

IN THE SUPREME COURT
OF THE UNITED STATES

Lloyd M. Blair #501643

Petitioner,

Case No. _____

vs.

Sherman Campbell, (Warden)

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Lloyd M. Blair
2727 E. Beecher St.
Adrian, Michigan 49221

QUESTIONS PRESENTED

1. Are the sentencing proceedings that was found to be unconstitutional made to be invalid?
2. Did the trial court abuse its discretion by refusing to consider the fact the defendant produced a jurisdictional defect which entitles the defendant to be resentenced because he was subject to unlawful constraints placed on his Sixth Amendment Rights to a jury trial?
3. Has the defendant met the burden of establishing entitlement to relief under MCR 6.508(D)?

LIST OF PARTIES

All parties appear in the caption of the cases on the cover page.

TABLE OF CONTENTS

OPINIONS RELON
JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED
STATEMENT OF THE CASE
REASONS FOR GRANTING THE WRIT
CONCLUSION

INDEX OF APPENDICES

APPENDIX A	Decision of State Court of Appeals
APPENDIX B	Decision of State Trial Court
APPENDIX C	Order of the State Trial Court Denying Reconsideration
APPENDIX D	Decision of State Supreme Court Denying Review

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., AM V

U.S. CONST., AM XIV

CONST. 1963, ART 1, § 1

CONST. 1963, ART 1, § 17

CONST. 1963, ART 1, § 20

MCL 769.34(a)

MCL 333.74.01(3)

MCL 777.31(1)(c)

MCL 750.317

MCL 769.34(2)(3)

MCR 6.425

MCR 6.425(F)(3)

MCR 7.203(A)(1)

MCR 7.204(A)(2)

MRE 401

MRE 402

MRE 403

MRE 404(A)

TABLE OF AUTHORITIES

<u>Case:</u>	<u>Pages</u>
People v. McIntire, 7 Mich App. 133; 151 N.W.2d 187 (1967)	4
People v. Drohan, 475 Mich 140; 713 N.W.2d 778 (2006)	6
People v. Gibbs, 299 Mich App. 473 (2013)	5
Montgomery v. Louisiana, 136 U.S. Ct. 718 (2016)	8, 11
Alleyne v. United States, 133 U.S. Ct. 2151; 186 L. Ed. 2d 314 (2013)	8
People v. Wilkins, 121 Mich App. 813 (1982)	9
People v. Mackowski, 285 Mich 244 (1991)	9
People v. Triplett, 407 Mich 510 (1980)	9
People v. Whalen, 412 Mich 166 (1981)	9
People v. Weeks, 2016 Mich App. Lexis 690	9
People v. Calloway, 2016 Mich App. Lexis 605	9
People v. Gentry, 2016 Mich App. Lexis 886	9
Townsend v. Burke, 344 U.S. 736	9
People v. Lockridge, 498 Mich 358 (2015)	10
Ex parte Sisbold, 100 U.S. 371 (1880)	11
Johnson v. White, 261 Mich App. 332 (2004)	11
Stanton v. Lloyd Hammond Produce Farms, 400 Mich 135 (1997)	11,13
People v. Clabin, 441 Mich 472 (1981)	12
People v. Glass, 464 Mich 266	13
People v. Jones, 497 Mich 155 (2014)	13
People v. Cornell, 466 Mich 335	13
McDougall v. Schanz, 461 Mich 14 (1999)	15

IN THE SUPREME COURT
OF THE UNITED STATES

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINION BELOW

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

The opinion of The Michigan Supreme Court appears at Appendix B to the petition and is unpublished.

The opinion of the Sixth Judicial Circuit Court appears at Appendix C to the petition and is unpublished.

The opinion of The Sixth Judicial Circuit Court for Reconsideration appears at Appendix D to the petition and is unpublished.

JURISDICTION

The date on which The United States Court of Appeals decided my case was September 17, 2017.

No petition for rehearing was timely filed in my case.

The jurisdiction of this court invoked under 28 U.S.C. § 1254(1).

The date on which The Michigan Supreme Court decided my case was September 12, 2018.

No petition for rehearing was timely filed in my case.

The date on which The Sixth Judicial Circuit Court decided my case was November 17, 2016.

A timely petition for rehearing was thereafter denied on the following date: December 15, 2016 and a copy of the order denying reconsideration appears at Appendix C.

The jurisdiction of the court is invoked under U.S.C. § 1257(a).

STATEMENT OF THE CASE

This case arose out of a shooting incident which occurred on August 17, 2008, wherein Jason Jones was killed. While attending a party that Defendant was invited to, he approached a vehicle occupied by Amanda Marion, the mother of his children, and Jason Jones, the deceased.

Defendant and Ms. Marion exchanged a few words and then Defendant slapped Ms. Marion several times across her face while she was still sitting in the vehicle. Defendant never spoke a single word to Mr. Jones. However, Mr. Jones took it upon himself to get out of the vehicle that he was driving Ms. Marion in and attacked Defendant.

Defendant and Mr. Jones started to physically fight. During the fight both individuals tussled and struggled for a weapon that the Defendant allegedly possessed.

During the altercation two shots rang out and both Mr. Jones and the Defendant took off running. Shortly after this altercation Mr. Jones was found deceased on the porch of a local resident approximately one block from the location of the altercation.

It was later determined that Mr. Jones had died from a single bullet wound to the chin. The bullet had traveled down through his lung killing him.

The prosecution constantly made mention of the fact Mr. Jones died because of an act of chivalry, instead of making the total and exact references to everything that occurred. contrary to the prosecution's assertions to being an act of chivalry, Mr. Jones never had to get out of the vehicle and attacked Defendant.

There were many other avenues which Mr. Jones could have taken instead of aggressively getting out of the vehicle and attacking Defendant. despite the fact

that the Defendant did slap Ms. Marion, he never said a single word to Mr. Jones. Therefore, Mr. Jones was the true aggressor in the altercation between himself and the Defendant.

As the trial court reflects, this case was decided on false testimony by several different witnesses. The primary witness, Kim Marion, told several different lies about how he was between the two men during their altercation, and how he witnessed the Defendant shoot Mr. Jones in the leg. Mr. Jones never suffered from a gunshot to the leg. Mr. Marion further stated that he ran behind the two men and he saw the Defendant fire several more shots at Mr. Jones. After cross-examination by Defendant, Attorney, Mr. Marion admitted that he lied about that and no additional shell casings were ever located. Additionally, every other witness, including Mr. Marion's own daughter, said that they did not see him until 20 minutes after the incident happened.

Furthermore, Mr. Marion also lied about calling 911. The prosecution continued to support this witness even after knowing that he had made multiple statements that were inconsistent with his Preliminary Examination testimony as well as his trial testimony.

Every witness had a different story to tell concerning every aspect of the incident. The stories range from the Defendant chasing Mr. Jones down the street to the Defendant chasing Mr. Jones as he drove away in a white van. The inconsistencies among all of the witnesses clearly demonstrates reasonable doubt.

There was many different things that were overlooked as far as the mitigating circumstances of the incident are concerned. Several things were allowed by the judge that should never have been permitted. These injustices worked to the Defendant's disadvantage and had a substantial and injurious affect on the outcome of the Defendant's trial.

As depicted by his Pre-Sentence Report, Defendant was assessed a total of 57 points for his prior record variables (PRV's), which appears horizontally on the sentencing grid for Class A offenses. This places Defendant in category E. The PRV's are being mentioned because there was a miscalculation when scoring the variables and once combined with the Offense Variables (OV's), the floor of Defendant's minimum sentence guidelines range automatically increased beyond that prescribed by law. Accordingly, Defendant was assessed a total of 95 points in the OV category, 25 points were calculated for OV-1; 5 points were assessed for OV-2; 25 points were assessed for OV-3; 15 points were assessed for OV-5; and 25 points were assessed for OV-6, which totals 95 points. The total of 95 points placed Defendant in Cell II category of his sentencing grid. Combining OV level II with PRV level E places Defendant's minimum sentence range at 270 to 675.

PRV CHALLENGES

PRV 1: Was utilized to score 25 points for an Armed Robbery conviction that was committed when the Defendant was a juvenile, and it was also used to enhance the Defendant's sentence cause this offense was placed in the Defendant's adult history. The Defendant believes that this matter should not have been included in his juvenile history cause Defendant was sentenced on this charge when he was 16 and he was also sentenced to a Juvenile Training Facility. This offense therefore, should never have been placed in his adult history. See People v. McIntire, 7 Mich App. 133, 140; 151 NW2d 187 (1967).

PRV 5: If the 2 points scored here are as a result of the "alleged" Grand Blanc Marijuana arrest when the Defendant was between the ages of 12 and 13 years of age, the Defendant objects cause the court has no record of the Defendant ever being arrested nor does the court have any record of Defendant ever being adjudicated for any such offense.

PRV 6: The Defendant objects to the scoring of this variable. The Defendant was never arrested for this marijuana offense nor was the Defendant on any type of delayed sentence status or bond for the marijuana offense when the instant offense occurred. According to the Defendant, he was made aware that the marijuana charge had been levied against him after being arrested for the instant offense. And furthermore, the court have no record of any type of bond payment ever being made.

PRV 7: The Defendant objects to the scoring of 20 points for this variable. The instructions to this variable states that: (1) A current felony conviction that will result in a mandatory consecutive sentence may not be counted under PRV 7; (2) A concurrent felony conviction that will result in a consecutive sentence under MCL 333.7401(3) may not be counted under PRV 7. The offenses in question will result in consecutive sentences and thus, should not be scored.

OV CHALLENGES

To show that Defendant's sentence resulted in a Sixth Amendment jury trial violation, OV-1 is based upon "the aggravated use of a weapon." The instructions pursuant to MCL 777.31(1)(c) requires the trial court to assess 25 points if "a firearm was pointed at or toward a victim, or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon."

The charges in the information read to the jury were for First Degree Murder, Felony Firearm, Felon in Possession, and Carrying Concealed Weapon. At no point was Defendant's jury informed that a separate charge of Aggravated use of a Weapon (OV-1) would be included in the list of charges. The jury was never asked to consider any facts concerning the aggravated use of a weapon to increase the punishment of Defendant's sentence upon a finding of guilt. The jury was only required to find beyond a reasonable doubt that Defendant was armed with a weapon -- not that he pointed it at a victim. See *People v. Gibbs*, 299 Mich App. 473, 490-491 (2013).

This however, is analogous to the circumstances found in *Alleyene*, *supra*, where the jury form indicated that the Defendant used a firearm during a crime of violence, but not that the firearm was brandished. Because the finding of brandishing increased the penalty to which the Defendant was subject, the Supreme Court held that it was an element of the offense which had to be found by the jury beyond a reasonable doubt. 133 S. Ct. at 2156.

Since Defendant did not admit to the facts underlying OV-1, and in light of the language enunciated in both *Lockridge* and *Alleyene*, Defendant submits that the 25 points assessed to him for OV-1 was done so in clear violation of his Sixth

Amendment jury trial rights, as they constitute impermissible judge found facts.

Next, OV-2 is based on the "Lethal Potential of a Weapon Possessed or Used." Here, Defendant was assessed 5 points where it was determined by a preponderance of the evidence (Judge found facts) that Defendant possessed or used a pistol... As with OV-1, because the charge of "Lethal Potential of a Weapon" was not submitted to the jury for consideration, charged in the information, or admitted to by the Defendant, this too, is violative of Defendant's Sixth Amendment jury trial rights where the judge found facts relied upon by the sentencing court were impermissible used to increase the floor of Defendant's minimum sentencing guideline range.

Next, OV-5 is based on Serious Psychological Injury Requiring Professional Treatment. Defendant was assessed 15 points where it was determined by a preponderance of the evidence (Judge found facts) that the Defendant caused psychological injury to a member for the victim's family without any evidence being produced that the family members sustained psychological injury requiring professional treatment.

Next, Defendant was assessed 25 points of OV-6, intent to kill or do great bodily harm, or to create such risk. It is undisputed that Defendant was attacked and then involved in a physical altercation (fist fight) with the victim.

In affirming Defendant's conviction and sentence, the Michigan Court of Appeals held that Michigan uses an indeterminate sentencing scheme in which the trial court sets the minimum sentence, but can't never exceed the maximum sentence. *People v. Drohan*, 475 Mich 140, 164; 715 N.W.2d 778 (2006). Thus, as long as the Defendant receives a sentence within that statutory maximum a trial court may "utilize judicially ascertained facts to fashion a sentence within the range authority by the jury's verdict." *Drohan*, *supra* at 164.

On January 15, 2010, the jury convicted the Petitioner of Second Degree Murder, Felon in Possession of a Firearm, Carrying a Concealed Weapon, and Felony Firearm. On February 8, 2010, the trial court sentenced the Petitioner to serve 44-80 years in prison for the homicide, to serve concurrent terms for the two weapons possession crimes and to serve two years consecutive for the felony firearm conviction.

The Petitioner timely filed his request for appointment of counsel as required by MCR 6.425(f)(3) and MCR 7.204(a)(2). Peter Ellenson was appointed as counsel for the Petitioner on May 26, 2010.

REASONS FOR GRANTING PETITION

1. Where the Michigan Court struck down MCL 769.34(a) as unconstitutional pursuant to Montgomery v. Louisiana, this, in effect, produced a jurisdictional defect in Defendant's conviction and sentence that the state no longer has the authority to impose. In light of this intervening change of law which requires retroactive application, Defendant is entitled to resentencing where he was subjected to unlawful constraints placed on his Sixth Amendment right to a jury trial.
2. Alleyne emphasis that "when a finding of facts alters the legally, proscribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the Defendant could have received the same sentence with or without the facts." 133 S. Ct. at 2152.
3. Because the Supreme Court declared MCL 769.34(2) & (3) to be unconstitutional, Montgomery establishes that once a state determines to be unconstitutional, it no longer has the authority to insist that a prisoner remain in jail based on a punishment barred by the constitution, 136 S. Ct. 732. Here, in Defendant's case, OV-5 consist of judicial found facts that were predicate upon inaccurate information which increased his punishment and constituted a separate offense. As a result, Defendant's Sixth Amendment right to a jury trial was violated where the facts used for OV-5 were not included in the charged offense, not admitted by the Defendant, nor submitted to the jury for their consideration.
4. The trial court's reliance upon inaccurate information to sentence Defendant, combined with the unconstitutional use of OV's [MCL 700.39(2)], deeply prejudiced Defendant in more than one way. For starters, the errors complained of

had substantive effect on Defendant's sentence. Secondly, having been sentenced based on inaccurate information produced an "invalid sentence." All of which seriously affected the fairness, integrity, and public reputation of the judicial proceedings.

5. In *People v. Wilkins*, 121 Mich App. 813 (1982), the Court of Appeals held that it is vitally important to the Defendant and to the ends of justice, that a sentence be based upon accurate information. (Citing *People v. Mackowski*, 395 Mich 244, 249 (1971) and *People v. Triolett*, 407 Mich 510 (1980)). Nevertheless, a sentence which is based on inaccurate information is invalid. *People v. Whalen*, 412 Mich 166, 169, 170 (1981).

Very recently, the Michigan Court of Appeals has determined that the OV's (which are unconstitutional under Lockridge) constitutes an "invalid sentence." See e.g., *People v. Weeks*, 2016 Mich App. Lexis 690; *People v. Calloway*, 2016 Mich App. Lexis 605; and *People v. Gentry*, 2016 Mich App. Lexis 886. While it may be true under Michigan law that our state has an interest in finality, what Michigan "has no interest in," is compelling prisoner to serve time under an invalid sentence.

6. In any event, "A careless or designed pronouncement of sentence on a foundation [that is] extensively materially false" denies the Fourteenth Amendment due process right to be sentenced based on accurate information. *Townsend v. Burke*, 344 U.S. 736 at 741. Sentencing on the basis of assumptions concerning Defendant's criminal record which are materially untrue, "whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." *Id.*

LEGAL ANALYSIS

7. In *People v. Lockridge*, 498 Mich 358 (2015), our State Supreme court struck down Michigan's sentencing guideline statute as unconstitutional. Accordingly, the Offense Variables (OV's) used to calculate mandatory minimum sentencing guidelines were found to be constitutional flawed, as they unlawfully allowed the judge to find by a preponderance of the evidence, facts that are used to compel an increase in the mandatory minimum punishment a Defendant receives. The statutes, which made it mandatory for ALL JUDGES IN MICHIGAN to follow violated the Sixth Amendment, because it forced judges to consider facts during the sentencing phase which had not been found by the jury or admitted to by the Defendant.

8. However, to make a threshold showing of plain error that could require a resentencing [under Lockridge] a Defendant must demonstrate that his OV level was calculated using facts beyond those found by the jury or admitted by the Defendant, and, that a corresponding reduction in the Defendant's OV score to account for the error would change the applicable guidelines minimum sentence range. 498 Mich at 399.

9. Nevertheless, this procedure which allows a Defendant to show that he was sentenced above his mandatory guidelines based upon judge found facts which had not been found by the jury, or admitted to by the Defendant, is also the procedure that Defendant is using to illustrate that the time added to his sentence based upon an unconstitutional statute, constitutes a jurisdictional defect that the State no longer has the authority to impose.

JURISDICTIONAL DEFECT PURSUANT TO MONTGOMERY V. LOUISIANA

10. Relevant to Defendant's claim is the Supreme Court's position within the framework of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that once a State determines a statute to be unconstitutional, it no longer has the authority to insist that a prisoner remain in jail based upon a punishment barred by the Constitution. 136 S. Ct. at 732.

Viewing the language found in *Ex parte Siebold*, 100 U.S. 371 (1890), the Court in *Montgomery* took judicial notice that in *Siebold* that they had been convicted under unconstitutional statutes. There, the Court explained that if, "This position is well taken, it affects the foundation of the whole proceedings." *Id.* at 376.

11. A conviction under an unconstitutional law is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. Put... if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. *Id.* at 376-377.

12. Reiterating *Siebold*, the Court further explained that an unconstitutional law is void, as is no law. "A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional, there is no grandfather clause that permits States to enforce punishments the Constitution forbid, to conclude otherwise would undercut the Constitution's substantive guarantees." 136 S. Ct. 731.

13. In *Johnson v. White*, 261 Mich App. 332 (2004), the Court held as a general rule, "An unconstitutional statute is void ab initio, it is void for any purpose and is as ineffective as if it had never been enacted." (Citing *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich 135, 144 (1997). Pursuant to this rule, decisions declaring statutes unconstitutional have been given full retroactive application.

[citations omitted].

14. In light of the above, there should be no doubt that sentences imposed under an unconstitutional statute not only constitute a jurisdictional defect, but also requires reversal of the illegal sentence. Clabin, *supra*. Montgomery makes it clear that, "A state may not Constitutionally insist on the same results in its own post conviction proceedings." Under the supremacy clause of the Constitution, State Collateral Review Courts have no greater power than Federal Courts to mandate that a prisoner continue to suffer punishment barred by the Constitution, if a State Collateral proceeding is open to a claim controlled by Federal Law requires." [136 S. Ct. at 732].

Here, once the Michigan Supreme Court struck down MCL 769.34(2) and MCL 769.34(3) as unconstitutional, this not only established a jurisdictional defect, it also resulted in an intervening change in the law requiring retroactive application.

INTERVENING CHANGE IN LAW/RETROACTIVITY

15. In distinguishing the difference between substantive -vs- procedural, the Court held that, "Substantive Rules" set forth categorical guarantees that place certain criminal laws and punishments altogether beyond the States power to impose, that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful...

16. As it stands, MCL 769.34(2) and 769.34(3) are statutes that were created by Michigan Legislature. Statutes [which are unconstitutional] consist of "substantive law" that can only be made or created by the legislature. Although the Michigan Supreme Court has authority to strike down a statute as unconstitutional, it does not have authority to write or create laws, for to do so would violate the separation of powers principle, See Const. 1963, Art. 3, Sec. 2, and In re 1976 PA 267, 400 Mich 666 (1997).

17. The distinction between the legislature and judicial branches of Michigan's Government was expressed in *People v. Glass*, 464 Mich 266 at 281, where the Court emphasized that it was not authorized to enact rules that establish, abrogate, or modify substantive law --- the substantive law [states] could only be created by the legislature. See *People v. Jones*, 497 Mich 155 (2014); *People v. Cornell*, 466 Mich 335; and *McDougall v. Schanz*, 451 Mich 14, 27 (1999). Thus, to belabor the point, statutes that are found to be unconstitutional are unlawful at its inception, and is to be applied retroactively. *Stanton v. Lloyd Hammond Produce Farms*, *supra*.

18. In sum, the above illustrates that Lockridge was decided on "substantive grounds," and applies retroactively to anyone who can show that they were erroneously affected by the unlawful sentencing procedure that was in use at the

time of their sentencing. In this vein, Montgomery enforces the facts that a conviction and sentencing imposed under an unconstitutional statute produces a jurisdictional defect where the unconstitutional sentence must be deemed void.

19. Here, Defendant has shown in great detail that his sentence using inaccurate information is invalid. The use of an unconstitutional sentencing procedure, that unlawfully increased the floor of his minimum guideline sentence, thereby, violating Defendant's Sixth Amendment jury trial rights. Defendant has equally demonstrated that being sentenced under an unconstitutional statute produced a jurisdictional defect which nullifies his illegal sentence.

20. As stated in Montgomery v. Louisiana, *supra* at 731, "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."

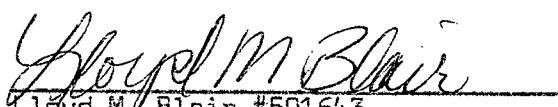
21. Based on the foregoing, Defendant asserts that he has established a threshold showing for plain error sufficient to warrant a remand to the trial court for further inquiry. In the interest of justice, Defendant is entitled to resentencing. Townsend v. Burke, Art. 7 § 17.

CONCLUSION

The Petition For Writ Of Certiorari, should be GRANTED.

Respectfully Submitted,

December 7, 2018



Lloyd M. Blair #501F43
Defendant In Pro Per
Gus Harrison Correctional Facility
2727 E. Beecher St.
Adrian, Michigan 49221