No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES MCCRAY, JR. - PETITIONER

vs.

SHERRY BURT, WARDEN - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(NAME OF THE COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James McCray, Jr., #268019
In Properia Persona
Muskegon Correctional Facility
2400 S. Sheridan Drive
Muskegon, Mich 49442

STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE SIXTH CIRCUIT DECISION IS OBJECTIVELY UNREASONABLE AS A MATTER OF DUE PROCESS, BECAUSE MCCRAY SENTENCING GUIDELINES OFFENSE VARIABLE[S] WAS UNCONSTITUTIONALLY SCORED A TOTAL OF 40 POINTS, WHERE ANY FACT FOUND BY JUDGE THAT INCREASE THE MINIMUM SENTENCE GUIDELINES, NOT BY JURY BEYOND A REASONABLE DOUBT, OR ADMITTED BY THE DEFENDANT VIOLATES THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **Federal courts:**

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[ ] reported at _____; or
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Michigan Court of Appeals appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **Federal courts:**

The date on which the United States Court of Appeals decided my case was May 31, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, ____, and a copy of the order denying rehearing appears at Appendix ___.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1245(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was May 24, 2016.

A copy of that decision appears at Appendix C

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ___.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A ___.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SIXTH AMENDMENT

The Sixth Amendment of the U.S. Constitution includes such rights as the right to speedy and public trial by an impartial jury, right to be informed of the nature of the accusation, the right to confront witnesses, the right to assistance of counsel and compulsory process.

STATEMENT OF THE CASE

Petitioner plead guilty to second degree murder MCL 750.317; assault with/intent to murder MCL 750.83; carrying a concealed weapon MCL 750.227; felon in possession of a firearm MCL 750.224f and two counts of possession of a firearm during the commission of a felony MCL 750.227b.

Petitioner McCray was sentenced to a term of 16 to 32 years for the murder and AWIM convictions, 4 to 7 years for the CCW and felon in possession convictions, consecutive to 2 years for the felony firearm convictions.

Petitioner is incarcerated at the Muskegon Correctional Facility, Muskegon, Mich.

December 14, 2008, Defendant filed with the Court of Appeals a formal "Notice of Appeal and Request for Appointment of Appellate Counsel" and on January 9, 2009 Attorney Ronald D. Ambrose was appointed as appellate counsel.

April 17, 2009 Attorney Ambrose visited Defendant and Defendant instructed Ambrose to file an appeal of the sentence which Defendant believed to have been improperly scored. Despite Defendant's instructions to appeal, Attorney Ambrose sought to summarily dismiss the appeal by preparing an "Acknowledgment Dismissing Post-Conviction Proceedings" Motion. However, Defendant McCray, Jr., refused to sign the motion and subsequently filed a letter of complaint with Judge Crane requesting that Attorney Ambrose be removed from the case.

September 9, 2009 Attorney Ambrose filed a Motion to Vacate Order of Appointment of Appellate Counsel, wherein counsel admitted that "Defendant did not consent to dismiss appeal."

October 12, 2009 a Hearing was held concerning the Motion to Vacate, and the appointment was VACATED. However, Defendant McCray, Jr., was not present at the hearing and neither the Court nor attorney Ambrose notified Defendant

that the Order of appointment of counsel was vacated.

March 2, 2011, Defendant In Pro Per, filed a post conviction pleading challenging the scoring of his sentence. On March 7, 2011, the Court after finding the pre per pleading failed to comply with MCR 6.502(C), instructed Defendant to refile said pleading and motion in proper MCR 6.500 form.

January 1, 2012, Defendant In Pro Per, filed a Motion for Reissuance of Judgment (MCR 6.428) requesting the court to issue an Order restarting his time for taking a direct appeal due to ineffective assistance of appellate counsel. However, on February 8, 2012, the motion was denied.

October 12, 2015 McCray filed his properly filed Motion for Relief from Judgment and the Trial Court denied relief from Judgment on December 22, 2015.

Petitioner timely filed application for leave to appeal in the Michigan Court of Appeals, and the Court of Appeals denied leave to appeal on May 24, 2016.

On November 30, 2016 the Michigan Supreme Court denied leave to appeal.

The United States District Court, Eastern District of Michigan denied writ of habeas corpus on January 31, 2018.

The United States Court of Appeals for the Sixth Circuit denied application for a COA on May 31, 2018. **(Appendix A).** Defendant McCray commences this action under 28 U.S.C. § 1245(1).

REASONS FOR GRANTING THE PETITION

Petitioner states the United States Court of Appeals for the Sixth Circuit has decided an important federal question in a way that conflict with relevant decisions of this Court, and allowed such a departure by a lower court, as to call for an exercise of this Court's supervisory power based on "fundamental miscarriage of justice" issues, even if Defendant can not demonstrate the "cause" and "prejudice" requirement equitable tolling is applicable.

Both the United States Court of Appeals for the 4th Circuit (23 F.3d 888, 893) and the 5th Circuit (977 F.2d 951, 959), cert. denied, 510 U.S. 829 (1993)("assuming, without deciding," that actual innocence of death penalty exception "may apply to the sentencing phrase of non-capital trials," petitioner would have to show that "but for the constitutional error he would not have been legally eligible for the sentence he received").

McCray has diligently pursued his rights with the aid of other prisoners, and without the assistance of train counsel according to the Sixth Amendment.

For these reasons, this Court should remand this action to the United States Court of Appeals for the Sixth Circuit with instructions to grant Mr. McCray's Writ of Habeas Corpus based on the fundamental miscarriage of justice standard set forth in **McQuiggin v. Perkins**, 133 S.Ct 1924, 1931 (2013).

CLAIM I.

THE SIXTH CIRCUIT DECISION IS OBJECTIVELY UNREASONABLE AS A MATTER OF DUE PROCESS, BECAUSE MCCRAY SENTENCING GUIDELINES OFFENSE VARIABLE[S] WAS UNCONSTITUTIONALLY SCORED A TOTAL OF 40 POINTS, WHERE ANY FACT FOUND BY JUDGE THAT INCREASE THE MINIMUM SENTENCE GUIDELINES, NOT BY JURY BEYOND A REASONABLE DOUBT, OR ADMITTED BY THE DEFENDANT VIOLATES THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

McCray is entitled to equitable tolling under **Holland.** McCray diligently pursued his rights regarding this claim, and McCray has also shown that some extraordinary circumstances stood in his way when both attorney Ambrose and the State failure to notify McCray of the October 12, 2009 decision to VACATE appointment of appellate counsel set forth at Statement of the case.

As discussed below, McCray has also shown that § 2244(d)(1)(B) apply to this case. And the State created impediment prevented McCray from filing timely because "neither attorney Ambrose or the State informed McCray of the October 12, 2009 decision to VACATE appointment of appellate counsel. McCray is not seeking the retroactive application of **Lockridge** recently recognized constitutional right, but the date on which the factual predicate of the claim or claim presented became available, because they could not have been discovered through the exercise of due diligence which materialized July 29, 2015 in light of 28 U.S.C. 2244(b)(2)(B)(i).

Moreover, McCray has alleged that he is actually innocence (in fact, he did not state under oath that he is not when he pleaded guilty because he plead nolo contender). As such, the **Holland** avenue is available. **Holland,** 560 US 631 at 649 (2010).

The Sixth Circuit Court of Appeals unreasonably determined "jurists of reason would not disagree with the district court's conclusion that McCray's pleadings in the trial court did not toll the statute of limitations because he filed them after the limitations period had expired. Filing a state post-

conviction action can toll the statute of limitations, but it does not restart the limitations period. **Allen v. Yukins,** 366 F.3d 396, 401 (6th Cir. 2004). In 2011, McCray sent a letter to the trial court about his sentence calculation and moved for the appointment of appellate counsel. In 2012, he moved the trial court to reissue the judgment of conviction to restart his time for appeal and filed a Motion for Relief from Judgment. In 2013, McCray filed a Motion for Reconsideration from the denial of his 2012 Motion for Relief from Judgment. McCray filed a second Motion for Relief from Judgment in 2015. The Michigan Court of Appeals and the Michigan Supreme Court denied him leave to appeal. None of these efforts tolled the statute of limitations because it had already expired." **(Appendix A p 3)**(Emphasis added).

Defendant submits the Supreme Court of the United States has held that the habeas statute of limitation is subject to equitable tolling. **Holland v. Florida,** 560 US 631, 649 (2010). Equitable tolling is available in habeas challenges to state court convictions only when a litigant can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way...." **Holland,** 560 US at 649.

A. Discussion Of Factual and Procedural History

1. On December 14, 2008, Defendant filed with the Court of Appeals a formal "Notice of Appeal and Request for Appointment of Appellate Counsel" and on January 9, 2009 Attorney Ronald D. Ambrose was appointed as appellate counsel.

2. On April 17, 2009 Attorney Ambrose visited Defendant and Defendant instructed Ambrose to file an appeal of the sentence which Defendant believed to have been improperly scored. Despite Defendant's instructions to appeal, Attorney Ambrose sought to summarily dismiss the appeal by preparing an "Acknowledgment Dismissing Post-Conviction Proceedings" Motion. However, Defendant McCray, Jr., refused to sign the motion and subsequently filed a letter of

complaint with Judge Crane requesting that Attorney Ambrose be removed from the case.

3. On September 9, 2009 Attorney Ambrose filed a Motion to Vacate Order of Appointment of Appellate Counsel, wherein counsel admitted that "Defendant did not consent to dismiss appeal."

4. On October 12, 2009 a Hearing was held concerning the Motion to Vacate, and the appointment was VACATED. However, Defendant McCray, Jr., was not present at the hearing and neither the Court nor attorney Ambrose notified Defendant that the Order of appointment of counsel was vacated.

5. On March 2, 2011, Defendant In Pro Per, filed a post conviction pleading challenging the scoring of his sentence. On March 7, 2011, the Court after finding the pre per pleading failed to comply with MCR 6.502(C), instructed Defendant to refile said pleading and motion in proper MCR 6.500 form.

6. On January 1, 2012, Defendant In Pro Per, filed a Motion for Reissuance of Judgment (MCR 6.428) requesting the court to issue an Order restarting his time for taking a direct appeal due to ineffective assistance of appellate counsel. However, on February 8, 2012, the motion was denied.

7. On October 12, 2015 McCray filed his properly filed Motion for Relief from Judgment and the Trial Court denied relief from Judgment on December 22, 2015.

8. Petitioner timely filed application for leave to appeal in the Michigan Court of Appeals, and the Court of Appeals denied leave to appeal on May 24, 2016.

9. On November 30, 2016 the Michigan Supreme Court denied leave to appeal.

Thus, Defendant has diligently pursued his rights from his State conviction starting back on December 14, 2008 through the filing of his Petition for Writ of Habeas Corpus on January 9, 2017 by demonstrating that (1) he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way . . . demonstrating both **Holland** factors. 130 S.Ct at 2562 (quoting **Pace v. DiGuglielmo**, 544 US 408, 411 (2005)); (accord **Hall v. Warden, Lebanon Corr. Inst.**, 622 F.3d 745, 749-50 (6th Cir. 2011)(holding that **Holland** replaced the 5-part inquiry of **Dunlap v. United States**, 350 F.3d 1001, 1010 (6th Cir. 2001)).

In **Pace v. DiGuglielmo**, 544 US 408, 418 n.8; 125 S.Ct 1807; 161 L.Ed.2d 669 (2005). The Supreme Court have previously made clear that a "Petitioner" is "entitled to equitable tolling" only if he shows (1) "that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way" and prevented timely filing. In this case, the main "extraordinary circumstances" at issue involves State Court and Appellate Attorney both failure to notify Petitioner for a little over 2 years of the Courts October 12, 2009 decision to vacate appointment of appellate counsel" creating a "constitutional impediment" failure to satisfy professional standards of care. (Emphasis added).

Defendant contends that he was erroneously assessed a combination of 40 points for OV 5 and OV 6 by trial judge in at least two respects that may warrant resentence consideration. First, the trial court concluded that because the victim's family member's "suffered serious psychological injury requiring professional treatment occurred", therefore 15 points were warranted. (SIR). Assessing OV 5 for those reasons was wrong because they were not proven to jury beyond a reasonable doubt, nor did defendant testify that any of the victim's family member's require professional psychological treatment. This

reason was unreasonable and had no legal justification.

The second reason is OV 6 should not have been scored either because neither the State witness nor Defendant testified that the Defendant created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result beyond a reasonable doubt. The record is void of such evidence.

B. Apprendi and its Progeny

The Sixth Amendment to the United States Constitution provides, in part, that criminal trials shall be "by an impartial jury."

For a time, the United States Supreme Court held that **Apprendi** did not prohibit judicial fact-finding which increased the minimum sentence. See **Harris v. United States,** 536 US 545, 557 (2002). However, **Harris** was recently overruled by **Alleyne v. United States,** 133 S.Ct 2151 (2015). After **Alleyne,** "It is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment." 133 S.Ct at 2161.

In **Alleyne,** the defendant was convicted by a jury of offenses including robbery affecting interstate commerce. 18 USC 1951(a). The jury indicted on the verdict form that the defendant "[u]sed or carried a firearm during and in relation to a crime of violence," but made no indication the defendant had "brandished" the firearm. The penalty for the offense was 5 years of imprisonment, but was elevated to 7 years where a defendant had brandished a firearm. Because there was no jury finding on this point, the judge made the finding and sentenced the defendant with the elevated minimum. Id. at 2155-2156. The **Alleyne** Court noted **Apprendi** only concerned statutory maximums, and that **Harris** has declined to extend **Apprendi** to statutory minimums. The **Alleyne** Court agreed "**Harris** was wrongly decided and that it cannot be reconciled with

our reasoning in **Apprendi.**" Id., at 2158. The Court concluded "just as the maximum of marks the outer boundary of the range, so seven years marks its floor. And because the legally prescribed range is the penalty affixed to the crime, infra, this page, it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." Id., at 2160. (emphasis in original, internal citation omitted). Further, "It is impossible to dissociate the floor of a sentencing range from the affixed to the crime." Id. **Alleyne** overruled **Harris** and extended **Apprendi** to minimum sentences. **Alleyne** establishes the rule that judges may not find facts which increase the floor of permissible sentences.

In the instant case, without those additional "judge found facts" Defendant base guidelines sentence range would have been (171 to 385) months. (SIR p 1).

C. Fundamental Miscarriage of Justice

The United States Supreme Court has made clear that the term "miscarriage of justice" means that the defendant is actually innocent, but in other criminal contexts the phrase has wider meaning extending to any error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' ... independently of the defendant's innocence." **United States v. Olano,** 507 U.S. 725, 736-37 (1993)(quoting **United States v. Young,** 470 U.S. 1, 15 (1985); **United States v. Frady,** 456 U.S. 152, 163 n. 14 (1986)).

State procedural rules only bar federal habeas claims if no **fundamental miscarriage of justice** would be had if the state rule was honored. **McQuiggin v. Perkins,** 133 S.Ct 1924, 1931 (2013). Claims of actual innocence qualify as miscarriage of justice, and this can overcome state procedural defaults. **McQuiggin v. Perkins,** 133 S.Ct at 1931-32. A claim of actual innocence is

sufficient to overcome state procedural default when new evidence shows "it is more likely than not that no reasonable juror would have convicted the prisoner." **McQuiggin v. Perkins,** 133 S.Ct at 1933 (quoting **Schlup v. Delo,** 513 U.S. 298, 329 (1995)).

In a similar case the Sixth Circuit Court of Appeals has remanded with instructions to resolve the factual discrepancy in the prisoner's record, set aside a sentence based in part on false information, and resentence. **Collins v. Buchkoe,** 493 F.3d 343 (6th Cir. 1974). Also see, **United States v. Mayback,** 23 F.3d 888, 893 (4th Cir. 1994)(exception applies to noncapital sentencing enhancement under Federal Sentencing Guidelines because "[e]xception for the obvious difference in the severity of the sentences, we see little difference between holding that a defendant can be innocent of the acts required to enhance a sentence in a death case and applying a parallel rational in non-capital case"); and, **Smith v. Collins,** 977 F.2d 951, 959 (5th Cir. 1992), cert. denied, 510 U.S. 829 (1993)("assuming, without deciding," that actual innocence of death penalty exception "may apply to the sentencing phrase of non-capital trials," petitioner would have to show that "but for the constitutional error he would not have been legally eligible for the sentence he received").

Thus, it will be a fundamental miscarriage of justice not to hear this claim, "but for the Sixth Amendment 40 point error, Defendant would not have been legally eligible for the sentence enhancement he received for OV 5 and OV 6 judicial fact finding."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ James E. McCray, Jr.

James McCray, Jr.
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Date: July 9, 2018