

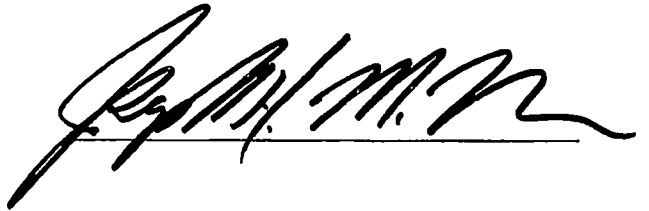
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
CRIMINAL DIVISION

FILED  
2019 JAN 14 AM 9:25  
CLERK OF THE  
CRIMINAL DIVISION  
Gen. No. 17-CR 4286  
CLERK

PEOPLE OF THE STATE OF ILLINOIS, )  
)  
Plaintiff, )  
)  
v. )  
)  
JASON VAN DYKE, )  
)  
Defendant, )

NOTICE OF FILING

PLEASE TAKE NOTICE that the undersigned has on January 14, 2019, caused to be filed in the Office of the Circuit Court of Cook County, Illinois, a copy of the above and foregoing People's Sentencing Memorandum of Law in the above-captioned case and hereby serve you with copy of the same.

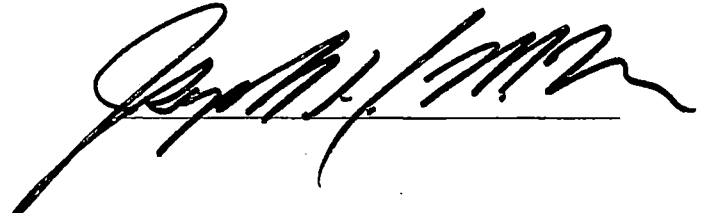


PROOF OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the above and foregoing People's Sentencing Memorandum of Law to the individual listed below:

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by hand on January 14, 2019.



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IN THE CIRCUIT COURT OF COOK COUNTY  
COUNTY DEPARTMENT-CRIMINAL DIVISION

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D. \_\_\_\_\_  
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PEOPLE OF THE STATE OF ILLINOIS, )  
Respondent )  
vs. )  
JASON VAN DYKE, )  
Petitioner )

CASE NO. 17 CR 4286

PEOPLE'S SENTENCING MEMORANDUM OF LAW

The following memorandum of law addresses the governing relevant statutes and case law which potentially apply to this case:

1. Defendant was charged with first degree murder, official misconduct, and sixteen separate counts of aggravated battery with a firearm. The aggravated battery with a firearm charges apportioned each act of firing defendant's weapon as a separate crime based on the order in which it was fired (e.g., first shot, second shot, third shot, etc.)
2. The jury convicted defendant of second degree murder and all sixteen counts of aggravated battery with a firearm.
3. Under 720 ILCS 5/9-2, second degree murder is a Class 1 felony, with a sentencing range of not less than 4 years and not more than 20 years. 730 ILCS 5/5-4.5-30. Second degree murder is a potentially probationable offense. A sentence for second degree murder is eligible for day-for-day good conduct credit. 730 ILCS 5/3-6-3(a)(2.1)
4. Under 720 ILCS 5/12-3.05(e)(1), aggravated battery with a firearm is a Class X felony, subject to a sentencing range of 6-30 years. 730 ILCS 5/5-4.5-25(a). Aggravated battery with a firearm is non-probationable. 730 ILCS 5/5-4.5-25(d). A sentence for aggravated

battery with a firearm is subject to truth-in-sentencing which requires that defendant receive no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment. 730 ILCS 5/3-6-3(a)(2)(ii). An aggravated battery with a firearm conviction may not be reduced to less than 85% of the sentence imposed thereon. 730 ILCS 5/3-6-3(4.7)(i).

5. The People maintain that the one-act one-crime doctrine does not apply to this case, and as such, a sentence must be imposed on each of the sixteen aggravated battery with a firearm verdicts reached by the jury.
6. The one-act one-crime doctrine disallows multiple convictions to be carved from a single physical act. *People v. King*, 66 Ill.2d 551, 566 (1977). In *King*, the Court defined an “Act” as: “any overt or outward manifestation which will support a different offense.” *Id.* A person can be guilty of multiple offenses even when a common act is part of both offenses. *People v. Rodriguez*, 169 Ill.2d 183, 188 (1996). When the one-act, one-crime doctrine applies, the less serious offense must be vacated. *People v. Lee*, 213 Ill.2d 218, 226 (2004).
7. In *People v. Crespo*, 203 Ill.2d 335, (2001), the Illinois Supreme Court articulated the test for determining when the one act one crime doctrine applies. *Crespo* was convicted of the first degree murder of the mother of his child, and armed violence, as well as two counts of aggravated battery based on stabbing the victim’s daughter three times. He was sentenced to 75 years for the murder, 30 years for the armed violence, and 5 years for the aggravated battery, after finding that the two counts of aggravated battery merged. All sentences ran concurrently. *Crespo*, 203 Ill.2d at 336-338.

On appeal, defendant claimed that his aggravated battery conviction could not stand because it was based on the same single act as the armed violence charge. *Id.* at 337. While

the Court found that each stab wound could, in theory, support a separate offense, that they did not, because “this is not the theory under which the State charged defendant, nor does it conform to the way the State presented and argued the case to the jury.” 203 Ill.2d at 342. The failure of the indictment to apportion the offenses according to the various stab wounds, and the prosecutor’s portrayal of defendant’s conduct as a single attack disallowed the two aggravated battery convictions to stand. *Id.* at 345. The Court held:

Here, the State specifically argued to the jury that the three stab wounds constituted great bodily harm. The State never argued that only one of the stab wounds would be sufficient to sustain this charge. Again, it must be pointed out that the State *could have*, under our case law, charged the crime that way, and *could have* argued the case to the jury that way. The State chose not to do so, and this court cannot allow the State to change its theory of the case on appeal. It is possible that, although the jury found that all three stab wounds together constituted great bodily harm, the jury would not have considered any one of the stab wounds individually to constitute great bodily harm. This court will not invade the province of the jury and decide this question of fact. *People v. Crespo*, 203 Ill. 2d at 344.

8. Thereafter, in *People v. Bishop*, 218 Ill.2d 232, 246 (2006), the Illinois Supreme Court reiterated that multiple convictions are proper where the State consistently treats the defendant’s acts as separate in the indictment and at trial. See also, *Guide to Sentencing and Bond Hearings in Illinois*, O’Brien, Darren (2018 Ed.), p. 31: Ch. IX Merger (The One Act One Crime Rule) (“Prosecutorial intent, as it is reflected in the charging document, is a significant factor in determining whether the defendant’s conduct constituted separate acts capable of supporting multiple convictions.”)

9. Applying the foregoing authority to the facts of this case, defendant must be sentenced on all sixteen counts of aggravated battery with a firearm where: (1) the indictments charged defendant with firing sixteen separate shots, (2) each charge was supported with evidence pertaining to each individual shot and the resulting damage and blood loss caused by it (See, Exhibit A, attached), (3) the People consistently maintained in opening statement and closing arguments that defendant committed sixteen separate acts of aggravated battery with a firearm, all of which contributed to the death of Laquan McDonald, and, (4) the jury was provided and signed 16 separate verdict forms for each separate shot fired.
10. Having established that defendant must be sentenced on all sixteen charges of aggravated battery with a firearm, the question arises as to whether a sentence should be imposed on the second degree murder charge. Resolution of such question requires consideration of the Illinois Supreme Court's holding in *People v. Lee*, 213 Ill.2d 218 (2004). In *Lee*, defendant was convicted of second degree murder and one count of aggravated battery with a firearm where he shot and killed one victim (Wile), and one count of aggravated battery with a firearm where he shot the second victim (Willis). The trial court sentenced defendant to 20 years for the second degree murder and 15 years for the aggravated battery with a firearm of Wile. 213 Ill.2d at 221. Defendant received a consecutive 18 year sentence for the aggravated battery charge of Willis.
11. On appeal, the Fourth District Appellate Court found that the one-act, one-crime doctrine barred convictions for both second degree murder and aggravated battery with a firearm. *People v Lee I*, 311 Ill. App. 3d 363 (4<sup>th</sup> Dist. 2000). Initially, the court found that defendant's convictions were based on separate acts where defendant shot the victim three times. 311 Ill. App. 3d at 369-370. The Court then determined that where multiple

convictions are based on multiple offenses, and some offenses are included offenses, that only the conviction and sentence for the offense with the highest sentence may stand because the rule against multiple convictions should inure to the State and not provide a windfall for defendants. *Id.* at 373

12. Defendant appealed and the Supreme Court issued a supervisory opinion directing the appellate court to vacate its judgment and reconsider. In its second published decision, the appellate court, relying on *People v. Crespo*, indicated that the State's failure to apportion the crimes among the three gunshots fired at Wile required that either the second degree murder conviction or aggravated battery with a firearm conviction be vacated. *People v. Lee II*, 343 Ill. App. 3d 431, 439 (4<sup>th</sup> Dist. 2003) The court vacated defendant's aggravated battery with a firearm conviction, again holding that where multiple convictions cannot stand under one-act, one-crime doctrine, that only the conviction and sentence for the offense with the highest sentence may stand because the rule against multiple convictions should inure to the State's benefit and not defendant's. *Id.* at 441.
13. The Illinois Supreme Court granted defendant leave to appeal. After noting that the State had conceded that the one-act one-crime doctrine applied to require that the less serious offense be vacated, the Court held that aggravated battery with a firearm is a more serious offense than second degree murder based on the legislative classification assigned each offense. *Id.* at 229-230. As such, the Court remanded the case to the appellate court to vacate the second degree murder conviction in favor of the aggravated battery with a firearm conviction. *Id.* at 230.
14. Application of *Lee* to this case divests this court of the ability to sentence defendant on the second degree murder verdict, to the exclusion of the aggravated battery with a firearm verdicts

because second degree murder is, as a matter of law, the lesser offense. See also, *Guide to Sentencing and Bond Hearings in Illinois*, O'Brien, Darren (2018 Ed.), p. 31: Ch. IX Merger (The One Act One Crime Rule) (citing *People v. Lee* as “holding that Aggravated Battery /Firearm is a higher class than 2<sup>nd</sup> Degree Murder involving the same victim and, therefore, only a sentence on the Aggravated Battery/Firearm is appropriate).

15. Consideration of whether defendant’s aggravated battery convictions require the imposition of consecutive sentences properly begins with 730 ILCS 5/5-8-4(d)(1), found constitutional in *People v. Wagener*, 196 Ill.2d 269, 285-86 (2001). In pertinent part, it provides:

Consecutive terms; mandatory. The court shall impose consecutive sentences in each of the following circumstances:

- (1) One of the offenses for which the defendant was convicted was **first degree murder or a Class X or Class 1 felony** and the defendant inflicted **severe bodily injury**.

16. The offenses described in 5/5-8-4(d)(1) are referred to as “triggering offenses” and are: “crimes of a singular nature, involving particularly serious invasions of the person.” *People v. Curry*, 178 Ill.2d 509, 538 (1997). In *Curry*, the Illinois Supreme Court interpreted the consecutive sentencing statute as mandating that consecutive sentences be served prior to, and independent of, any sentences imposed for non-triggering offenses. *Id.* at 539.

17. Here, because the People apportioned the separate acts underlying each and every charge, and where aggravated battery with a firearm is a class X felony, there are 16 potential triggering offenses. The confluence of the mandatory consecutive sentence statute and the rule of law established in *People v. Lee* allows for the anomalous possibility of a minimum prison sentence of 96 years in the Illinois Department of Corrections (six years multiplied by sixteen counts of aggravated battery with a firearm). The People acknowledge both that Article 1, § 11 of the Illinois Constitution provides that “All penalties shall be determined

both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship” and that 720 ILCS 5/1-2(c) provides that the Criminal Code be construed to prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders. As such, the People maintain that prudence dictates that this Court also impose a sentence on the second degree murder verdict in this case to prevent the needless waste of judicial resources should the Supreme Court decide to revisit their previous holdings in *Lee* or *Crespo*.

18. For a potential triggering offense to result in the imposition of a consecutive sentence, however, the trial court must make an explicit finding of severe bodily injury. *People v. Alvarez*, 2016 IL App (2d) 140364, ¶ 24. The First District Appellate Court has held that “severe bodily injury” is not synonymous with “great bodily harm.” *People v. Williams*, 335 Ill. App. 3d 596, 599-600 (1<sup>st</sup> Dist. 2002) (“Severe bodily injury” requires a degree of harm to the victim that is something more than that required to create the aggravated battery offense.”) The trial court is in the best position to evaluate all of the relevant factors and determine whether the injury to the victim constitutes “severe bodily injury.” *People v. Austin*, 328 Ill. App. 3d 798, 808-09 (2002). A trial court’s finding of fact with respect to this issue is to be given great deference. *People v. Deleon*, 227 Ill.2d 322, 332 (2008).
19. It must also be noted, however, that extant precedent holds that the death of the victim of a triggering offense may constitute the “severe bodily injury” which requires the imposition of a consecutive sentence. *People v. Thompson*, 331 Ill. App. 3d 948, 956-57 (1<sup>st</sup> Dist. 2002); *People v. Carney*, 327 Ill. App. 3d 998, 1002 (1<sup>st</sup> Dist. 4<sup>th</sup> Div. 2002); *People v. Causey*, 341



Ill. App. 3d 759, 771-772 (1<sup>st</sup> Dist. 6<sup>th</sup> Div. 2003). See also, *Guide to Sentencing and Bond Hearings in Illinois*, O'Brien, Darren (2018 Ed.), p. 31: Ch. VII Consecutive Sentencing, ¶ 1(a) “ ‘Death’ qualifies as ‘severe bodily injury’ sufficient to trigger consecutive sentencing.”

20. Putting aside the extensive evidence presented by the People regarding each individual wound inflicted by defendant, defendant’s own evidence conclusively established that at least two of the shots that defendant fired were fatal. On this basis alone, a finding of “severe bodily injury” necessarily follows. This would have the effect of making defendant subject to a minimum sentence of 18 years: 6 years for each triggering offense, to be served independent of and in addition to a 6 year minimum sentence on a non-triggering offense, with all offenses to be served at the rate of 85%.
21. Such position finds support in *People v. Stanford*, 2011 IL App (2d) 090420 ¶¶46-47, where the Appellate Court held that the trial court was required to impose consecutive sentences for defendant’s armed violence and attempt murder convictions where multiple gunshots were apportioned as separate acts to support convictions for both charges. The Court held:

The State's reference to defendant's firing multiple shots supported its argument that each separate, additional act of firing the gun lent credence to the conclusion that defendant had the intent to kill.

In other words, the State did not treat the multiple shots as a single act; rather, it treated them as multiple, separate acts showing a single element of attempted murder.

We also note that the State extensively questioned Pruneda [the victim] about each of his individual injuries. The trial court found that the “shooting of Pruneda, Silva, and Diaz arose from a series of closely related acts,” and defendant does not dispute this finding. As we observed above, 17 of the 20 counts in the indictment expressly indicated a specific injury to a specific victim.

With respect to Pruneda, defendant committed three separate acts: he shot Pruneda in the face (supporting count I for attempted murder); he shot Pruneda in the left ankle (supporting count XIII for armed violence); and he shot Pruneda in the right ankle (supporting count XIV for armed violence). The indictment was sufficient to put defendant on notice that the State was treating defendant's infliction of each gunshot wound as a separate act, and the State's case was consistent with that theory.

22. Additionally, where the evidence adduced at trial established that: (1) defendant fired sixteen bullets into the body of Laquan McDonald, first when Laquan was upright, and later, after “reassessing the situation” upon Laquan falling to the ground, (2) each and every shot caused bleeding, and, (3) each and every shot contributed to Laquan’s death which resulted from multiple gunshot wounds, where he, essentially, bled to death, there is ample basis for this Court to make additional findings of “severe bodily injury.”

23. A sampling of cases where gunshot wounds were found to cause severe bodily injury to require consecutive sentencing includes:

- *People v. Deleon*, 227 Ill.2d 322, 332-333 (2008) (victim shot through the chest qualifies as severe bodily injury even though victim was able to drive away from the scene, notice an ice cream truck surrounded by children, get himself to a nearby gas station and request help, collect the bullet from his sweater, and wait for the police to arrive.)
- *People v. Johnson*, 149 Ill.2d 118, 128-129 (1992) (victim shot in the shoulder qualifies even though he walked out of the apartment where the shooting occurred, flagged down a passing motorist, told the driver there was a robbery and a shooting, and had the motorist drive him to a hospital.)
- *People v. Williams*, 335 Ill. App. 3d 596, 601 (1<sup>st</sup> Dist. 2002) (gunshot wound to victim’s left arm resulting in emergency surgery and a 19-day stay in the hospital constitutes severe bodily injury, while through-and-through shots to victims’ legs for which no

immediate medical attention was received required additional inquiry and findings by trial court.)

- *People v. Kelley*, 331 Ill. App. 3d 253, 260 (1<sup>st</sup> Dist. 2002)(victim shot twice in right arm, requiring hospitalization for three days constitutes severe bodily injury for imposition of consecutive sentence.)
- *People v. Austin*, 328 Ill. App. 3d 798, 807(1<sup>st</sup> Dist. 2002) (where overnight hospitalization required for victim who suffered gunshot to back and a graze on side of head, injuries were severe and warranted consecutive sentencing.)
- *People v. Amaya*, 321 Ill. App. 3d 923, 933 (2<sup>nd</sup> Dist. 2001) (where one victim shot in the stomach and another in the back and both required surgery, consecutive sentence proper.)
- *People v. Primm*, 319 Ill. App. 3d 411, 427 (1<sup>st</sup> Dist. 2000) (consecutive sentence required where victim shot in the back of left thigh and taken to the hospital).

24. A sampling of cases where gunshot wounds were not found to constitute severe bodily injury to justify the imposition of a consecutive sentence include:

- *People v Jones*, 323 Ill. App. 3d 451, 461 (1<sup>st</sup> Dist. 2001) (bullet graze to victim's right cheek bone requiring a band aid and nothing more did not constitute severe bodily injury)
- *People v. Rice*, 321 Ill. App. 3d 475, 486 (1<sup>st</sup> Dist. 2001) (trial court's refusal to impose consecutive sentencing affirmed where victim was only hospitalized for two days as a result of bullet wounds)
- *People v. Murray*, 312 Ill. App. 3d 685, 694 (1<sup>st</sup> Dist. 2000) (where gunshot wound caused a fracture to victim's big toes for which he was treated and released within 2 ½ hours, did not qualify as severe bodily injury)
- *People v. Durham*, 303 Ill. App. 3d 763, (1999) (gunshot injury to victim requiring no medical attention and described a small nick or cut" insufficient to constitute severe bodily injury for imposition of consecutive sentencing)
- *People v. Ruiz*, 312 Ill. App. 3d 49, 63 (1<sup>st</sup> Dist. 2000) (gunshot wound to officer's knee for which he did not seek medical treatment until after attending a police officer's roundtable meeting did not constitute severe bodily injury.)

25. Finally, under 730 ILCS 5/5-8-4(f), the maximum consecutive sentence that may be imposed for offenses committed as a part of a single course of conduct where there was no substantial change in the nature of the criminal objective is twice the maximum sentence authorized for the two most serious felonies. In this case, that would put the upper sentencing limit at 120 years in the Illinois Department of Corrections.

### CONCLUSION

For the foregoing reasons, the imposition of sentence in this matter should be guided by the following principles:

1. A sentence must be imposed for the offense of aggravated battery with a firearm because per Supreme Court edict, it is more serious than the offense of second degree murder.
2. A sentence of probation, which would deprecate the seriousness of the offense is unauthorized where aggravated battery with a firearm is a non-probationable offense.
3. A sentence must be imposed on each count of aggravated battery with a firearm based on: (a) the indictment, which charged sixteen separate acts, (b) the People's consistent articulated theory of the case, and, (c) the jury's sixteen verdicts.
4. Any count for which this Court makes a finding of severe bodily injury is subject to a mandatory consecutive sentence.
5. The mandatory supervised release period for class x offenses is three years (730 ILCS 5/5-4.25), while the mandatory supervised release period for class 1 offenses is two years (730 ILCS 5/5-4.5-30).

6. The interests of judicial economy would be best served by the imposition of a concurrent sentence on the charge of second degree murder.

RESPECTFULLY SUBMITTED,

People of the State of Illinois  
Joseph H. McMahon  
Special Prosecutor, Kane County State's Attorney

By: 

Joseph H. McMahon

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