

Order

Michigan Supreme Court
Lansing, Michigan

July 22, 2011

142843

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DONALD GERALD JOHNSTON,
Defendant-Appellant.

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

SC: 142843
COA: 302290
Lenawee CC: 09-014386-FH

On order of the Court, the application for leave to appeal the February 28, 2011 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARILYN KELLY, J. (*dissenting*).

I dissent from the order denying defendant's application for leave to appeal because I believe that offense variable (OV) 10 was improperly scored. As I stated in my concurring statement in *People v Brandt*, 489 Mich 875, 876 (2011), OV 10 contemplates a living human victim; an institutional victim cannot be a vulnerable victim as contemplated by the definition of "vulnerability" in MCL 777.40(3)(c). Accordingly, zero points should have been assessed for OV 10. Since the resulting change in defendant's total OV score would produce a lower recommended minimum sentence range under the sentencing guidelines, I would vacate defendant's sentence and remand the case for resentencing with instructions to the trial judge to assess zero points for OV 10. See *People v Francisco*, 474 Mich 82 (2006).

CAVANAGH, J., joins the statement of MARILYN KELLY, J.



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I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 22, 2011

Corbin R. Davis

Clerk