

No. _____ - _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

_____ Term Of _____

HARRY LONZO-BOLTON ERVIN,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT FOR THE STATE OF MICHIGAN**

Michigan Supreme Court
File No. 2017-155220

Michigan Court of Appeals
File No. 2016-335901

PETITION FOR WRIT OF CERTIORARI

BY: **HARRY LONZO-BOLTON ERVIN (#482984)**
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QUESTIONS PRESENTED

ARGUMENT I.

Pursuant to the intervening Constitutional rule announced in *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), which clarified the retroactivity jurisprudence of *Teague v Lane*, 489 US 288 (1989), should the United States Supreme Court's extension of *Apprendi v New Jersey*, 530 US 466 (2000) -- that was clarified for the first time in *Alleyne v United States*, 570 US 99 (2013) -- have been applied retroactively to Petitioner's case, since the *Apprendi-Alleyne* constitutional rule invokes substantive as well procedural Sixth Amendment protection against increases in "either end" of the sentencing range, based on facts that were not admitted to by the defendant, or found by a jury "beyond a reasonable doubt"?

ARGUMENT II.

Does this Court have jurisdiction to decide whether the appellate courts for the State of Michigan correctly refused to give retroactive effect in this matter to the United States Supreme Court's substantive rule of constitutional law set forth in *Apprendi v New Jersey*, 530 US 466 (2000), as extended and clarified for the first time in *Alleyne v United States*, 570 US 99 (2013), in wake of the intervening clarification of *Teague v Lane*, 489 US 288 (1989), retroactivity jurisprudence that was interpreted and clarified by the United States Supreme Court in *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), which has been, and is still being, misinterpreted by the State of Michigan and other federal habeas circuits?

LIST OF PARTIES



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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Because the State of Michigan, and other appellate circuits, has decided an important federal question in a way that directly conflicts with the holding reached by the United States Supreme Court in *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), governing the retroactive application of intervening changes in *substantive* constitutional rules, that has not been, but should be settled by this Court, with respect to the following:

ARGUMENT I .

PURSUANT TO THE INTERVENING CONSTITUTIONAL RULE ANNOUNCED IN *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), WHICH CLARIFIED THE RETROACTIVITY JURISPRUDENCE OF *Teague v Lane*, 489 US 288 (1989), THE UNITED STATES SUPREME COURT'S EXTENSION OF *Apprendi v New Jersey*, 530 US 466 (2000), THAT WAS CLARIFIED AND EXPANDED FOR THE FIRST TIME IN *Alleyne v United States*, 570 US 99 (2013), SHOULD HAVE BEEN APPLIED RETROACTIVELY TO PETITIONER'S CASE, BECAUSE THE *Apprendi-Alleyne* RULING INVOKES SUBSTANTIVE AS WELL AS PROCEDURAL SIXTH AMENDMENT PROTECTION AGAINST INCREASES IN "EITHER END" OF THE SENTENCING RANGE, BASED ON FACTS THAT WERE NOT ADMITTED TO BY THE DEFENDANT, OR FOUND BY A JURY "BEYOND A REASONABLE DOUBT."

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ARGUMENT II .

THIS COURT HAS JURISDICTION TO DECIDE WHETHER THE APPELLATE COURTS FOR THE STATE OF MICHIGAN CORRECTLY REFUSED TO GIVE RETROACTIVE EFFECT IN THIS CASE TO THE UNITED STATES SUPREME COURT'S CONSTITUTIONAL RULING OF *Apprendi v New Jersey*, 530 US 466 (2000), EXTENDED AND CLARIFIED FOR THE FIRST TIME IN *Alleyne v United States*, 570 US 99 (2013), IN WAKE OF THE INTERVENING CLARIFICATION OF *Teague's* RETROACTIVITY-JURISPRUDENCE BY THIS COURT IN *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), THAT HAS BEEN, AND IS STILL BEING, MISINTERPRETED BY THE STATE OF MICHIGAN AND OTHER FEDERAL HABEAS CIRCUITS.

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OPINIONS AND ORDERS BELOW

FOR CASES FROM STATE COURTS:

On November 29th of 2017, the Michigan Supreme Court entered a standard form order denying Petitioner's application for leave to appeal (Appendix #3), from the Michigan Court of Appeals' December 14, 2016 order denying leave to appeal (Appendix #2), which stemmed from the Berrien County Trial Court's written Opinion and Order denying a Motion for Relief From Judgment (Appendix #1).

STATEMENT OF JURISDICTION

The final judgment and order of the Supreme Court for the State of Michigan denying Petitioner's *propria persona* application for leave to appeal (from the standard form order issued by the Michigan Court of Appeal on December 14, 2016) was entered by the Clerk of the Michigan Supreme Court on November 29th of 2017. This Petition for Writ of Certiorari is filed within the ninety (90) day period required by law and *Sup. Ct. R. 13(1)*. A "NOTICE OF APPEAL" was filed with the Clerk of the Michigan Supreme Court on January 29th of 2018 (Appendix #4), and the "CERTIFICATE OF SERVICE" is attached hereto and marked as Appendix #5. The jurisdiction of this Court is invoked under *28 USC § 1257*, which provides, in relevant part that: "[f]inal judgment or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court." Moreover, pursuant to *Sup. Ct. R. 10(b)(c)*, a Petition for Writ of Certiorari may be granted if: "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" or, in relevant part: "has decided an important question of federal law that has not been, but should be, settled by this Court".

CONSTITUTIONAL PROVISIONS INVOLVED

The **SIXTH AMENDMENT** of the United States Constitution, *US Const. Am. VI*, and the **FOURTEENTH AMENDMENT** of the United States Constitution, *US Const. Am. XIV*, are involved for the constitutional claims herein asserted.

STATEMENT OF PERTINENT FACTS

On July 23rd of 2008, Petitioner-Appellant HARRY LONZO-BOLTON ERVIN (herein after referred to as Mr. Ervin) appeared in the Berrien County Circuit Court, for the State of Michigan, before the Honorable ANGELA M. PASULA and entered a *nolo contendere* guilty plea to Count I of a criminal indictment charging him with assault with intent to murder, *MCL 750.83*, in exchange for dismissal of Count II (torture); Count III (attempted murder); Count IV (interfering with an electronic communication), and all supplemental charges (Plea Transcripts at 3-4). The factual basis of the offense alleged in the *amended* indictment to which Mr. Ervin plead guilty to are set forth as follows:

THE COURT: "That on or about June 3rd, 2008, you were at or near Columbus Avenue, Benton Harbor, Berrien County, Michigan, and at that time and location, you did, under Count I, make an assault upon Lavonda Walters with intent to commit the crime of murder. That is a felony, punishable by up to life in prison or any term of years. Do you understand that charge?"

THE DEFENDANT (Mr. Ervin): "Yes, ma'am" (Id. at 4-5).

* * *

"THE COURT: "Okay. Then, to the charge of Assault with intent to murder, how do you plead?"

MR. ERVIN: "No contest, right? No contest."

THE COURT: "And do you understand that if you plead *no contest* that will be a conviction?"

MR. ERVIN: "Yes, ma'am" (Plea Transcript at 7).

On August 18th of 2008, Judge Pasula sentenced Mr. Ervin to a minimum prison term of 30 years and a maximum term of 90 years -- with fines and court costs assessed (Sentencing Transcript at 26).

FIRST-TIER APPEAL

Following sentencing, court-appointed appellate counsel filed a timely Motion to Correct Invalid Sentence, on grounds that the trial court: (1) failed to adequately consider Mr. Ervin's mental capacity and history of abuse for mitigation purposes; (2) failed to grant credit for time spent in jail awaiting sentencing, and (3) improperly assessed attorney fees

despite Mr. Ervin's indigency. On March 26th of 2009, a hearing was held on the motion, and on April 7th of 2009, the trial court entered an order granting the motion, insofar as vacating the attorney fee assessment, but denying the motion on the other two grounds.

Court-assigned appellate counsel then filed a timely application seeking leave to appeal in the Michigan Court of Appeals, from the trial court's April 7, 2009 order denying resentencing, that was summarily denied in a standard form-order. *People v Ervin*, No. 291668 (Mich. App. Ct., May 29, 2009). Timely leave to appeal was sought, from the Court of Appeals' order, in the Michigan Supreme Court that was summarily denied in a standard form-order by that court. *People v Ervin*, No. 139305 (Mich Sup. Ct., Oct. 26, 2009)(KELLY, Chief Justice, would have granted leave to appeal "for the reasons set forth in *People v Idziak*, 484 Mich 549 (2009).

FIRST POST-APPEAL MOTION

Following his conviction, sentence and first-tier review in the Michigan appellate courts, including denial of habeas corpus review at the federal level, retained counsel filed a motion for relief from judgment on behalf of Mr. Ervin, pursuant to *MCR 6.500* et. seq., raising two (2) claims not pertinent to this action. On February 26th of 2010, the State trial court entered an order denying the motion seeking relief from judgment, pursuant to *MCR 6.508(D)(3)*. The Michigan Court of Appeals denied leave to appeal (from the trial court's February 26, 2010 order), for "failure to establish entitlement to relief under *MCR 6.508(D)*," *People v Ervin*, No. 300448 (Mich. App Ct., Dec. 2, 2010), and in a standard form-order, the Michigan Supreme Court also denied Mr. Ervin's timely filed application for leave to appeal. *People v Ervin*, No. 142454 (Mich. Sup. Ct., Jul 25, 2011).

SECOND POST-APPEAL MOTION

On July 29th of 2015, the Michigan Supreme Court concluded that the "rule from *Apprendi v New Jersey*, 530 US 466 (2000), as extended by *Alleyne v United States*, 570 US 99 (2013), applies to Michigan's sentencing guidelines and renders them constitutionally deficient." *People v Lockridge*, 498 Mich 358, 364 (2015). The *Lockridge* Court went so

far as to hold that a trial court commits "*plain error*" and violates the Sixth Amendment right to a jury trial when it calculates an Offense Variable (OV) score "using facts beyond those found by the jury or admitted by the defendant if that miscalculation would change the applicable guidelines minimum sentencing range." *Lockridge*, supra at 399.

In wake of the *Lockridge-Alleyne* rulings, on or about June 29th of 2016, retained counsel filed a second motion for relief from judgment on behalf of Mr. Ervin, arguing that the Supreme Court's intervening extension of the *Apprendi*-rule, clarified for the first time in *Alleyne*, should be applied retroactively to Mr. Ervin's case. The sentencing record in the circumstances at bar illustrates that Mr. Ervin scored a total of 50 points on his Prior Record Variable (PRV) and, as illustrated below, 140 points was scored on the OV, putting Mr. Ervin in the **VI E** cell:

OV No.	DESCRIPTION	POINTS
OV 1	Aggravated Use of Weapon	15
OV 2	Lethal Potential of a Weapon Possessed or Used	5
OV 3	Degree of physical Injury to a Victim	25
OV 6	Intent to Kill or Injure Another Individual	25
OV 7	Aggravated Physical Abuse	50
OV 12	Number of Contemporaneous Felonies Criminal Acts	10
OV 19	Threat to Security or Interference with the Administration of Justice.	10
TOTAL POINTS		140

Relying upon a *Lockridge* footnote (498 Mich at 394 n 30) and the retroactivity jurisprudence of *Teague v Lane*, 489 US 288, 311 (1989), on November 9th of 2016, Berrien County Trial Court Judge Dennis M. Wiley entered an opinion and order denying relief from judgment for reasons being that "the *Lockridge* decision is not a substantive rule; rather it is procedural."

The court went on to find that, "because *Lockridge* is not retroactive," Mr. Ervin could not "satisfy the requirement for bringing a successive motion ... as stated in *MCR 6.502(G)(2)*." (See Appendix #1, pg. 4, ¶ 3). Retained counsel filed a timely application for leave to appeal in the Michigan Court of Appeals, from the trial court's November 9, 2016 opinion and order, that was summarily denied by the court in a standard form-order. *People v Ervin*, No. 335901 (Mich. App. Ct., Dec. 14, 2016)(Appendix #2). Mr. Ervin then

filed a timely application for leave to appeal in the Michigan Supreme Court (from the Court of Appeals' December 14, 2016 order), *in propria persona*, that was denied in a standard form-order. *People v Ervin*, No. 155220 (Mich. Sup. Ct., Nov. 29, 2017)(Appendix #3).

REASONS FOR GRANTING THE WRIT

Because the State of Michigan, and other appellate circuits, has decided an important federal question in a way that directly conflicts with the holding reached by the United States Supreme Court in *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), governing the retroactive application of intervening changes in *substantive* constitutional rules, that has not been, but should be settled by this Court, with respect to the following:

ARGUMENT I.

PURSUANT TO THE INTERVENING CONSTITUTIONAL RULE ANNOUNCED IN *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), WHICH CLARIFIED THE RETROACTIVITY JURISPRUDENCE OF *Teague v Lane*, 489 US 288 (1989), THE UNITED STATES SUPREME COURT'S EXTENSION OF *Apprendi v New Jersey*, 530 US 466 (2000), THAT WAS CLARIFIED AND EXPANDED FOR THE FIRST TIME IN *Alleyne v United States*, 570 US 99 (2013), SHOULD HAVE BEEN APPLIED RETROACTIVELY TO PETITIONER'S CASE, BECAUSE THE *Apprendi-Alleyne* RULING INVOKES SUBSTANTIVE AS WELL AS PROCEDURAL SIXTH AMENDMENT PROTECTION AGAINST INCREASES IN "EITHER END" OF THE SENTENCING RANGE, BASED ON FACTS THAT WERE NOT ADMITTED TO BY THE DEFENDANT, OR FOUND BY A JURY "BEYOND A REASONABLE DOUBT."

Although the analytical framework structuring the standard upon which to decide the *retroactive* application of new constitutional rules has strong and binding precedent, some state and federal circuits have interpret the retroactivity-jurisprudence of *Teague* to apply only to intervening changes in laws that fall within the constitutional ambient of a "watershed rule of criminal procedure." *Sawyer v Smith*, 497 US 227, 242 (1990); *Echlin v LeCurear*, 995 F2d 1344, 1347 (CA 6, 1993). The constitutional core of a retroactive decision is, therefore, structured on the *purpose* of the new rule, and in cases where the matter at issue is one that "places certain kinds of primary, private individual conduct

beyond the power of the criminal lawmaking authority to proscribe," an intervening change or extension of law is applied retroactively. *Teague v Lane*, supra, 489 US at 310-311.

Although the Michigan Supreme Court found that the *Apprendi*-rule, extended by the Supreme Court in *Alleyne*, "applies to Michigan's sentencing guidelines and renders them constitutionally deficient," *People v Lockridge*, 498 Mich 358, 364, cert. denied, 136 S Ct 590 (2015), the trial court in this matter, nevertheless, denied Mr. Ervin's motion for resentencing. In ruling on Mr. Ervin's collateral motion for relief from judgment, the trial court went so far as to hold that a trial court commits "plain error" and violates the Sixth Amendment right to a jury trial when it calculates an OV "using facts beyond those found by the jury or admitted by the defendant if that miscalculation would change the applicable guidelines minimum sentencing range," the state appellate courts denied Mr. Ervin's motion for sentencing relief from the final judgment in this matter.

Relying upon a *Lockridge* footnote and the retroactivity jurisprudence of *Teague*, as interpreted prior to the intervening clarification by the *Montgomery* Court, the trial court in the circumstances at bar concluded that: "the *Lockridge* decision is not a substantive rule; rather it is procedural." The court went on to find that, "because *Lockridge* is not retroactive," Mr. Ervin could not "satisfy the requirement" for challenging his constitutional claim on collateral review (Appendix #1, pg. 4, ¶ 3). *Teague's* retroactivity jurisprudence was not clarified until after *Lockridge*, where the United States Supreme Court set forth the clear distinction between substantive and procedural rules, by explaining that substantive rules set forth "constitutional guarantees" that controls the outcome of the conviction or the sentence imposed. The *Montgomery* Court went on to explain that:

"[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution *requires state collateral review courts to give retroactive effect to that rule*. *Teague's* conclusion establishing the retroactivity of new substantive rules *is best understood as resting upon constitutional premises*."

* * *

"This Court's precedents addressing the nature of *substantive* rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution *requires* substantive rules to have *retroactive effect* regardless of when a conviction became final." (*Montgomery*, supra, 136 S Ct at 728-729, Emphasis supplied).

Both state post-conviction and federal habeas courts have declined to grant relief based on their interpretation of the retroactivity standard utilized during that appellate era. For example, appellate courts throughout this country, including Michigan, denied collateral motions seeking retroactive application of the Supreme Court's ruling in *Miller v Alabama*, 567 US 460 (2012), who held that mandatory life sentences for juvenile offenders violated the Eighth Amendment. In *People v Carp*, 298 Mich App 472 (2012), Michigan interpreted the new constitutional rule announced in *Miller* as being only "procedural" in nature and, therefore, could not be applied retroactively to cases on collateral review.

In the circumstances at bar, Michigan has once again interpreted an important intervening constitutional mandate as being "procedural rather than substantive," and has determined that only a "substantive rule of criminal law" can be applied retroactively to cases on collateral review. Although the *Montgomery* Court acknowledged that the *Miller* ruling possessed a "procedural component" that required a sentencing court to consider certain factors before finding that life without the possibility of parole was a proportionate sentence for juvenile offenders, the *Montgomery* Court explained that some constitutional rules may have both "procedural and substantive" ramifications:

"There are instances in which a substantive change in the law must be attended by a *procedure* that enables a prisoner to show that the falls within the category of persons whom the law may no longer punish.

* * *

"[A] trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have automatic consequences of invalidating a defendant's conviction or sentence.

"The same possibility of a valid result *does not exist* where a substantive rule has *eliminated* a State's power to proscribe the defendant's conduct or impose a given sentence. "[E]ven the use of impeccable factfinding procedures could not legitimate a verdict" where "the conduct being penalized is constitutionally *immune* from punishment." Nor could the use of flawless sentencing procedures legitimate a punishment when the Constitution *immunizes the defendant from the sentence imposed*. No circumstances call more for the invocation of a rule of complete retroactivity." (*Montgomery*, *supra*, 136 S Ct at 730; citing *United States v U.S. Coin & Currency*, 401 US 715, 724 (1971), *emphasis supplied*).

The unconstitutional factfinding process utilized by the sentencing court in the circumstances at bar was based on a "probable cause" determination from a preliminary examination for all counts listed in the indictment, including those counts that were later dismissed, and

including the single count Mr. Ervin plead *nolo contendere*. Addressing the constitutionality of the Sixth Amendment violation involved in *Apprendi*, the Supreme Court held that:

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v New Jersey*, *supra*, 530 US at 490).

It merits repeating that *substantive* rules establishes "constitutional guarantees that places certain criminal laws and punishments altogether beyond the State power to impose." The *Lockridge* court went so far as to hold that a trial court commits "*plain error*" and violates the Sixth Amendment right to a jury trial when it calculates an OV "using facts beyond those found by the jury or admitted by the defendant, if that miscalculation would change the applicable guidelines minimum sentencing range" -- such as this matter involves.

The major strands of the Sixth Amendment precedent upon which *Alleyne* relied on in its extension of the *Apprendi*-rule, establishes the clear understanding that their intervening constitutional mandate embraces the mixture of *procedural* and *substantive* rules, so as to constitutionally "immunize" Mr. Ervin from the increased penalty that was imposed. As the *Montgomery* Court may have put it: "No circumstances call more for the invocation of a rule of complete retroactivity." *Id.*, 136 S Ct at 730. Clearly, Michigan's appellate courts have wrongly determined that *Apprendi-Alleyne* does not comprise of "a substantive new rule" subject to retroactive application for cases on collateral review.

The constitutional question involved in the retroactive application of *Miller* was eventually clarified by the *Montgomery* Court as having a "procedural component," but that the new constitutional rule was, nevertheless, clearly "*substantive*" in nature, so as to fall squarely within the ambient of the first exception of *Teague's* retroactivity jurisprudence. Because the Sixth Amendment protects against increases in "either end" of the sentencing range, based on judge-found facts not charged in the amended indictment, admitted to by the defendant or found by a jury "beyond a reasonable doubt," *Montgomery's* intervening clarification of *Teague's* retroactivity jurisprudence should have been applied in this matter to cure the substantive Sixth Amendment violation herein complained of.

ARGUMENT II.

THIS COURT HAS JURISDICTION TO DECIDE WHETHER THE APPELLATE COURTS FOR THE STATE OF MICHIGAN CORRECTLY REFUSED TO GIVE RETROACTIVE EFFECT IN THIS CASE TO THE UNITED STATES SUPREME COURT'S CONSTITUTIONAL RULING OF *Apprendi v New Jersey*, 530 US 466 (2000), EXTENDED AND CLARIFIED FOR THE FIRST TIME IN *Alleyne v United States*, 570 US 99 (2013), IN WAKE OF THE INTERVENING CLARIFICATION OF *Teague's* RETROACTIVITY-JURISPRUDENCE BY THIS COURT IN *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), THAT HAS BEEN, AND IS STILL BEING, MISINTERPRETED BY THE STATE OF MICHIGAN AND OTHER FEDERAL HABEAS CIRCUITS.

Although the circumstances upon which a defendant may challenge a conviction years after an adjudication of the appellate process are exceedingly rare, in *Agostini v Felton*, 521 US 203, 239 (1997), the Supreme Court determined that collateral relief may be sought in situations where there has been an intervening clarification of a "substantive rule of constitutional law" that was not available or was misinterpreted by a court in its resolution of an appeal. Recognizing the fundamental unfairness of judicial fact-findings not charged in the indictment, admitted to by the defendant, or found by a jury "beyond a reasonable doubt," the *Alleyne* Court clarified and extended the *Apprendi*-rule that struck down as unconstitutional any law or statute which provides for an increase in the penalty.

In this clarification, as it related to the substantive restrictions placed upon the authority of sentencing judges that run afoul of the jury trial guarantees, the *Alleyne* Court made it unequivocally clear that the Constitution affords Sixth Amendment protection and substantive Due Process rights that guards against improper increases in "either end" of a sentencing guideline range. *Alleyne*, supra, 133 S Ct at 2154. Speaking on the guiding constitutional principles of the *Apprendi*-rule, the Supreme Court in *Blakely v Washington*, 542 US 296; 124 S Ct 2531 (2004), pointed out that:

"Our commitment to *Apprendi* in this context reflect no just respect for longstanding precedent, but the need to give intelligible content to the right to jury trial. That right is no mere *procedural formality*, but a fundamental reservation of power in our constitutional structure." (*Blakely*, supra, 124 S Ct at 2538-2539).

The sentencing record in the circumstances at bar clearly illustrates that Mr. Ervin scored a total of 50 points on his PRV and, as illustrated below, he scored a total of 140 points on the OV, putting him in the **VI E** cell:

OV No.	DESCRIPTION	POINTS
OV 1	Aggravated Use of a Weapon	15
OV 2	Lethal Potential of a Weapon Possessed or Used	5
OV 3	Degree of Physical Injury to a Victim	25
OV 6	Intent to Kill or Injure Another Individual	25
OV 7	Aggravated Physical Abuse	50
OV 12	Number of Contemporaneous Felonies Criminal Acts	10
OV 19	Threat to Security or Interference with the Administration of Justice.	10
TOTAL POINTS		140

Not only has Michigan's appellate courts incorrectly failed to give retroactive effect to the intervening constitutional mandate announced by this Court in *Apprendi-Alleyne*, despite having acknowledged that they, rightfully, "applies to Michigan's sentencing guidelines and renders them constitutionally deficient," *People v Lockridge*, 498 Mich 358, 364; cert. den., 136 S Ct 590 (2015), but the subsequent intervening clarification of *Teague's* retroactivity jurisprudence announced in *Montgomery v Louisiana*, 577 US ____; 136 S Ct 718 (2016), has also been misinterpreted by the State of Michigan and other federal habeas circuits.

Although Michigan appellate courts had strongly opposed the *Apprendi-Blakely* holdings as being inapplicable, and interpreted those constitutional violations as procedural which applied only to the maximum penalties, *Alleyne's* intervening extension of *Apprendi*, coupled with *Montgomery's* intervening clarification of *Teague's* retroactivity jurisprudence, must rightfully be applied in this matter. A similar situation arose in *Beagle v Stewart*, 2017 U.S. Dist. LEXIS 137654 (ED Mich, Aug. 28, 2017), where the petitioner argued that, pursuant to *Montgomery's* clarification on the retroactive application of "new substantive" rules of constitutional law, the holding in the case of *In re Maggio*, 756 F3d 487, 489-490 (CA 6, 2014), was undermined, and the extension of the *Apprendi-Blakely* rule announced in *Alleyne* should be applied retroactively in that case.

Like *Beagle*, other federal circuits has interpreted *Apprendi*, *Blakely* and *Alleyne* as consisting of only a "procedural" rule of constitutional law, not applicable to cases on collateral review. *Crayton v United States*, 799 F3d 623, 625 (CA 7, 2015); *Simpson v United States*, 721 F3d 875, 876 (CA 7, 2013); *In re Payne*, 733 F3d 1027 (CA 10, 2013).

**ENTITLEMENT TO RETROACTIVE APPLICATION OF *APPRENDI-ALLEYNE*,
BASED ON THE CORRECTED INTERPRETATION AND CLARIFICATION OF *TEAGUE'S*
RETROACTIVITY-JURISPRUDENCE ANNOUNCED, FOR THE FIRST TIME,
BY THE UNITED STATES SUPREME COURT IN *MONTGOMERY V LOUISIANA***

It merits repeating that the State of Michigan, and other appellate circuits, has decided an important question in a way that directly conflicts with the holding reached by the *Montgomery* Court, which governs the retroactive application of "substantive rules" of constitutional law. In the present matter, *Apprendi* and *Alleyne* announced a constitutional mandate that affords Sixth Amendment protection and substantive Due Process rights that guards against improper increases in "either end" of a sentencing range. As the Supreme Court explained in *Schriro v Summerlin*, 542 US 348 (2004), "new substantive rules generally apply retroactively. The Supreme Court went on to say that:

"This includes decisions that narrow the scope of a criminal statute by interpreting its terms, *Bousley v United States*, 523 US 614, 620-621 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to prescribe. * * * Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal" or faces a punishment that the law cannot impose upon him." (*Schriro*, *supra*, 542 US at 352).

Mr. Ervin submits that he had a right, clearly established by the Supreme Court in *Fiore v White*, 531 US 225, 228 (2001), and *Bunkley v Florida*, 538 US 835 (2003), to retroactive application of the *Apprendi-Blakley* constitutional mandate, as well as the extension of the rulings clarified for the first time in *Alleyne*.

Although the appellate courts in the State of Michigan did not have the benefit of the intervening clarification and interpretation of *Teague's* retroactivity jurisprudence at the time of the *Lockridge* holding, the plain language of *Montgomery* makes retroactivity of the substantive constitutional rule announced in *Apprendi-Alleyne* applicable to Mr. Ervin's sentence. In *Fiore v White*, 531 US 225 (2001), the petitioner's conviction had become final before the Pennsylvania Supreme Court interpreted the criminal statute at issue *for the first time* in the petitioner's co-defendant's appeal. Although the petitioner's conduct as charged in the indictment "would not have come within the purview of the statute" as

interpreted in the co-defendant's intervening appeal, the Pennsylvania courts nevertheless denied collateral relief. Like *Fiore*, the substantive rule of constitutional law established in *Apprendi* and clarified for the first time by the Supreme Court in *Alleyne*, should have been applied retroactively in the present matter. In finding that a first-time "clarification in the interpretation of a statute" resting upon constitutional law must be applied retroactively to cases on collateral review, the *Fiore* Court stated that:

"This Court's precedents make clear that *Fiore*'s conviction and continued incarceration on this charge violates due process."

* * *

"The simple, inevitable conclusion is that *Fiore*'s conviction fails to satisfy the Federal Constitution's demands. We therefore reverse the contrary judgment of the Third Circuit and remand this case for proceedings consistent with this opinion." (*Fiore v White*, *supra*, 531 US at 228-229).

In view of the facts and circumstances herein detailed, the "simple, inevitable conclusion" is that the increase in Mr. Ervin's sentence on the amended charge of assault with intent to murder "fails to satisfy" the jury trial guarantees of the Sixth Amendment and Due Process rights that guards against increases in "either end" of a sentencing guideline range. As the *Montgomery* Court determined in its corrected interpretation and clarification of *Teague*'s retroactivity jurisprudence: "States may not disregard a controlling, constitutional command in their own courts." The Court went on to explain that:

"A conviction or sentence imposed in violation a a substantive rule is not just erroneous, but contrary to law and, as a result, void. * * * It follows, as a general principle, that a court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced." (*Montgomery*, *supra*, 136 US at 730-731).

Firmly rooted legal precedents makes it, unequivocally, clear that Mr. Ervin's "continued incarceration" on his ostensibly harsh punishment "violates due process." *Montgomery*'s intervening clarification of *Teague*'s retroactivity jurisprudence represents a constitutional mandate that requires State appellate and federal habeas courts to give retroactive effect to "substantive" rules that violate the Constitution, "regardless of whether the conviction or sentence becomes final before the rule was announced."

CONCLUSION

For all the reasons herein set forth, Petitioner HARRY LONZO-BOLTON ERVIN respectfully ask this Honorable Court to GRANT his Petition for Writ of Certiorari on each of the federal questions herein asserted, where the State of Michigan, and other appellate circuits, has decided these important questions in a way that directly conflicts with prior decisions that have not been, but should be, settled by this Court.

Respectfully submitted,

SIGNED:


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