**STATE OF MICHIGAN**
**IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL EDWARD BELLAR and
JOSEPH MATTHEW MORRISON,

Defendant-Appellants.

**Case No's. 20-3171-FH**
**20-3172-FH**
**Hon. Thomas D. Wilson**



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# RULING ON DEFENDANT-APPELLANTS' MOTION FOR POST-CONVICTION RELIEF

## BACKGROUND

Defendant-Appellant Morrison has filed a motion for a new trial. Defendant-Appellant Bellar has filed a concurrence in Morrison's motion for a new trial. The Court will issue this one ruling as applicable to both Defendant-Appellants.

Defendant-Appellants were members of a group named the Wolverine Watchmen (Watchmen), a group of about 12 members total that became the subject of an FBI investigation based on the angry tone of their internet presence.

Defendant-Appellants were charged with, and then on October 26, 2022 convicted by jury of three counts:

1. Providing material support for acts of terrorism
2. Gang membership
3. Felony firearm

Defendant-Appellants were sentenced by this Court on December 15, 2022.

Defendant-Appellants now come with a motion for new trial based on 1) evidence not presented, and 2) instructional error.

The evidence not presented issue claims that important evidence was not presented at either the entrapment hearing or the trial.

The instructional error issue encompasses several individual concerns including mere presence, abandonment, and unanimity.

## I. EVIDENCE NOT PRESENTED

Here Defendant-Appellants offer three alternatives for the type of error, a) *Brady* violation, b) *Cress* new evidence, and c) *Strickland* ineffective assistance of counsel. Seven items of evidence are brought into question. The first of these is the credit cards as testified to in the Federal Court trial of Croft and Fox who were not members of the Watchmen.

**Credit card evidence**

Defendant-Appellants offer that the evidence of the FBI offering money to them in the form of credit cards that were the subject of testimony in the federal trial of Croft and Fox was not presented at their trial. Croft and Fox were not members of the Watchmen. The purpose of the credit cards was to obtain equipment and materials to be used in kidnapping the governor.

Defendant-Appellants argue that it is probable that credit cards were also offered to them, and that the credit card information would have been relevant to the entrapment hearing.

That the Federal Court had the credit card evidence and did not make a finding of entrapment is indicative to this Court.

> "Michigan uses an objective test for entrapment that focuses on police conduct. The test examines whether the actions of the police were so reprehensible under the circumstances that, as a matter of public policy, the conviction should not stand. *People v. Juarez,* 158 Mich.App. 66, 404 N.W.2d 222 (1987). The police conduct forbidden is that which would induce the commission of a crime by one not ready to commit it, regardless of the propensities of the particular person induced. *D'Angelo, supra; Graczyk, supra.* In other words, defendant must show that police officers impermissibly manufactured or instigated a crime. *People v. Smalls,* 139 Mich.App. 759, 362 N.W.2d 805 (1984). *People v. Jones*, 165 Mich. App. 670, 676–77, 419 N.W.2d 47, 50 (1988).

Defendant-Appellants look to the credit card evidence from the federal trial of Croft and Fox to girder their argument that the FBI made "Frantic efforts to create

a terror plot." In that trial Chappel, an FBI informant, testified that credit cards were offered to FBI targets. Neither Morrison nor Bellar were named in that testimony. Defendant-Appellants contend that it is "probable if not inevitable that the cards were offered to Watchmen".

The People observe that the credit card testimony of the federal trial of Croft and Fox was provided to the Defendant-Appellants as part of the transcripts they received prior to their trial in this Court. Prosecution correctly concludes that as such this evidence was neither suppressed (*Brady*) nor newly discovered (*Cress*). What remains then is the third alternative that Defendant-Appellants offer for the type of error this might possibly be, a *Strickland* ineffective assistance of counsel issue.

Claims of ineffective assistance of counsel involve mixed questions of law and fact. *People v. LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of facts are reviewed for clear error and constitutional issues are reviewed de novo. *People v, Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish a claim of ineffective assistance, "a defendant must show that (1) counsel's performance fell below and objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability the at the outcome would have been different." *People v. Trakhtenberg,* 493 Mich 38, 51; 826 NW2d 136 (2012). Defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy under the circumstances. *People v. Toma,* 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant bears a heavy burden to overcome the presumption of effective assistance of counsel. *People v. Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The Court does not see a reasonable probability of the credit card testimony being included in either or both the evidentiary hearing and/or the trial resulting in a

different outcome of either proceeding. The evidence does not specifically demonstrate that credit cards were offered to either of the defendant-appellants here. It requires a great supposition that ought not be tempted in a criminal justice proceeding. Defendant-Appellants were in no way prejudiced by trial counsels' not bringing the credit card testimony, which is not supported by any evidence of relevancy, to either the evidentiary hearing or the trial.

Defendant-Appellants allude to the testimony about the possible or intended use of the cards as having relevance to show that they were not serious about the ultimate goal of their activities. The Court sees this argument as unmeritorious because it too necessitates supposition, this time as to the mindset of the Defendant-Appellants. Beyond that, the Court does not see a probability that this evidence from a federal trial would change the result of either the entrapment hearing or the trial.

**Sign-in sheet evidence**

The second of the unpresented evidence items proffered by Defendant-Appellants is the use of sign-in sheets at some of the gatherings. Their argument is that the use of sign-in sheets that documented who attended indicates an ignorance of any possibility of illegal activity being afoot.

This evidence too comes from the Croft/Fox federal trial. Prosecution points out that the sign-in sheet that is here referenced was from the meeting at Peebles, Ohio that neither Morrison nor Bellar attended.

The argument that this evidence can speak to the lack of consciousness of guilt on the part or Defendant-Appellants here is fragile. Just as above in the analysis of the credit card evidence, it was available to defense at trial. For trial counsel to be

found at fault for not bring to bear evidence that could only be assumed to have any relevance is not plausible. Defendant-Appellants could not have been prejudiced by the exclusion of irrelevant evidence. No different result in any proceeding would be probable.

**The charts**

Here too Defendant-Appellants put at issue evidence that was presented at the Croft/Fox federal trial. This time the evidence was in the form of charts that were shown to illustrate the defendants' participation in planning activities among those accused of planning to kidnap the Governor.

Defendant-Appellants' contention is that the lack of inclusion of Morrison and/or Bellar in those charts create doubt that they were doing much chatting and particularly that they were in leadership positions. They contend that these charts were representative of chat groups important to their trial. They allude to the limited amount of chatting with Croft and Fox bringing doubt to them provided material support for the alleged terrorist act being planned by Croft and Fox.

The People counter that while Defendant-Appellants may not have participated in the chats represented by the charts, there is evidence of their participation in other chats that included Croft and Fox. There is also evidence of Defendant-Appellants having phone conversations with Croft and Fox.

Defendant-Appellants appear to rely on the amount of chatting and the degree of involvement as tempering their culpability. There is nothing in statute, legislative history, or case law to indicate that an analysis of degree is warranted.

Here too, as in the previous issues argued, inclusion of this evidence at either the evidentiary hearing or the trial would not have yielded a reasonable probability of a different result.

**The Michigan Patriot Three Percenters**

Fox was not a member of the Watchmen. He belonged to a group called the "Michigan Patriot 3%." The three percent groups were established across the country and were created by the FBI. The FBI used assets from other 3% groups in forming the Michigan 3% group.

Defendants argue that this evidence was not presented at either the entrapment hearing or the jury trial.

The entrapment hearing and jury trial records both show that Defendants raised the possibility of the FBI having created the Michigan 3% Patriots at both proceedings.

At the entrapment hearing Mr. Musico's counsel conducted cross-examination of SA Impola that specifically addressed this and inquired of another witness as to who made that group at the second entrapment hearing.

At the jury trial this evidence was argued during an admissibility discussion with the Court outside of the presence of the jury.

Counsels cannot be found to be ineffective regarding this evidence because it was used at the entrapment hearing. The evidence was neither suppressed evidence (*Brady*), or newly discovered (*Cress*), and counsel was not ineffective in the use of it.

Even had trial counsels delved more deeply into this aspect it is not reasonable for that to have brought about a different result.

**Drug use and drinking**

This evidence pertains to Croft and Fox and was presented at their federal trial and is neither suppressed evidence (*Brady*) or newly discovered (*Cress*).

Defendants "wonder" whether the authorities were providing the drugs and alcohol but admit that there is no basis to support that claim. Defendants do claim that the evidence of drug use and drinking would put the angry remarks of defendants in the "right context – drunken, unserious talk."

Evidence of drug use by Fox was presented to the jury in the trial of Defendant-Appellants before this Court. It did not deter the jury from finding Defendants guilty. The Court would not find additional evidence to be material or probable to bring a different result even if it had been suppressed or newly discovered.

**The two drive-by surveillances of the Governor's residence**

The record shows that testimony regarding these two occasions was included in the federal trial of Croft and Fox and was provided to the Defendant-Appellants as part of the transcripts they received prior to their trial in this Court. Therefore, this evidence was neither suppressed (*Brady*) nor newly discovered (*Cress*). What remains then is the third alternative that Defendant-Appellants offer for the type of error this might possibly be, a *Strickland* ineffective assistance of counsel issue.

The Court cannot find that counsel was ineffective for not making use of evidence that demonstrates a progression of the planned kidnapping of the Governor despite the lack of documented direct involvement of the Defendants. The record does not

substantiate any lack or participation by Defendant-Appellants attributable to a repentance. The record shows reasons other than a desire to withdraw from group activities because of conscience or moral direction. Those reasons include the need to focus on other areas of life such as marital relationships; reasons not at all indicative of a change of heart or mind as to the goals of the group.

Here too, such evidence being presented would not have a high probability of causing a different result.

**FBI conduct – deliberate confusion of facts and issues**

Here again Defendants want to direct the Court's attention to things garnered from the Croft-Fox federal trial. Any information or evidence from that does not pass either *Brady* or *Cress* as suppressed or newly discovered because the transcripts of the Croft-Fox trial were provided to Defendants prior to them being tried in this Court.

Further, Defendants first fail to provide specifics of the pleading(s) they reference for the Court to verify, and second, Defendants allude to continuing to complete the work of acquiring the evidence to support this allegation.

The Court sees this claim as incomplete for its lack of specificity and completeness. It would be premature and irresponsible to consider the impact of such vague assertions.

## II. INSUFFICIENT EVIDENCE TO MEET THE ELEMENTS OF THE CHARGES, ACCQUITAL REQURIED

### Overview

Defendants argue that the prosecution provided no evidence of any activity that was not protected by the First Amendment.

Defendants further argue that any will shown on the part of Defendants to commit a terrorist act was offset by defendants having abandoned those plans.

Lastly, Defendants argue that a Michigan Court of Appeals holding renders kidnapping to not be a violent felony and as such does not satisfy the charged statute.

Defendants conclude that they are entitled to a ruling that all their convictions in this matter fail as a matter of law.

The People respond that the grounds argued by Defendant are "not so."

The language of MCL 750.543k allows the prosecution flexibility to show a wide range of activities that would satisfy a conviction for material support for terrorism. MCL 750.543k(1) states that a person who "does *any* of the following is guilty" of soliciting or providing material support for terrorism:

> (a) Knowingly raises, solicits, or collects material support or resources intending that the material support or resources will be used, in whole or in part, to plan, prepare, carry out, or avoid apprehension for committing an act of terrorism against the United States or its citizens, this state or its citizens, or a political subdivision or any other instrumentality of this state or of a local unit of government who knows that the material support or resources raised, solicited, or collected will be used by a terrorist or terrorist organization.

(b) Knowingly provides material support or resources to a person knowing that the person will use that support or those resources in whole or in part to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism against the United States or its citizens, this state or its citizens, or a political subdivision or any other instrumentality of this state or of a local unit of government.

Material resources is defined under MCL 750. 543b(d) as "currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance."

> "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich. 508, 515 (1992). Moreover, "[c]circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App. 98, 100 (1993). Challenges to the sufficiency of the evidence are reviewed de novo. *People v. Lueth,* 253 Mich App 670, 680; 660 NW2d 322 (2002).

**Standard of review**

The standard for evaluation of sufficiency of evidence and of evidence in the context of a directed verdict are the same and the analysis centers on viewing the

evidence in a light most favorable to the prosecution to answer the question of whether the evidence was sufficient for a reasonable trier of fact to find that all the elements were established beyond a reasonable doubt.

> "The same review process from *Oliver* is applicable, although we only consider the evidence presented by the prosecution up to the time the motion was made. See *People v. Gould,* 225 Mich.App. 79, 86, 570 N.W.2d 140 (1997)." *People v. Powell*, 278 Mich. App. 318, 320, footnote 1, 750 N.W.2d 607, 608 (2008).

> "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979).

The prosecution is required to prove its theory of the case beyond a reasonable doubt and confront any contradictory evidence the defense presents. *People v. Chapo*, 283 Mich App 360, 363-364 (2009). It is allowable that circumstantial evidence and reasonable inferences arrived at from the circumstantial evidence be seen as satisfying an element of a crime. *People v. Reddick*, 187 Mich App 547, 551 (1991). The Court will not substitute its assessment of witness credibility for that of the jury.

> "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v. Lemmon*, 456 Mich. 625, 637, 576 N.W.2d 129, 134 (1998).

**First Amendment protection of Defendants' activities**

It may be that taken individually Defendants' thoughts, expressions of thoughts, and individual activities would come under First Amendment protection. But when taken in sum they amount to a threat of terrorism.

Defendants look to *United States v. Rogers* for the premise that the one act of owning a copy of the "Anarchist's Cookbook" was ruled by a Federal District Court to not be sufficient to merit conviction on a weapons charge. *United States v. Rogers*, 270 F.3d 1076, 1080-1081 (7th Cir. 2001). Defendants note that no such precaution was taken at their trial. No such precaution was warranted based on Defendants' brief summation of the cause and purpose for the precaution.

In *Rogers* the issue was that the prosecutor used the portions of the book that were not pertinent to the charge. The *Rogers* court also ruled that presenting to the jury other evidence of materials in the possession of the defendant was not error either under the First Amendment because it made more likely that defendant was culpable.

Further to First Amendment protections our Michigan courts have consistently ruled that Michigan's terrorism statutes do not infringe upon the First Amendment. This includes the statute prohibiting the making of a terrorist threat. *Id.* at 1081.

From the Michigan Court of Appeals we know this:

> ""To minimize infringement on our fundamental interest in free expression, 'a state statute which regulates speech and expression must be narrowly drawn so as not to infringe on constitutionally protected speech.'" *People v. Cervi,* 270 Mich.App. 603, 621, 717 N.W.2d 356 (2006), quoting *People v. Taravella,* 133 Mich.App. 515,

519, 350 N.W.2d 780 (1984). What constitutes an otherwise valid governmental regulation may be deemed unconstitutional if it "sweeps so broadly as to impinge upon activity protected by the First Amendment." *Dandridge v. Williams,* 397 U.S. 471, 484, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). However, First Amendment protections are not absolute and the United States Supreme Court has recognized the permissibility of governmental regulation of certain categories of speech without violating an individual's right to free expression, such as statements deemed to comprise "true threats." *Virginia v. Black,* 538 U.S. 343, 358–359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003)." *People v. Osantowski*, 274 Mich. App. 593, 601–02, 736 N.W.2d 289, 297 (2007), rev'd in part, appeal denied in part, 481 Mich. 103, 748 N.W.2d 799 (2008).

And:

"Further, because the statutes require the existence of an intent to "intimidate or coerce," they extend beyond the type of speech or expressive conduct that is afforded protection by the First Amendment." *Id.* at 603.

The sample of case law noted above stands in stark contrasts to the assertion that Defendants' First Amendment rights were infringed during their trial.

**Defendants abandoned the plan to kidnap the Governor and the people who carried on with the plan.**

Defendants contend that there is no record of them agreeing to engage in conflict with the government but acknowledge that they did, in theory, want to engage in conflict. Defendants support this argument with a recitation of meetings and events in which they did not participate and cite the record that the FBI noted the change in the group and the lack of an actual plan.

Whatever the reason(s) for the defendants waning interest and/or participation in the group's activities and events were, they fall short of establishing by a preponderance of the evidence a voluntary and complete abandonment. *People v Akins,* 259 Mich App 545, 555 (2003).

For the defense of abandonment Defendant-Appellants need to show more than a tapering off of interest or activity. Abandonment needs to be the result of repentance or a genuine change of heart, *People v Cross*, 187 Mich App 204, 206 (1991) and must be shown by an affirmative act. Defendant-Appellants nowhere related such a change of heart and never demonstrated abandonment in an affirmative way.

> "In order to establish withdrawal, a defendant must show that he or she took affirmative action to defeat or disavow the purpose of the conspiracy. *Id.; United States v. United States Gypsum Co.,* 438 U.S. 422, 464–65, 98 S.Ct. 2864, 2887, 57 L.Ed.2d 854 (1978). **Mere cessation of activity is not sufficient.** *Hyde v. United States,*225 U.S. 347, 369, 32 S.Ct. 793, 803, 56 L.Ed. 1114 (1912)." *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991). [Emphasis added]

The timing of Defendant-Appellants' alleged withdrawing prevents an abandonment defense. They had already committed the crimes they were charged with as they showed motive and intent for engaging in conflict with the government as they gave support to the activities of the group, as already established above. They cannot abandon what they had already done.

**Kidnapping is not a violent felony; it cannot be an act of terrorism.**

Defendants argue that kidnapping is not a violent felony and is not dangerous to human life and does not satisfy the first two components of MCL 750.543b(a) which defines an act of terrorism and necessarily being a "violent felony under the laws of this state" and that person knows or should know "is dangerous to human life."

Subsection (h) of that statute defines a "violent felony" as meaning a felony in which an element is the use, attempted use, or threatened use of physical force against an individual … or the use, attempted use, or threatened use of an explosive device.

Subsection (b) of that statute defines "dangerous to human life" as meaning that which causes a substantial likelihood of death or serious injury, or that is a violation of MCL 750.349 – Kidnapping.

Kidnapping, by statute, is an act dangerous to human life and does satisfy the second component of an act of terrorism. Whether it also satisfies the first component of being a violent felony is brought into question by Defendants.

Defendants' foundation for their contention that kidnapping is not a violent felony is less than solid as it rests on *People v Quigley* No. 322482, 2016 WL 232311, an unpublished ruling of the Michigan Court of Appels that has not been found to

have a useful purpose by any other court in the eight years since its advent. The Court is hesitant to take *Quigley* as even slightly persuasive. Even with that understanding, the Court need not rely on its view of *Quigley* for making determination of this claim. The Court need not decide of whether kidnapping is a violent felony because murder unquestionably is.

Defendants were involved in a plot that also included the possibility of killing the Governor. Murder satisfies the first component of an act of terrorism and thus both of the first two components of an act of terrorism are met in this case. Defendant-Appellant's contention that kidnapping is not a violent felony is rendered moot. The talk of killing the Governor has the same impact on their argument that the felony firearm charge should be dismissed because it depended on a non-existent felony. The felony of murder exists within the plot to which they lent support.

## III. INSTRUCTIONAL ERRORS – DENIAL OF A FAIR TRIAL

### a. Lack of abandonment instruction

Defendant-Appellants contend that their waning participation and involvement with the group was presented as evidence of them abandoning the plan to kidnap and possibly kill the Governor and entitled them to the jury being given an abandonment instruction. They here claim instructional error. Defendant-Appellants' claim fails in two ways.

First, counsel did not raise an objection to the lack of an abandonment instruction at trial. In fact, trial counsel was queried by the Court regarding their satisfaction with the jury instructions and did not then fault the Court for the lack of an abandonment instruction. That failure to object constituted a waiver.

"Counsel's affirmative expression of satisfaction with the trial

court's jury instruction waived any error. *People v. Lueth,* 253 Mich.App. 670, 688, 660 N.W.2d 322 (2002)." *People v. Chapo*, 283 Mich. App. 360, 372–73, 770 N.W.2d 68, 77 (2009).

"In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review." *People v. Carter*, 462 Mich. 206, 219, 612 N.W.2d 144, 151 (2000).

**b. Unanimity instruction**

Defendant-Appellants assert that the Court's failure to provide a more specific than general unanimity instruction to the jury was error. They argue that the People presented different concepts and acts as evidence regarding both how the Defendant-Appellants gave support to a terrorist act, and what a terrorist act is. They contend that jurors might have been confused as to which happenings may have been those that were the basis for the charge of them giving support to a terrorist act.

Defendant-Appellants draw lines of similarity between the present case and that of *Duncan*[1], a Federal District Court ruling that is not binding on this court, where two separate and distinct statements were made. There the Court gave a specific unanimity instruction because the two statements were conceptually distinct and required very different proofs. *Duncan* at 1109.

The People counter that because the providing material support for a terrorist act

[1] *United States v. Duncan*, 850 F.2d 1104, 1114 (6th Cir. 1988)

statute is a multiple theory statute, meaning that it lists alternative means of committing the offense a specific unanimity instruction is not required. The different acts could all satisfy the one charge of supporting a terrorist activity, they did not need to be charged individually.

> "When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory." *People v Johnson,* 187 Mich App 621m 629-630; 468 NW2d 307 (1991).

That is distinct from the charged offense in *Duncan* where the charge was of a multiple acts statute, meaning that there can be evidence of multiple acts, each of which would satisfy the actus reus of a single charged offense. In *Duncan*, the need for a specific unanimity instruction was because of the intent element; whether the defendant knew of the falsity of either or both statements.

> "When distinct proof is required to establish distinct affirmative acts as elements of an offense, specific unanimity is necessary". *Id* at 1113.

> "[A] specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others.[13] In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice." *People v. Cooks*, 446 Mich. 503, 512–13, 521 N.W.2d 275, 279 (1994).

As discussed above under the second issue:

The language of MCL 750.543k allows the prosecution flexibility to show a wide range of activities that would satisfy a conviction for material support for terrorism. MCL 750.543k(1) states that a person who "does *any* of the following is guilty" of soliciting or providing material support for terrorism:

(a) Knowingly raises, solicits, or collects material support or resources intending that the material support or resources will be used, in whole or in part, to plan, prepare, carry out, or avoid apprehension for committing an act of terrorism against the United States or its citizens, this state or its citizens, or a political subdivision or any other instrumentality of this state or of a local unit of government who knows that the material support or resources raised, solicited, or collected will be used by a terrorist or terrorist organization.

(b) Knowingly provides material support or resources to a person knowing that the person will use that support or those resources in whole or in part to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism against the United States or its citizens, this state or its citizens, or a political subdivision or any other instrumentality of this state or of a local unit of government.

Material resources is defined under MCL 750. 543b(d) as "currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances,

explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance."

**c. Trial counsel's failure to request those instructions**

Where a specific unanimity instruction was not proper, there can be no fault for failing to request one.

**i. Deprivation of right to a fair trial**

Defendant-Appellants could not have been denied a fair trial due to a failure to request inapplicable jury instructions.

**ii. Ineffective assistance of counsel**

Counsel could not have been ineffective for failing to request inapplicable jury instructions.

## IV. SENTENCING ERRORS

**a. Offense Variables (OV) 13 and 14 were scored incorrectly**

**i. OV 13**

Defendant-Appellants' complaint about OV 13 is that the definition of "gang" differs between the offense of felony gang membership and OV 13. They assert that under OV 13 the definition includes a common purpose of "profit".

Here again, Defendant-Appellants look to a non-binding authority to establish their argument, *People v. Chandler*, No. 320797, 2015 WL 3648849, (Mich. Ct. App. June 11, 2015). In *Chandler* the court was lamenting the lack of a definition of "gang" from the legislature and looked to the *American Heritage* and *Black's Law*

dictionaries for definitions. The American Heritage was referenced and included the "for profit" language. It appears to have not been adopted by the court as it makes no further reference to the profit aspect.

> "Under MCL 777.43(1)(b), OV 13 is scored at 25 points if "[t]he offense was part of a pattern of felonious criminal activity directly related to causing, encouraging, recruiting, soliciting, or coercing membership in a gang or communicating a threat with intent to deter, punish, or retaliate against another for withdrawing from the gang." The term "gang" has not been defined by the Legislature, so we turn to the dictionary for guidance in understanding the Legislature's intent. *People v. Stone,* 463 Mich. 558, 563; 621 NW2d 702 (2001). In context, the term "gang" refers not to just a group of persons who join together to commit a crime, but "[a] group of criminals or hoodlums who band together for mutual protection and profit." *The American Heritage Dictionary of the English Language* (1996). The phrases "membership in a gang" and "withdrawing from a gang" clearly imply the existence of an ongoing criminal enterprise that survives with varying membership over time. A "gang," for purposes of OV 13, commonly has "identifying signs and symbols, such as hand signals and distinctive colors." *Black's Law Dictionary* (7th ed). The record in the case at hand does not evidence the existence of a "gang" of which defendant is a member. The record does not show the existence of an ongoing criminal enterprise, and the stealing of firearms does not necessarily implicate gang activity. As a result, 25 points was not warranted under subsection (b)." *Id.* at *2.

Further, the legislature has given definition to the term "gang" in MCL 750.411u(1)(a) as:

> "Gang" means an ongoing organization, association, or group of 5 or more people, other than a nonprofit organization, that identifies itself by all of the following:
>
> (*i*) A unifying mark, manner, protocol, or method of expressing membership, including a common name, sign or symbol, means of recognition, geographical or territorial sites, or boundary or location.
>
> (*ii*) An established leadership or command structure.
>
> (*iii*) Defined membership criteria.

The jury found Defendant-Appellants guilty of gang membership and this Court sees no reasonable cause to fault that finding of the jury.

**ii. OV 14**

Defendant-Appellants acknowledge that Morrison was the leader of the Watchmen but argue that OV 14 is incorrectly scored because Morrison was not a leader in any criminal offense, that he was not a leader of the Watchmen for purposes of scoring OV 14.

Purposes of scoring OV 14 are provided by the Michigan Court of Appeals in *Rhodes*:

> "The Legislature did not define by statute what constitutes a leader for the purposes of OV 14. We have not found any binding caselaw defining "leader" in this context. Consequently, we turn to the dictionary. See *Ter Beek v. City of Wyoming,* 495 Mich. 1, 20, 846 N.W.2d 531 (2014). According to *Random House Webster's College Dictionary* (2001), a

"leader" is defined in relevant part as "a person or thing that leads" or "a guiding or directing head, as of an army or political group." To "lead" is defined in relevant part as, in general, guiding, preceding, showing the way, directing, or conducting." *People v. Rhodes*, 305 Mich. App. 85, 90, 849 N.W.2d 417, 419 (2014).

Morrison was the acknowledged leader of the Watchmen. The Watchmen provided material support of a terrorist activity. Considering the entire criminal transaction as prescribed by MCL 777.44(2), Morrison was a leader in a multiple offender situation as defined and to be considered in the scoring of OV 14, also as per MCL 777.44(2).

**b. Gang membership sentence cannot run consecutively to the felony firearm sentence**

Defendant-Appellants are correct in their assertion that the sentences for gang membership and felony firearm should not run consecutively. Just as it did in the Matter of Musico, this Court will amend its judgment of sentence such that only the sentence for providing material support to a terrorist activity will run consecutively to the felony firearm sentence.

Doing so will accomplish correction of the error without the need for a re-sentencing.

**c. The Court failed to make a record of reasons for the gang membership and material support sentences to be consecutive.**

Defendant-Appellants are correct in this assertion also, and just as above the correction can be accomplished without need for a resentencing. The precedent for

this comes from Norfleet, a case directly on point, where our Court of Appeals remanded to the trial court for resentencing but retained jurisdiction.

> "If the trial court does resentence defendant, it must provide a rationale for each sentence that it, in its discretion, determines should be served consecutively." *People v. Norfleet*, 317 Mich. App. 649, 670, 897 N.W.2d 195, 207 (2016).

**CONCLUSIONS AND RULING**

There was sufficient evidence at trial to support and sustain Defendant-Appellants' gang membership conviction. Neither the evidence presented at trial, nor the evidence not presented deprived Defendant-Appellants of their due process rights. The jury instructions are shown to be sufficient. There was no ineffective assistance of counsel to the Defendant-Appellants that would have resulted in a different outcome of the trial. Although Defendant-Appellants are correct in their assertions of sentencing errors regarding what is to be served consecutively, those errors do not require re-sentencing for correction. The Court will issue revised judgment of sentence for both Defendant-Appellants.

Defendant-Appellants' motion for post-conviction relief is **DENIED**.

**IT IS SO ORDERED** this 24 day of Jan, 2024.

HONORABLE THOMAS D. WILSON
CIRCUIT COURT JUDGE

I hereby certify that copy of this ruling was provide to the parties this 27 day of January, 2025.

Elizabeth Watkins

Elizabeth Watkins, Court Clerk