attached orders. See infra.

Mr. Wilding filed an application for leave in the Michigan Court of Appeals. It was denied by order dated June 1, 2012. See attached order. Defendant then filed for leave to appeal in the Michigan Supreme Court. The Supreme Court remanded the case as on leave granted by order dated February 6, 2013. See attached order. The Court of Appeals issued an unpublished opinion on July 16, 2013, granting relief as to OV 9, but denying relief on all other issues. Because the OV 9 error does not alter the guidelines range, resentencing was also denied. See attached opinion.

It is from the above sentence that Defendant now appeals.

***4 ARGUMENT**

I. DEFENDANT CHALLENGES THE SCORING OF OV 3, 4, 8, 9, & 10, BECAUSE THE SCORES ASSESSED DO NOT COMPORT WITH THE FACTS, APPLICABLE LAW, OR DUE PROCESS GUARANTEES.

Standard of Review. A trial court's findings of fact at sentencing are reviewed for clear error. People v Osantowski, 481 Mich 103, 111 (2008). A trial court's scoring decision for which there is a preponderance of record evidence in support will be upheld. *People v Endres*, 269 Mich App 414, 417 (2006); *People v Hardy* and Glenn, Mich Docket Nos. 144327 and 144979 (July 29, 2013). "Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v McGraw*, 484 Mich 120, 135 (2009). The proper interpretation of the sentencing guidelines is a question of law that the appellate court reviews de novo. *People v Bemer*, 286 Mich App 26, 31 (2009). It may be raised by a timely motion for resentencing. Kimble, supra. Challenges to facts in the

presentence report are constitutional in nature. *People v Hoyt*, 185 Mich App 531, 533 (1990). Constitutional questions are reviewed de novo. People v Breeding, 284 Mich App 471, 488 (2009).

Analysis. General Principles. A defendant has a statutory right to challenge the guidelines scoring in his case. MCL 769.34(10). Specifically, MCL 769.34(10) states that "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence... absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Id. Further, the statute goes on to state, "A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing..." Id. (Emphasis added). ***5** Additionally, a defendant has a due process right to be sentenced on the basis of complete, accurate, and reliable information under the Michigan and United States Constitutions. [1]

Guidelines variables, like all presentence information, must be based only on evidence which is part of the record. See People v Osantowski, 481 Mich 103, 111 (2008), lv den 476 Mich 866 (2006), cert den 555 US 1015; 129 S Ct 574; 172 L Ed 2d 435 (2008). *People v Endres*, 269 Mich App 414 (2006). Once factual bases are challenged, either at sentencing or by a timely motion for resentencing, the court must find that such information is correct by a preponderance of the evidence. This is the minimum standard of proof with respect to sentencing. See *People v Kimble*, 470 Mich 305, 310-11 (2004); McMillan v Pennsylvania, 477 US 79 (1976). If a defendant challenges a fact used in sentencing, he or she is entitled to that fact being proved by a preponderance and by way of an evidentiary hearing, if necessary, as a matter of ***6** due process. As Justice Archer wrote in People v Ewing, 435 Mich 433, 459-60 (1990): "[F]undamental fairness... must invasively dominate at least how the presentence information can be judicially utilized, to the extent that trial courts must be willing and able to wade through and separate that which may be factored into a sentencing decision and that which may not."

Specific Challenges to Offense Variables

OV 3. Offense variable 3 is governed by MCL 777.33, which provides:
(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was killed - 100 points

(b) A victim was killed - 50 points

(c) Life threatening or permanent incapacitating injury occurred to a victim - 25 points

(d) Bodily injury requiring medical treatment occurred to a victim - 10 points

(e) Bodily injury not requiring medical treatment occurred to a victim - 5 points

(f) No physical injury occurred to a victim - 0 points

When the Legislature enacted this statute, it chose not to define "bodily injury." See MCL 777.33. In People v Cathey, 261 Mich App 506 (2004), the Michigan Court of Appeals reaffirmed the decision in *People v Woods*, 204 Mich App 472 (1994), which held that pregnancy is a "bodily injury" within the context of OV 3. Cathey, 261 Mich App at 514. The court in Cathey went on to state, "we do not look to this case law definition because the statute is ambiguous. Instead, it is because there is no statutory definition available that we must look to the dictionary and common law for the definitions of the same terms used by the Legislature in M.C.L. § 777.33. Nor is there any surrounding text that is of any assistance." Id. at 517. The dictionary ***7** definition of injury is "harm or damage that is done or sustained," (see http://dictionary.reference.com/browse/

injury?fromAsk=true&to=100074) or "an act that damages or hurts." See http://www.merriam-webser.com/dictionary/injury. Therefore, it necessarily follows that "bodily injury" is harm or damage to an individual's body.

Several cases in Michigan provide additional examples of how to score OV 3. In *People v Endres, supra,* for example, the court held that OV 3 was erroneously scored at five points. Endres, 269 Mich App at 417. The court noted that although "the prosecutor's file notes indicated that the victim experience rectal pain as a result of the assault, the information, in the prosecutor's file, had not been made a part of the record." *Id.* Therefore, the court held that scoring OV 3 was improper since there was no record evidence to support the score. *Id.* at 417-18. In another case, People v McDonald, unpublished opinion of the Court of Appeals, issued July 12, 2011 (Docket No 297889) (attached), the panel held that an infection contracted by the victim constituted bodily injury within the meaning of the statute. However, as in the case at bar, the mere fact that a victim was taken to a hospital to be examined by a sexual assault nurse is **not enough by itself** to constitute an injury under Michigan case law. *People v Hamilton,* unpublished opinion per curiam of the Court of Appeals, issued December 6, 2011 (Docket No 298944) (attached). The Hamilton court held that there would have to be evidence presented that the victim actually sustained bodily injuries from the sexual assaults; an examination is not dispositive in and of itself of an injury. *Id.*

***8** Further, it is important that the plain language of the statute specifies that any injury supporting OV 3 scoring must be supported by evidence that it was of a severity which "required medical treatment," even if none was administered. See MCL 777.33.

As applied. Defendant's Table of Conflicting Facts Regarding OV 3, below, shows the deficiencies in proof supporting a score of 10 points for OV 3: [2]

Facts as stated by Defendant	**Facts as stated by Prosecution & Judge Reader*****
Amanda does not mention any injury sustained in interview with Livingston County Sheriff's Dept. or during CARE Interview. See IR 6-8; CARE Interview of Amanda Cangialosi.	Amanda's mother, Ruth, stated her "injuries were the loss of her virginity and round of immunizations & testing for HIV. I believe there was some bruising between her legs." See Victim Impact Statement from Ruth Cangialosi.
The Review of Symptoms, conducted by the medical examiner at the ER, "revealed no injuries." See Inpatient Consultation or Referral Sheet.	During a phone call (not the examination) it was stated that "child woke up with pain, swelling and bruising of labia and vagina." See Medical Social Work Note page 2 of 3.
Pain Score was reported at 0. See University of Michigan Hospitals and Health Centers Emergency Department Nursing Care Record page 2 of 3.	Both Judge Reader and the Prosecutor argued that "it sure looks like something more than alcohol..." (making references to the use of a date rape drug - however it was not charged and there is no toxicology report substantiating such a claim)
On Amanda's Victim Impact Statement under Question 6 which states "As a result of this incident, were you physically injured?" Amanda checks NO. See Victim's Impact Statement from Amanda Cangialosi.	

Defendant was incorrectly scored 10 points for "bodily injury requiring medical treatment." MCL 777.33(1)(d). Although both Sarah and Amanda were taken to the ***9** hospital for assessment (although Amanda was taken the following day after her mother learned of the incident, see Livingston County Sheriff's Incident Report, CARE Interview page 1 of 2), there is nothing in the record which indicates that Amanda sustained any type of "bodily injury," much less one that required medical treatment. See PSR and IR; also Inpatient Consultation or Referral Sheet, attached: "ROS revealed no injuries." Further, most, if not all, comments describing injury of any kind came from Amanda's mother, not from Amanda herself. *See e.g.*, CARE Interview with the victim, pgs 1-2, attached (no mention of pain or injury). The absence of any statements made by Amanda indicating bodily

injury requiring medical treatment, would clearly suggest that no such injury occurred in this case, thus, under Hamilton, the prosecution has not established enough to support this score. See PSR; IR; *People v Hamilton*, unpublished opinion per curiam of the Court of Appeals, entered December 6, 2011 (Docket No 298944) (attached). Something more than just the sexual act supporting a CSC conviction must be shown to establish a "bodily injury," and in this case that burden has not been carried by the prosecution.

Moreover, the evidence is directly to the contrary. Not only did the medical examiner discover no injuries, the victim herself, on her victim impact statement checked "No" for the question asking whether or not she has sustained physical injury as a result of the crime. See Inpatient Consultation or Referral Sheet; Victim's impact Statement from Amanda Cangialosi. Lastly, both Judge Reader and the Prosecutor kept making remarks during the motion for resenting about "it sure looks like more than just alcohol" - suggesting that some kind of date rape drug was used. However, not only was this discussion unfounded, it was improper to even discuss in the context ***10** of scoring OV 3. Sarah is the individual who passed out, not Amanda, and moreover, Sarah indicated to the police that she believed the alcohol was interfering with the seizure medication she was taking. PSR Agent's Description of Event pg 4. Amanda on the other hand, indicated that she felt dizzy and disoriented - a conclusion which follows logically from a high school aged girl drinking half of a fifth of vodka in the time span of 1-2 hours. See IR 4-7 (both girls indicate separately that they split the bottle and Sarah further notes that it could not have been more than 2 hours total).

Accordingly, the proper score of OV 3 in this case was zero points, as no bodily injury has been established. Standing alone, correction of this error lowers the OV score by 10 points to 50 points, and does not changes the applicable range (but when taken with the other variable discussed infra, Defendant's range changes).

OV 4. Offense variable 4 is governed by MCL 777.34, which provides:
(1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Serious psychological injury requiring profession treatment occurred to a victim - 10 points

(b) No serious psychological injury requiring profession treatment occurred to a victim - 0 points

(2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

As the statute indicates, this is an "all or nothing" variable. The Legislature assigned two choices: a) serious psychological injury occurred, or b) no serious psychological injury occurred. See MCL 777.34(1); *People v Waclawski*, 286 Mich App 634 (2009). In the case of *People v Dorhan*, 264 Mich App 77 (2004), the Court of Appeals upheld a ***11** score of 10 points when the evidence showed that the victim was having nightmares, problems with her marriage, and problems at work.

However, the appellate court found error in the scoring of ten points under OV 4 where there was no record evidence of serious psychological injury resulting from the exhibition of a sexually explicit performance to a 12 year old girl. The trial court "may not simply assume that someone in the victim's position would have suffered psychological harm...." *People v Lockett*, 295 Mich App 165 (2012). See also People v Hicks, 259 Mich App 518 (2003) (court may not assume serious psychological injury from forceful purse snatching).

As applied. Table of Conflicting Facts Regarding OV 4.

Facts as stated by Defendant	**Facts as stated by Prosecution & Judge Reader*****

Amanda states on her Victim Impact Statement that she was psychologically injured. See Victim Impact Statement for Amanda Cangialosi.	Agreement.
Further Amanda states that she has "been going to therapy on and off since the incident." Id.	Agreement.
Amanda's mother, Ruth, stated her daughter was seeing a psychiatrist before this incident occurred. See Medical Report, attached.	
Amanda's mother also stated that her daughter desired to return to counseling. See Victim's Impact Statement for Ruth, PSR pg 6. (emphasis added).	

In the instant case, the Defendant was scored 10 points for inflicting serious psychological injury upon the victim which required professional treatment. MCL 777.34. However, the evidence in the record does not clearly support this score. At ***12** Defendant's motion for resentencing in front of Judge Reader at the circuit court, Judge Reader opened upon an interesting line of questioning with defense, about whether this variable is based on an objective or subjective standard. The problem is that the Legislature has not stated if this variable is based on objective or subjective standards, and counsel is aware of very little case-law directly on point. In People v Louis, unpublished opinion per curiam of the Court of Appeals, entered May 12, 2011 (Docket No 296623) (attached), the court stated:

> Michigan case law supports that subjective evidence regarding psychological consequences to the victim, including a victim's disrupted life, stress, personality and emotional changes, and nightmares, *can support* a trial court's scoring of 10 points under OV 4. (Emphasis added).

However, the Court did not give a *definitive* holding that OV 4 must be allowed to be scored with subjective evidence.

With the above principles in mind, in this case, Defendant's score of 10 points cannot be upheld as correct. Although Amanda checked the box that she received a serious psychological injury from this incident, her mother also stated that she was seeing a psychiatrist before the incident occurred. See Victim Impact Statement from Amanda; PSR 6. If not seeking psychological treatment is not dispositive, then seeking psychological treatment before the offense occurred for unrelated reasons, and then continuing to do so, cannot be dispositive either, because there is no way to know exactly what injury was caused by the event, and what had unrelated causes. It bears consideration, also, that the crime occurred in December 2008, and the complaint was filed in September 2009. Logically speaking, if the injury to Amanda was extreme, it would seem that attention would have been paid to this event much ***13** sooner by law enforcement. Therefore, without a further showing that defendant specifically caused Amanda "serious psychological injury," the fact that she states, and we must accept from a purely subjective statement, cannot be enough by itself to warrant 10 points, and should be rescored at zero absent a showing of causation on the part of the defendant.

OV 8. Offense variable 8 is governed by MCL 777.38, which provides:
(1) Offense variable 8 is asportation or captivity. Score offense variable 8 by determining which of following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense - 15 points

(b) No victim was asported or held captive - 0 points

The scoring instructions state:

All of the following apply to scoring offense variable 8:
(a) Count each person who was placed in danger of injury or loss of life as a victim.

(b) Score 0 points if the offense is kidnapping.

Offense variable 8 is another "all or nothing" variable. For this particular variable, the Legislature was silent as to the meaning of "asportation as not by the Court of Appeals in People v Spanke, 254 Mich App 642 (2003). The Spanke Court noted that "unless defined in the, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. Id. at 646 (emphasis added). Although the Court clearly acknowledged that "asportation" is not defined in the plain language of the statute, they did not define the word. See Id. at 647; MCL 777.38.

***14** When words are not "expressly defined in the statute, it is permissible for this Court to consult dictionary definitions in order to aid in construing the term 'in accordance with [its] ordinary and generally accepted meaning."' People v Morey, 431 Mich 325, 330 (1999) (citing Bd County Rd Commissioners for Oakland County v Mich Prop & Casualty Guaranty Assoc, 456 Mich 590, 604 (1998)). Black's Law Dictionary defines "asportation" as "the act of carrying away or removing (property or a person)." See Black's Law Dictionary (3d pocket ed, 2006).

As applied. Table of Conflicting Facts Regarding OV 8.

Facts as stated by Defendant	**Facts as stated by Prosecution & Judge Reader*****
Amanda asked the Defendant and James if they could get her and Sarah alcohol, and provided the money for said alcohol. See CARE Interview, Livingston County Sheriff's Report, page 1 of 2.	Since the van had moved by the time Sarah came out later after Amanda went to the van with Defendant and James, the Defendant asported Amanda. See IR 5.
Amanda, James, Sarah, and Defendant went to and from the van numerous times throughout the evening, to smoke, drink, etc. See IR 4-8.	
Amanda voluntarily went back out to the van with just Defendant and James to get more alcohol. Amanda confirmed this in her interview and then stated that once in the van she began kissing Gordy, then climbed into his lap and was sitting on his lap facing him kissing CARE Interview, Livingston County Sheriff's Report, page1 of 2.	

Asportation. In considering the presence of asportation, the Spanke Court observed that: "[T]he victims were moved, even if voluntarily, to defendant's home where the criminal acts occurred. The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have ***15** occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others." Spanke, 254 Mich App at 648. To come to this holding, the Spanke court looked to the kidnapping statute for guidance on the meaning of asportation, and noted that "in order to establish asportation as an element of the crime of kidnapping, MCL 750.349, there must be some movement of the victim taken in furtherance of the kidnapping that is not merely incidental to the commission of another underlying lesser or coequal crime." Id. at 647. Although the court held that asportation "can be accomplished without using force against the

victim," they necessarily read-in another provision in the plain meaning of asportation. Id. That is, by looking at kidnapping and the requirement that the asportation occur for the offense of kidnapping and not be "merely incidental to the commission of another underlying lesser or coequal crime," the court implicitly held that for asportation to occur in cases which are not kidnapping, the defendant must "carry away" the victim for the purpose of committing the underlying crime and not for another purpose. Spanke, 254 Mich App at 647 (emphasis added).

With those principles in mind, it is clear in this case that asportation has not been shown. The police report, submitted as CARE Interview on 9-28-09 Livingston County Sheriff Report, page 1 of 2, attached, states as follows (from the interview of Amanda Robin Cangialosi) :
Amanda stated she asked the person she knew as Gordy if he could get her some alcohol after she found out he had been drinking. Amanda told him he needed to put it in a water bottle so she could drink it inside the building where the battle of the bands concert was being held. Amanda said that Gordy's friend went to the store and bought some Raspberry ***16** Smirnoff. Amanda and her friend Sarah Travis went to Gordy and his friends van where Sarah began to fill the water bottle, but was afraid she would spill it. She handed it to Gordy's friend who finished filling the empty water bottle with the alcohol. Amanda stated after they filled the bottle they all went into the building and began drinking and dancing.

Amanda stated she went back out to the van for more alcohol. Once in the van she began kissing Gordy, then climbed into his lap and was sitting on his lap facing him kissing. Amanda then remembers being in the back of the van with her pants and off (sic) with Gordy on top of her. Amanda stated she was a virgin and she remembers her vagina hurting because Gordy's penis was inside her. Amanda then stated someone was knocking on the side of the van and Gordy told her to get dressed. Amanda stated it was her friend Whitney who came to get her out of the van.

Amanda stated she didn't tell her mother till later because she didn't remember it happening until she changed into her pajamas and couldn't find her underwear. (Emphasis added.)

In another interview, dated 9/28/09, page 6 of 9, attached, Amanda stated that she and Sarah "went to the car" with Gordy. A consistent fact throughout the accounts is that the individuals went together to and from the van numerous times that evening to partake in drinking and smoking. See IR 4-7. There has been no showing, nor could there be, that at the time the defendant, James, and Amanda went to the van when the incident eventually occurred, that the defendant somehow "carried away" Amanda to the van. It was Amanda, on her own volition, who approached defendant for alcohol, who went in and out of the dance with him, drinking and dancing, and who appeared to have initiated the sex in the back of the van. On these facts, under Spanke's interpretation of asportation, and the plain meaning according to the dictionary definition, the defendant's score for OV 8 must be vacated and properly reassessed at zero.

***17** Place of greater danger. Further, based upon the facts above, it is not established that any asportation, even if a court were to reach a conclusion that there was asportation, was to a place of "greater danger" or that the "victim" was "held captive beyond the time necessary to commit the offense."

As to "greater danger": the comparative term "greater" indicates that there was an initial place where the crime could have been committed. A defendant aggravates the "badness" of the crime by taking a victim to a place of "greater danger," as compared to the initial site for the offense. Here, there was no place of greater danger, because there was only one place where the sexual penetration could be completed, i.e., the van, which was a private place that the defendant had access to at the time of the offense. Assuming all can agree that the act of penetration would not be taking place on the dance floor, this was not a place of greater danger. Rather, it was merely the site of the offense.

Held captive. Regarding "held captive beyond the time necessary to commit the offense": there is absolutely no showing of this element of the variable. Further, there is no showing of any movement not incident to the commission of the offense, since, as noted above, this was the obvious place for sex to take place between defendant and the victim. OV 8 must be scored at

zero. This reduces Defendant's overall OV score to 45 rather than 60; the range for a presumptively valid sentence changes from C-V, 51-85 months, to C-VI, 45-75 months. This in turn, requires that resentencing be ordered. People v Francisco, 474 Mich 82, 88-92 (2006).

OV 10. Offense variable 10 is governed by MCL 777.40, which provides:

***18** (1) Offense variable 10 is **exploitation** of a vulnerable victim. Score offense variable 10 by determining which of following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved -15 points

(b) The offender **exploited** a victim's physical disability, mental disability, youth or agedness, or domestic relationship or the offender abused his or her authority status - 10 points

(c) The offender **exploited** a victim by his or her difference in size, strength, or both, or **exploited** a victim who was intoxicated, under the influence of drugs, asleep, or unconscious - 5 points

(d) The offender did not **exploit** a victim's vulnerability - 0 points

(2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability

(3) As used in this section:

(a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) "**Exploit**" means to manipulate a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was **exploited** out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

According to the language of the statute, for a defendant to receive a score of 15 points, predatory conduct must be involved. MCL 777.40(1). As noted by the Michigan Supreme Court in People v Huston, 489 Mich 451, 461 (2011), "The fact that the Legislature has directed sentencing courts to assess 15 points, the highest number of points that can be scored under OV 10, for 'predatory conduct,' also strongly suggests that the Legislature did not intend 'predatory conduct' to describe any manner of 'preoffense conduct."' The Court went further and stated:

> Indeed, if that were the case, 15 points could be assessed under OV 10 in almost all cases because there will almost always be some manner of ***19** preliminary or preoffense conduct. Few criminal offenses arise utterly spontaneously and without forethought. Most importantly, reading MCL 777.40(1)(a) as requiring 15 points to be assessed for OV 10 in every case would essentially render nugatory MCL 777.40(1)(b) through (d),... Id. at 461-62.

Therefore, the Michigan Supreme Court concluded that the term "preoffense conduct,"

does not encompass any "preoffense conduct," but rather only those forms of "preoffense conduct" that are commonly understood as being predatory in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or "preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *Id.* at 462 (quoting *People v Cannon*, 481 Mich 152, 162 (2008)).

Additionally in the case of People v Cannon, the Michigan Supreme Court set out a three-part test to help lower courts determine if 15 points should be assessed:
(1) Did the offender engage in conduct before the commission of the offense?

(2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint persuasion or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? (People v Cannon, 481 Mich 152, 162 (2008)).

The Court further stated that if all three are not answered affirmatively, then fifteen points should not be assessed. Id. [3]

***20** Finally, in People v McClain, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2012 (Docket No 301359) (attached), the Court considered OV 10 in the context of an unarmed robbery. There, the defendant pushed a woman in her eighties in a shopping mall parking lot during a purse-snatching. The Court of Appeals reversed the lower court's scoring of 15 points for OV 10:
At sentencing, the prosecutor argued that defendant "had an opportunity to stalk and approach [the victim] prior to mugging her." The prosecutor stated that "there is an argument to be made for predatory conduct, because he had to see that this person that he mugged was **elderly** and he had to see that before he actually mugged her." This argument is based on pure speculation. There was no evidence presented which showed that defendant actually engaged in conduct before the offense. Rather, the only evidence presented below was that defendant approached the victim from behind and grabbed her purse. Therefore, the OV 10 should have not been scored at 15 points. While we conclude that scoring 15 points for OV 10 was improper based on the lack of factual support on the record, we hold that scoring 10 points under OV 10 would be appropriate. MCL 777.40(1)(b) provides that OV 10 must be scored at 10 points if "[t]he offender **exploited** a victim's... agedness." The trial court record clearly indicates that there is a factual basis for the conclusion that defendant **exploited** the victim's agedness.

As applied. There was nothing placed on the record, either in the original plea and sentence proceedings, nor at the motion hearing, which showed any evidence of "predatory conduct." What was shown is laid out in the table below:

Table of Conflicting Facts Regarding OV 10.

Facts as stated by Defendant	**Facts as stated by Prosecution & Judge Reader*****
James bought alcohol for the girls upon request from Amanda. IR 4.	Defendant and James plied the girls with alcohol. (Unsupported by the record).
Both girls voluntarily drank half of a fifth of vodka in less than 2 hours. IR 5, 7.	Again, both the Prosecutor and Judge Reader made comments about the case looking like something "more sinister" being used - however the use of ANY drugs was NEVER charged and is COMPLETELY UNSUPPORTED by the record (other than the seizure medication Sarah admits to being on and she is not the "victim" for purposes of this case).

> Sarah informed the investigation officer that she believed that the alcohol was interfering with her seizure medication. See PSR Agent's Description of Event, pg 4.

***21** In the instant case, the defendant was assessed 15 points, which is clearly wrong. See SIR. The record is void of any conduct on the part of the defendant which would rise to the level of predatory. This was not a case where he stalked around the dance floor trying to find a "vulnerable" victim, or anything of the sort. Rather, this is merely a case where a high school boy was approached by two girls who had a plan themselves - obtaining alcohol. See IR 4, 7. James, the individual with the defendant, and the person old enough to buy alcohol, agreed to do so, and the girls voluntarily drank it. Id. There is nothing in the record which shows that the boys forced the girls to drink it, moreover, the idea for alcohol was brought up by the girls. Id. at 4 (Sarah told the officer that "Amanda first asked Gordy and James if they could get them any alcohol."). Therefore, this case is nothing like Apgar, supra. Clearly, the score of 15 points was in error.

The Prosecution and Judge Reader both insisted on stating during Defendant's Motion for Resentencing, that James and the Defendant plied the girls with alcohol and that "it sure looked like something more than alcohol was being used." However, as noted supra, the use of any type of date rape drug was ***never charged and the record clearly does not support such an unfounded assertion.*** See PSR Agent's ***22** Description of Event pg 4 (where Sarah tells the investigation officer that she believed the alcohol was interfering with her seizure medication and hence led to her passing out). Moreover, the case cited by Prosecution in support of their stance, People v Lockett, unpublished opinion per curiam of the Court of Appeals, entered January 10, 2012 (Docket Nos. 296747, 296848) (attached), clearly misses the mark and is inapplicable. In Lockett, the defendants were both substantially older than the girls in the case (who were 12, 14, and 16). Id. There, the girls had decided to run away from home, and met up with the defendants who then took them to a liquor store, bought alcohol, and proceeded to go to a park where officers saw the van and observed sexual activities taking place. Id. Here, the defendant was very close in age to the "victim," did not buy the alcohol as he was not legally old enough to do so, and was not assisting extreme minors in running away from home. Contrary to what the prosecution asserts, Lockett, does not stand for a catch-all proposition that providing alcohol automatically equates to predatory conduct, and moreover, again, ***James bought the alcohol after being asked to do so by Amanda.*** The case sub judices is based on facts which are not remotely close to the facts presented in Lockett.

Finally, under MCL 777.40(b) the only factor in subsection (b) the prosecution could make in this regard would be in reference to Amanda's age. However, there is nothing in the record to support that the defendant somehow **exploited** her age. In fact, the defendant asserts that he was told by Amanda that she was sixteen years old, and thus did not have true knowledge of her age to begin with. See Defendant's Description, PSR. Moreover, as evidenced by the fact that the girls approached the boys looking for alcohol, it is clear that the defendant did not **exploit** her age. He was ***23** not circling the dance floor looking for a young girl he could prey upon. Therefore, a proper score in this case for OV 10 would, at most, be 5 points, because Amanda was intoxicated. MCL 777.40(c). However, the more accurate score is zero. Presumably and realistically, **exploitation** of a vulnerable victim through predatory conduct simply did not occur. Sex with an underage person is what took place. *See People v Aaron Todd Brown,* unpublished opinion of the Court of Appeals, entered November 25, 2008 (Docket No 280507) (attached); People v Corrin, unpublished opinion of the Court of Appeals, entered July 27, 2010 (Docket No 290747) (attached).

This error, if corrected, standing alone, changes the OV score from 60 to 45, and the presumptively correct guidelines range to C-IV, 45-75 months, requiring resentencing. *See Francisco, supra.*

Resentencing before different judge. The transcripts in this case demonstrate that the trial judge was not impartial and fair in his evaluation of Defendants crime and appropriate sentence. For example, at the initial sentencing on August 5, 2010, the court commented that he had been Defendant's juvenile judge and gave Defendant "zero chance" of completing probation on HYTA. ST 8/5/10 at 5-6. The motion transcript, [4] also shows that the court and prosecutor, both, concluded that this was a "rape" and that an inference could be made that Defendant actually "drugged" the girls, even though there is no evidence anywhere in the record that this is true. The court also commented that there was at least a possibility, if not a probability, that this would, in turn, support an upward departure if this case is ***24** remanded for resentencing. This is particularly troubling, because by

statute, departures must be objective and verifiable. MCL 769.34(3). The revelation of personal prejudice here, and the potential imposition of sentence on Defendant in deference to that prejudice requires resentencing before a different judge. People v Evans, 156 Mich App 68, 71-72 (1986).

***25 II. THE DEFENDANT WAS IMPROPERLY ASSESSED COSTS a ATTORNEY'S FEES AND THOSE FEES SHOULD BE VACATED; ADDITIONALLY, THE 20% LATE FEE IMPOSED ON DEFENDANT IS UNCONSTITUTIONAL BECAUSE IT CONSTITUTES AN IMPERMISSIBLE MEANS OF ENFORCEMENT THAT EXPOSES CRIMINAL DEFENDANTS WHO HAVE HAD THE ASSISTANCE OF APPOINTED COUNSEL TO MORE SEVERE COLLECTION PRACTICES THAN ORDINARY CIVIL DEBTORS.**

Standard of Review. Questions of law, including those which involve application of constitutional provisions, are reviewed de novo. *People v Carpentier*, 446 Mich 19, 60 n19 (1994); *People v Swint*, 225 Mich App 353 (1997).

Review of Facts

The defendant in this case has been ordered to pay several fees and costs which break down as follows:
#Court Costs - $1,800.00

● Circuit Court Attorney Fees - $850.00

● Crime Victim Assessment - $60.00

> State Costs - $68.00

> 20% Late Penalty Fee - $555.60. See Judgment of Sentence.

These fees and costs come to a total of $3,333.60 that defendant has been ordered to pay in this case. Defendant first asserts that the $1,800 court cost was just an arbitrary fee the court imposed with no support in statute or case law. Defendant next argues that the attorney fees cannot be imposed as defendant is indigent, and his ability to pay has not been properly assessed even though the court is trying to impose and collect the fees. Lastly, the defendant asserts that the 20% late fee is an unconstitutional blanket assessment and unjustly punishes someone solely upon their status as an indigent, and therefore, violates the equal protection clause of the ***26** United States and Michigan Constitutions. [5] , [6]

A. THE IMPOSITION OF COURT FEES IN THIS CASE WAS JUST AN ARBITRARY ASSESSMENT AND NOT SUPPORTED BY STATUTE OR CASE-LAW; THEREFORE, THE COURT COSTS MUST BE VACATED.

Argument

For a trial court to order a criminal defendant to pay costs, it must be expressly authorized by statute. People v Lloyd, 284 Mich App 703, 707 (2009). As noted by the court in Dilworth:
There are several statutes under which trial courts may impose costs. MCL 771.3 authorizes a trial court to order a defendant to pay costs as a condition of probation; specifically, it authorizes the assessment of costs "incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer." (Emphasis added.) See People v. Brown, 279 Mich.App. 116, 138-139, 755 N.W.2d 664 (2008). Under MCL 769.1k(1)(b)(iii), a trial court may order the defendant to pay [t]he expenses of providing legal assistance to the defendant. And under MCL 769.34(6), a trial court may order costs as part of the sentence. Because the Legislature has set forth specific circumstances under which trial courts may impose costs, a trial court generally has the discretionary authority to order a criminal defendant to pay the costs of prosecution.

When authorized, the costs of prosecution imposed "must bear some reasonable relation to the expenses actually incurred in the prosecution." People v. Wallace, 245 Mich. 310, 314, 222 N.W. 698 (1929). Furthermore, those costs may not include "expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific ***27** violations of the law." People v. Teasdale, 335 Mich. 1, 6, 55 N.W.2d 149 (1952). People v Dilworth, 291 Mich App 399, 400 (2011) (emphasis original).

In Dilworth, the defendant challenged an assessment of court costs in the amount of $1,235. Id. Ultimately the court of appeals vacated the order and remanded it to the trial court. Id. at 404. The court reasoned that without any explanation on the record to justify the costs, they could not be affirmed. Id.

People v Sanders. The Court of Appeals has issued an additional published case on costs, People v Sanders, 296 Mich App 710 (2012). It is consistent with the holding in Dilworth in mandating that costs must be reasonable: "there must be a reasonable relationship between the costs imposed and the actual costs incurred by the trial court. But a reasonable relation is not the same as an exact relationship." Id., slip op 3. (Emphasis added.) The Sanders holding is different, however, in that it appears to indicate that costs may 1) take into account the overhead costs of general maintenance of governmental agencies and 2) are not necessarily invalid because the same amount is assessed for all defendants. Id. The Court of Appeals considered the Sanders costs again after remand to the trial court. People v Sanders, 298 Mich App 105 (2012). The panel held that the costs were permissible, observing as follows:
On remand, the trial court conducted the hearing as directed and received evidence of the costs of processing a felony case in Berrien Circuit Court. After considering the **financial** data submitted by the county, the trial court determined that the average cost of handling a felony case was conservatively $2,237.55 per case and, potentially, as much as $4,846 each. Therefore, the trial court concluded, because, even the most conservative estimate of the costs of processing a felony far exceeds the $1,000 amount of costs imposed, and there was "a reasonable relationship between the costs imposed and the actual costs incurred by the trial court." FN4

***28** FN4. Sanders, slip op at 3.

Defendant's argument in the trial court against the trial court's determination appears to primarily have been a continued objection to the trial courts failure to assess costs in light of the actual expenditure of costs in a particular case. Defendant in particular argued the distinction between the time invested in resolving a case by plea and the time invested in conducting a trial, or, for that matter, between the amounts of time involved in a one-day trial and a three-day trial. But, as the trial court observed in its opinion, defendant was repeating an argument that we had already rejected in our earlier opinion: that the costs imposed have to be particularized to the case before the court. As we thought we had made clear in our original opinion, a trial court may impose costs "without the necessity of individually calculating the costs involved in a particular case" FN5 and that is true whether a case is quickly resolved by plea or at the conclusion of a lengthy trial.

FN5. Sanders, slip op at 4.

In this case the trial court imposed $1,800 in court costs without any justification as to the amount imposed. In the original sentence on August 5, 2010, the Judge imposed $1,800 in court costs without any assessment of why that was the proper amount; however, the Order of Probation, only had $1,200 listed in "Costs." ST1 at 8; see Order of Probation - Protective Conditions (signed 8/17/2010). Then, in the second sentence, the court simply stated "the other costs and assessments originally ordered will carry forward on the judgment of sentence." ST2 at 8. There was no further articulation on this point and the Judgment of Sentence reflects that the costs were raised back to $1,800. See JOS.

To demonstrate the absurdity of these costs, in total defendant has used 48 minutes of court's time. This includes everything from his originally scheduled pretrial hearing through his second and final sentencing. Moreover, the original assessment the Judge ordered - $1,800 (although the Order was dropped to $1,200) was after the ***29** defendant used only 26 minutes of the court's time. See ST1; Order of Probation -Protective Conditions (signed 8/17/2010). There is no justification for these costs. Unlike Dilworth, which involved a jury trial and only assessed the defendant roughly $1,200, the defendant here has not put the through a trial at all. See Dilworth, supra. Instead, he was simply there for the charged offense, pled guilty, and was sentenced. Therefore, the costs should be vacated absent a justification specific to this case.

B. THE DEFENDANT HAS BEEN CHARGED ATTORNEY FEES WITHOUT A COURT ASSESSMENT OF HIS ABILITY TO PAY, AND THEREFORE THE ATTORNEY FEES MUST BE VACATED UNTIL A PROPER ASSESSMENT HAS BEEN CONDUCTED.

Argument

MCL 769.1k authorizes a sentencing court to impose certain fees. Specifically, MCL 769.1k(b)(iii) states that the court may impose "the expenses of providing legal assistance to the defendant." With full knowledge of this enactment at the time of its decision in People v Arnone, the Supreme Court of Michigan stated that if a "trial court decides to order the defendant to pay attorney fees, it shall do so in a separate order, and not the judgment of sentence." People v Arnone, 478 Mich 908 (2007). That decision was citing to an earlier Court of Appeals decision, People v Dunbar, 264 Mich App 240, 256 (2004). Even though Dunbar has been overruled in part by People v Jackson, supra, at 645-46, the Court in Jackson was silent as to its earlier requirement in Arnone that attorney fees must be in a separate order from the judgment of sentence. See Id. Therefore, Arnone is still good law, and a trial court must enter an assessment of attorney's fees separate from the judgment of sentence.

***30** Although the Court in Jackson held that there is not a mandatory ability to pay assessment required when a trial court imposes attorney fees, the Court held that certain circumstances do require such an analysis. Jackson, supra, at 645-46. Specifically, when imposition of the fees are enforced and defendant contests his ability to pay, a trial court must engage in an ability to pay analysis. Id. Additionally, although the Jackson Court interpreted MCL 769.11 to create a presumption of non-indigency when a defendant is incarcerated, the Court also stated that if a defendant contests this status even while in prison, the trial court must address the claim. Id.

In this case, the court has not entered a separate order, apart from the judgment of sentence, requiring the defendant to pay attorney fees. Under the standard set out in Arnone, this is improper. Moreover, the court should conduct an ability to pay assessment. Defendant has claimed indigency when appellate counsel was requested and based upon his record, the defendant does not have a strong ability to pay the fees. When the defendant was first sentenced in 2010, the court stated "as I looked at your file your parents still owe about $20,000.00 on your juvenile court case." ST1 at 6. Additionally, in the PSR, the agent under the "Employment" section had the following to say:

> Given the defendant's age of 19 years, it is thought that perhaps by now he would have established some sort of rudimentary employment history. However, that is not the case. The defendant could not remember addresses or times of employment, but indicated that he was a fry cook at Wendy's and also worked at a local store by the name of Save A Lot as a stock person. Both these jobs paid minimum wages and he work part time at these jobs prior to quitting. The defendant had no real thoughts or plans on what his future employment might be if he is given an opportunity to remain in the community. This agent agrees that the defendant is at a disadvantage to say the least due to his extremely poor writing skills (evidence by his personal statement written) and the ***31** fact that he has not completed high school. It is clear that defendant will be relegated to likely part time or minimum wage rudimentary positions unless he is to complete his high school education. See Employment, PSR.

Based upon this information, the defendant contests his ability to pay these fees, and the court should vacate the order of attorney fees, until a proper ability to pay assessment has been conducted.

C. IMPOSING A 20% LATE FEE PURSUANT TO MCL 600.4803(1) CONSTITUTES AN IMPERMISSIBLE MEANS OF ENFORCEMENT THAT EXPOSES CRIMINAL DEFENDANTS WHO HAVE HAD THE ASSISTANCE OF APPOINTED COUNSEL TO MORE SEVERE COLLECTION PRACTICES THAN ORDINARY CIVIL DEBTORS.

Argument

As noted above, the defendant was assessed costs and fees, despite the fact that he has claimed indigent status. Additionally, defendant was represented by appointed counsel during his original sentence in 2010, and is now represented by the State Appellate defender office on appeal.

MCL 600.4803(1) provides in relevant part: "A person who fails to pay a penalty, fee, or costs in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. [7]

While the 20% late fee statute applies to all criminal defendants, it violates the constitution in a more egregious way with respect to those qualifying for court appointed counsel. Imposing such a harsh penalty on a class of people who have ***32** already been determined by the court to not have the means to retain an attorney is an impermissible means of enforcement because it singles out criminal defendants for unequal treatment. The federal and state constitutions, US Const, Am VI; Const 1963, art 1, § 20, guarantee that no one will be required to appear in a criminal proceeding without counsel because of being poor. See Gideon v Wainwright, 372 US 335 (1963). Thus, the defendant in this case and others similarly situated, have had their indigency status determined by way of the court's appointment of counsel.

i. The 20% late fee is usurious, especially in light of Defendant's indigent status.

Here, Defendant challenges the 20% late fee because it is assessed whenever a defendant does not pay fees and costs, regardless of indigent status. There is no individual consideration of case circumstances provided for in the law. It is a blanket penalty for all criminal defendants, including those who are indigent. Moreover, counsel has not found any statute like MCL 600.4803 that allows for the imposition of a 20% late fee. Perhaps the most apt comparison would be with the interest charged on judgments. While interest rates charged on judgments will vary from state to state, it generally does not rise above 12%. See List of state by state interest rates on judgments, attached. In contrast, the 20% penalty kicks in after a payment is 56 days late. MCL 600.4803(1). A 20% rate for 56 days equates to an annualized interest rate of over135%. [8]

***33** Additional comparisons are found within the following statutory schemes: under MCL 500.3142 and 500.3148, an insurance company that fails to pay a claim within 30 days pays a 12% assessment and attorney fees. MCL 600.6013 ties the interest rate for civil judgments to the Department of Treasury T-Bill interest rate. In 1989 that would have been 10% and today it is 3.7% compounded. Michigan currently has one of the most restrictive statutes pertaining to usury limits that can be found anywhere in the United States today in order to protect citizens against high interest rates on civil judgments, yet it charges an unconscionable amount for late payment of fines and costs imposed as a part of criminal sentences. See JOS.

ii. Imposition Of The 20% Penalty Under MCL 600.4803 violates Defendant's Equal Protection and Due Process Rights.

Imposing the 20% penalty under MCL 600.4803 on an indigent defendant violates the due process and equal protection clauses of the 14th Amendment. Defendant is clearly indigent, therefore imposition of the 20% penalty for no reason other than the inability to pay violates Defendant's rights to equal protection and due process under the 14th Amendment of the federal constitution and the parallel provisions of the Michigan constitution. See US Const, Ams V, XIV; Const 1963, art 1, S 17.

Once the appropriate sentence has been determined, it is unconstitutional to impose a higher penalty on the defendant for no reason other than defendant's inability to pay a fine or cost. In a situation where a defendant is further penalized due to an inability to pay, equal protection and due process principles converge. *Bearden v Georgia*, 461 US 660 (1983). In Bearden, the Supreme Court held that ***34** revoking a defendant's probation (thus, increasing the punitive result of the defendant's criminal actions) for failure to pay court imposed restitution and fines, without fault on the part of the defendant,[9] violated the fundamental fairness required by the 14th Amendment. Id. Once a state has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not subject a certain class of defendants to a period of imprisonment outside these limits solely by reason of that class's indigency.[10] By analogy, once a court has determined the appropriate amount of penalties, costs, and fees necessary to achieve the State's interests and policies, it should not then raise these fees, thereby increasing the punitive result, by 20% for no reason other than that defendant is indigent and cannot pay. Rather, in order to punish a defendant for failure to pay a fine or restitution, a sentencing court must first inquire into the reasons for the failure to pay. *People v Jackson*, 483 Mich 271, 280 (2009) (citing Bearden, supra, at 672).

***35 iii. The late penalty provided for in MCL 600.4803 is subject to the rule in Bearden.**

In Jackson, the Michigan Supreme Court decided that the US Supreme Court's reasoning[11] in *Bearden* did not prohibit assessments of attorney fees where a public defender has been provided. *Jackson, supra*, at 287-88. However, the penalty provided for by MCL 600.4803 is different from the fees at issue in *Jackson.* The attorney fees considered in Jackson are imposed on all defendants for whom counsel is provided. Rather than being punitive in nature, the attorney fees were held to be an attempt by the State to recoup the costs of providing representation to indigents. *Jackson, supra*, at 284. Also important to the court's decision in *Jackson* was that the defendant had not actually had his original sentence increased because of an inability to pay. *Id.* at 287.

Conversely, the penalty imposed by MCL 600.4803 is a punishment imposed for failing to pay the assessed fees and fines within 56 days of the due date. Unlike the Jackson case, where the attorney fee assessment was part of the original sentence, MCL 600.4803 takes part of the sentence that has already been imposed and increases it by 20% without further inquiry and by blanket application. Thus, due process guarantees are violated by the State's failure to offer, at a minimum, an opportunity to be heard before depriving defendants of property (20% for all unpaid fines after 56 ***36** days) without consideration of any of the circumstances of the case.[12] Equal protection concerns are equally offended by the treatment of an entire class of offenders, those indigent defendants who, not unexpectedly, cannot pay fines and costs within the time allowed by statute.

Further, there is no statutory that any money paid go to the same party to whom the underlying amount was owed. Rather, the statute commands that the 20% penalty go to the funding unit of the court. MCL 600.4803(2). This may sometimes result in the penalty going to the same party as the underlying amount if the underlying cost/penalty/fee was one that was owed to the court. However, the fact that the statute does not require same is indicative of an intent to punish, rather than an intent redress any injury or cost resulting from the late payment. The statute imposes a flat penalty regardless of how far past 56 days the payment is made. Had the statute been motivated by remedial concerns, the legislature could have tailored the penalty to have a proportional relationship between the amount of the late fee and how late the underlying payments are made.[13] Instead, the 20% penalty applies regardless of whether full payment is made one day late, or ten years late.[14] The ***37** constitutionally offensive nature of the statute as applied to indigent people is underscored by the complete lack of measured and rational application.

iv. As applied here.

In the instant case, Gordon Wilding is indigent. Applying the 20% penalty under MCL 600.4803 unconstitutionally increases his punishment [15] for no reason other than the inability to pay. For all of the above reasons, Defendant requests that the 20% late fee be vacated. [16]

***38 III. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS, US CONST, AM VI; CONST 1963, ART 1, S 20, WHERE HIS TRIAL ATTORNEY FAILED TO MAKE APPROPRIATE OBJECTIONS TO THE ERRORS IN THIS CASE.**

Standard of Review. Ineffective assistance of counsel is reviewed under a de novo standard. People v Pickens, 446 Mich 298 (1994).

Discussion. The issue of whether trial defense counsel's performance was constitutionally deficient is governed by Strickland v Washington, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and People v Pickens, 446 Mich 298 (1994). Simply stated, these decisions require that errors or omissions of trial defense counsel cannot be for strategic purposes and must be prejudicial or outcome determinative before reversal is required. To prevail on this argument, defendant must show that her trial counsel's representation fell below an objective standard of reasonableness under professional norms, that but for her counsel's error there is a reasonable probability that the results of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. People v Toma, 462 Mich 281, 302-303 (2000). Counsel's errors are apparent from the face of the record and may be reviewed by this Court. People v Rodriguez, 251 Mich App 10, 38 (2002). Alternatively, if the court views the record as inadequate for making an ineffective assistance finding, Defendant requests an evidentiary hearing.

Here, counsel did not challenge the errors presented above. His clear failures are as follows: 1) failure to thoroughly review the record and all police and medical reports, and to object to guidelines scoring that is patently incorrect after such a review; 2) failure to object to costs and other **financial** penalties that are clearly ***39** incorrect and for which there was published supportive authority (Dilworth, supra) at the time of the sentencing hearing. Counsel's representation was plainly inadequate under the performance prong of the above test. In addition, Defendant was prejudiced because he was scored under the guidelines for variables which were not properly supported by evidence in the record. See supra.

Counsel's error was plain; the attorney's failure violates *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), because (1) counsel's errors were so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) counsel's deficient performance prejudiced the defense, by effectively depriving Defendant of sentencing under a correct guidelines range, which would have mandated a much lower sentence. *Id. at* 687. *See also*, Defendant's supporting brief for resentencing motion, Issue I. Such issues may always be corrected on appeal if the errors were left uncorrected due to counsel's malfeasance. *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001); Edwards v Carpenter, 529 US 446; 120 S Ct 1587; 146 L Ed 2d 518 (2000).

***40 SUMMARY AND RELIEF**

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave and remand for resentencing, or grant any other relief which it deems fair and just, because this case involves a substantial question as to the validity of the applicable law, has significant public interest, and involves legal principles of major significance to the state's jurisprudence. He specifically asks that this Court ultimately vacate Mr. Wilding's current sentence and costs, and remand for resentencing. Mr. Wilding further respectfully requests that this Honorable Court grant resentencing before a different judge.

Footnotes

1 US Const, Ams V, XIV; Mich Const 1963, art 1, § 17; Townsend v Burke, 344 US 736 (1948); People v Francisco, 474 Mich 82, 88 (2006); People v Malkowski, 385 Mich 244 (1971); *People v Lee*, 391 Mich 618, 636-37 (1974). A trial court has several options when

addressing challenges to the accuracy of the PSIR. The sentencing court must respond to challenges to the accuracy of information in a presentence report. People v Newcomb, 190 Mich App 424, 427 (1991), overruled on other grounds, *People v Randolph*, 466 Mich 532 (2002). The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information. Newcomb, supra at 427. If the court decides to use last option to disregard the information (as the court did in the instant case), it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence. People v Brooks, 169 Mich App 360, 365 (1988). If the court finds the challenged information inaccurate or irrelevant, as it did here, it must strike that information from the PSR before sending the report to the Department of Corrections If the record information is insufficient for a finding by the preponderance standard, the court must hold a hearing to determine whether the challenged information is correct. *People v Hoyt*, 185 Mich App 531, 535 (1990).

2 Particular cites for the investigative record are provided in the body of the argument.

3 In contrast, a good example of what constitutes predatory conduct in a similar fact situation is found in People v Apgar, 264 Mich App 321 (2004). In People v Apgar, the defendant and accomplice invited the victim to accompany them to a store and then drove the victim around for two hours forcing the victim to smoke marijuana. Then they took the victim to an unfamiliar house and sexually assaulted her, and the court determined that forcing her to smoke marijuana was undertaken for purpose of making her an easier target and thus was predatory conduct. Here, substantial evidence shows the girls sought out alcohol; there is no mention in the medical reports of any drugs showing up in toxicology screens, and no other evidence to show that Defendant rendered Amanda more vulnerable by predatory conduct.

4 Motion hearing (MT) March 8, 2012 at 21-22, 25-27.

5 Much of this claim was addressed in People v Salina Desiree Fisher, unpublished decision of the Michigan Court of Appeals, issued April 19, 2011 (Docket No. 295322), attached. However, that decision was unpublished, and since these matters affect all indigent defendants, Defendant brings this claim again to the Court.

6 This claim is preserved by Defendant's presentation of same to the trial court by way of a supplemental brief filed in Livingston County, notwithstanding the trial courts refusal to consider same. MCR 6.429.

7 The standard form for judgments of sentence have a statement to this effect printed on the face of the document: “(t)he due date for payment is Fines, costs, and fees not paid within 56 days of the due date are subject to a 20% late fee on the amount owed.” In defendant's case, the date was entered as 8/5/10. See JOS.

8 By way of comparison, in Michigan the usury rate is 7% and a rate over 25% is criminal usury punishable by up to 5 years in prison. MCL 438.31; MCL 438.41.

9 The Supreme Court distinguished situations where a defendant willfully refuses to pay, or has failed to make bona fide efforts to obtain the means to pay. Id. at 668. Defendant argues that the 20% penalty could constitutionally be applied where it is shown that the defendant has willfully failed to pay or made no bona fide effort to do So.

10 *Bearden*, 461 US at 663-70 (citing *Williams v Illinois*, 399 US 235 (1970)). In analyzing this question, the Court noted that it generally analyzes the fairness of relations between the criminal defendant and the State under the Due Process Clause. It then observed that an Equal Protection Clause analysis is used to determine whether the State “has invidiously denied one class of defendants a substantial benefit available to another class of defendants.” Id. The Court concluded that “Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis,” but rather requires careful inquiry into factors such as the interest affected, the rationality of the connection between legislative means and purpose, and the existence of alternative means of reaching the state's objective. *Id.* (footnotes and citations omitted.)

11 While *Bearden* dealt with 14th Amendment claims, the specific claim in Jackson was that assessment of the attorney fees violated the 6th Amendment right to counsel. *See Jackson*, 483 Mich at 285.

12 US Const, Ams V, XIV. “Due process is flexible and calls for such procedural protections as the particular situation demands.” Matthews v Eldridge, 424 US 319, 334 (1976) (quoting *Morrissev v Brewer*, 408 US 471, 481 (1972)). “At the most fundamental level, due process ensures the right to be heard “at a meaningful time and in a meaningful manner.” *Goldberg v Kelly*, 397 US 254, 267 (1970).

13 For example, the state could charge interest on outstanding amounts.

14 By way of analogy, in contract law when determining whether a contract clause is a valid liquidated damages clause or simply a penalty, courts often look at whether the clause imposes a flat amount or proportions itself according to the actual harm. *See e.g.*, *Davis v Freeman*, 10 Mich 188 (1862).

15 To the extent the penalty is based on unpaid amounts that are not considered punitive, it creates a punishment where one did not previously exist. See supra.

16 This issue is submitted with acknowledgment to the work of Valerie Newman, SADO, Nicholas Ellis, and Sarah Elkins for their earlier work on this issue.

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