18-9199 ORIGINAL

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

PETER PEREZ, Petitioner,

vs.

STATE OF MICHIGAN, Respondent.

PETITION FOR WRIT OF CERTIORARI
On Appeal from the Michigan Supreme Court

BY: Peter Perez #230341
In *pro per*
R.A. Handlon Correctional Facility
1728 W. Bluewater Hwy.
Ionia, Michigan 48846

QUESTION(S) PRESENTED

I

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING MR. PEREZ RELIEF FROM JUDGMENT WHERE HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY BASED ON A POLICE OFFICER'S ENUMERATION OF PAST CRIMES TO THE JURY BEFORE THE JURY WAS EVEN EMPANELED AND WAS COUNSEL INEFFECTIVE FOR NOT CONDUCTING A NECESSARY FOLLOW UP?

II

DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING RELIEF FROM JUDGMENT WHERE MR. PEREZ ALLEGED A DUE PROCESS VIOLATION BASED ON THE PROSECUTION'S REFUSAL TO PROVIDE COMPLETE DISCOVERY OF THE NAMES OF WITNESSES THAT WOULD HAVE PROVIDED HIM WITH A VIABLE DEFENSE, AND WHERE THE TRIAL COURT FAILED TO DECLARE A MISTRIAL FOR THE AFOREMENTIONED BRADY VIOLATION?

III

IS PETITIONER ENTITLED TO A *CROSBY* HEARING OR RESENTENCING UNDER PEOPLE V *LOCKRIDGE*, WHERE HIS SENTENCE IS BASED IN PART UPON AN UNCONSTITUTIONAL LAW AND IS VOID BASED UPON THE UNITED STATES SUPREME COURT OPINION IN MONTGOMERY V LOUISIANA WHICH HELD THAT A CONVICTION OR SENTENCE BASED UPON AN UNCONSTITUTIONAL LAW IS VOID AB INITO?

LIST OF PARTIES

Petitioner, PETER PEREZ, is an individual and has no corporate affiliations. Petitioner is proceeding in *pro per* with the aid of a Michigan Department of Corrections Legal Writer.

Respondent, STATE OF MICHIGAN is the State who initiated a criminal prosecution against the Petitioner and is represented by the Michigan Attorney General's Office

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

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On September 12, 2018, the Michigan Supreme Court issued an order denying Petitioner's request for leave to appeal. (Appendix pg. 2a).

On November 20, 2017, the Michigan Court of Appeals issued an order denying Mr. Perez's Application for leave to appeal. (Appendix pages 1a).

On March 14, 2017, 2017, the Saginaw County Circuit Court denied Petitioner's post-conviction motion for relief from judgment.

JURISDICTION

Petitioner seeks review of the September 12, 2018, opinion of the Michigan Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional Provisions

U.S. Const., Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Const., Amend. XIV: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 14, 2011, Petitioner was convicted after a jury trial of eight counts of third-degree criminal sexual conduct. MCL 750.520d(1)(a). Petitioner was sentenced to a prison term of 25-52 years for his conviction. Petitioner's conviction and sentence was affirmed on direct appeal and the Michigan Supreme Court denied his application for leave to appeal. Petitioner's motion for relief from judgment was denied on March 14, 2017, the Court of Appeals denied leave to appeal on November 20, 2017 and now Petitioner seeks leave to appeal. Petitioner cites the relevant facts in the body of his petition as they relate to his arguments.

REASONS FOR GRANTING THE WRIT

CERTIORARI IS APPROPRIATE BECAUSE THE VARIOUS STATES ARE INTERPRETING SUPREME COURT PRECEDENT CONCERNING DEFENDANTS' SIXTH AMENDMENT RIGHTS AT SENTENCING IN INCONSISTENT AND CONTRADICTORY WAYS; THE DECISION OF THE MICHIGAN SUPREME COURT IS ONE OF THESE CONTRARY APPLICATIONS OF THIS COURT'S PRECEDENT ON A DEFENDANT'S RIGHT TO A JURY FINDING ON ALL FACTS WHICH INCREASE PUNISHMENT

MR. PEREZ WAS DENIED DUE PROCESS OF LAW BASED ON THE PROSECUTION'S REFUSAL TO PROVIDE COMPLETE DISCOVERY OF THE NAMES OF WITNESSES THAT WOULD HAVE PROVIDED HIM WITH A VIABLE DEFENSE, AND WHERE THE TRIAL COURT FAILED TO DECLARE A MISTRIAL FOR THE AFOREMENTIONED BRADY VIOLATION

MR. PEREZ IS ENTITLED TO RESENTENCING OR A CROSBY REMAND BASED UPON PEOPLE V LOCKRIDGE WHICH INVALIDATED THE MANDATORY CLAUSE OF MCL 769.34(2), AND THE UNITED STATES SUPREME COURT'S DECISION IN MONTGOMERY V LOUISIANA, WHICH HELD THAT ANY CONVICTION OR SENTENCE BASED UPON AN UNCONSTITUTIONAL LAW IS VOID AB INITIO

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. PEREZ A NEW TRIAL WHERE HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY VIA THE POLICE OFFICER'S ENUMERATION OF PAST CRIMES TO THE JURY BEFORE THE JURY WAS EVEN EMPANELED AND COUNSEL WAS INEFFECTIVE FOR NOT CONDUCTING A NECESSARY FOLLOW UP.

ANALYSIS

It is a fundamental tenet of criminal law that an accused has the right to a fair and impartial jury, **US Const Am VI and Const 1963, art 1, § 20**; *People v DeHaven,* 321 Mich 327, 334 NW2d 468 (1948), *Duncan v Louisiana*, 391 US 145, 149 (1968); *People v Clark,* 220 Mich App 240, 245-246 (1996), and to the effective assistance of counsel. *Strickland v Washington,* infra. The protection of **US Const, Am VI** applies to state prosecutions under the Due Process Clause of **US Const, Am XIV**.

Issues of ineffective assistance of counsel are reviewed under the two prong analysis set forth in *Strickland v Washington,* 466 US 668 (1984). First, the Petitioner must demonstrate that counsel's performance was deficient which means that counsel was not functioning as counsel guaranteed by the Sixth Amendment. This requires proof that counsel's acts or omissions were objectively unreasonable under prevailing professional norms. Review of counsel's performance is highly deferential and is assessed for reasonableness. Id.

Second, Petitioner must show that but for counsel's unreasonable acts or omissions there is a reasonable probability of a more favorable result. Id. 466 US 689-694.

Discussion

In this case, Petitioner respectfully submits that he was denied his constitutional rights to a fair and impartial jury and to effective counsel. During voir dire, a police officer who was present in the venire had informed other prospective jury members that he was in fact a police officer and had assisted in the arrest of Petitioner on numerous other charges. Trial counsel requested that the entire venire be stricken for cause after the officer's unsolicited declaration. (Trial Trans. [TT], Vol. I, pp 38-40). However, the trial court deferred ruling on this request because he wanted to wait until a jury was empaneled. (*Id* p 40). A jury panel was subsequently comprised of venire persons who heard the policeman's highly inflammatory outburst. **The trial court never ruled on counsel's objection to have the entire jury venire stricken**. Petitioner respectfully submits that this is a structural error requiring automatic reversal, despite the failure to raise this issue on appeal. **MCR 6.508(D)(3)(b)(iii)** allows for relief to be granted where the error is of such magnitude that the conviction should not be allowed to stand regardless of the effect of the error on the outcome. This language is identical to the rule of law allowing automatic reversal where the trial is tainted by a structural error. See *People v Duncan*, 462 Mich 47 (2000).

ABUSE OF DISCRETION

Petitioner respectfully submits that the trial court abused its discretion in denying his motion for relief from judgment without *liberally construing* his pro se arguments. The United States Supreme Court has held that pro se pleadings are to be liberally construed. *Haines v Kerner*, 404 US 519 (1972). Pleadings of pro se litigants should not be held to the same standards expected of licensed attorneys. *Id.* Petitioner's motion included a claim of ineffective assistance of counsel (Motion for relief from judgment p 7), which may constitute 'good cause', see *People v Reed,* 449 Mich 375, 378 (1975). Although Petitioner did not make a heading for an ineffective assistance of counsel argument, such argument was in fact made. The trial court recognized the same, (See Order p 2), but somehow concluded that Petitioner did not attempt to demonstrate good cause. (*Id.*) Petitioner asks this honorable Court not to exalt style over substance and give him the benefit of the doubt since he is in pro per. *Haines*, supra.

The Petitioner respectfully submits that he is innocent and but for the structural error in empaneling an impartial jury, there is a reasonable probability that he would have been acquitted. Therefore, the procedural bar should be excused whereas, the State has no legitimate interest in finality of a judgment that was obtained in violation of the State and Federal Constitutional rights to a fair and impartial jury and effective counsel.

Lifting the procedural bar would not offend the fair administration of justice inasmuch as Michigan courts do not routinely follow the contemporaneous objection rule where issues of constitutional magnitude are raised. In *People v Duncan*, supra, the Court created a 'bright line' rule requiring automatic reversal of a conviction due to a structural error, despite the fact that the

defendant failed to object. Duncan has not been invalidated or otherwise called into question, despite the tension created by *People v Vaughn*, 491 Mich 642, 664 (2012), (calling for forfeited public trial claim to be viewed under the plain error standard). The seating of an impartial jury is a structural error that requires automatic reversal as it affects the entire trial process itself.

The trial court committed an error of fact when it concluded that Petitioner did not attempt to establish 'good cause.' (See Order Denying Relief From Judgment at p 2). A liberal reading of Petitioner's argument illustrates that ineffective counsel was the reason that the initial objection was not followed up. The trial court should have given this claim due consideration. See MCR 6.508(E), which requires the trial court to make findings of fact and conclusions of law on each issue presented in the motion. It is an abuse of discretion for a court to refuse to exercise discretion in a matter properly before it. *People v Stafford*, 434 Mich 125, 134 n 4 (1990), see also, *People v Scamihorn*, 470 Mich 851 (2005).

RIGHT TO IMPARTIAL JURY

A defendant is constitutionally entitled to an impartial jury. US Const Am VI; Const 1963, art 1, Sec 20. This is a preeminent constitutional right because other constitutional protections of a criminal defendant are meaningless without a fair and impartial jury. An impartial jury requires that each of the 12 persons be impartial. Challenges for cause may be based on bias, partiality, disqualifying opinion, external factors or other facts disclosed by a juror's examination which fairly indicate that the juror may not be in a condition to render a fair and impartial verdict if permitted to serve. *People v Thomas,* 126 Mich App 611 (1983). **MCR 6.412(D)** governs challenges for cause in a criminal trial. It provides:

(D) Challenges for Cause.

(1) Grounds. A prospective juror is subject to challenge for cause on any ground set forth in **MCR 2.511(D)** or for any other reasons recognized by law.

(2) Procedure. If, *after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel.* (Emphasis added).

"Although, as a general matter, the determination whether to excuse a prospective juror for cause is within the trial court's discretion, once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in **MCR 2.511(D),** the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles,* 260 Mich App 379, 382-383 (2004). A showing that a juror comes within one of the grounds in which bias is deemed proven is equivalent to a showing of prejudice at common law and disqualifies the juror. *Bishop v Interlake, Inc*, 121 Mich App 397 (1982). See also **MCR 6.412(D)(2).**

MCR 2.511(D) lists 12 bases for challenging a juror for cause. **MCR 2.511(D)(2)** and **(3)** allow a challenge for cause if the prospective juror has a bias or state of mind that would prevent him from rendering a just verdict. **MCR 2.511(D)(4)** allows a challenge for cause if the juror "has opinions or conscientious scruples that would improperly influence the person's verdict." "[I]n criminal cases, whenever, after a full examination, the evidence given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt." *People v Holt,* 13 Mich 224, 227-228 (1865).

In *Poet v Traverse City Osteopathic Hospital,* 433 Mich 228, 238 (1989), the Supreme Court held that the trial court should err in favor of the moving party when "apprehension is reasonable":

> [A]pprehension is "reasonable" when a venire person, either in answer to a question posed on voir dire or upon his own initiative, affirmatively articulates a particularly biased opinion which may have a direct affect upon the person's ability to render an unaffected decision.

Had the trial court examined the jurors in regards to how they felt after hearing the officer's inflammatory comments, Petitioner would have been entitled to the benefit of any doubts that may have arisen from their responses. *People v Holt*, supra. In *United States v Martinez-Salazar*, 120 S Ct 774, 781 (2000), the Supreme Court rejected the argument that federal law requires a defendant to use a peremptory challenge to cure the judge's erroneous refusal to dismiss a juror for cause. The Supreme Court stated that when a defendant objects to a trial court's denial of his for-cause challenge, the defendant may choose to either remove the challenged juror peremptorily and forgo a Sixth Amendment challenge, or allow the juror to sit preserving the claim for appeal. 120 S Ct at 781; *Wolf v Brigano*, 232 F3d 499, 501-502 (CA6, 2000).

In *Groppi v Wisconsin*, 400 US 505; 91 S Ct 490; 27 L Ed 2d 571, 575 (1971), the United States Supreme Court re-affirmed the due process right, under **US Const, Am XIV**, to a fair and impartial jury in a state criminal jury trial:

> The issue in this case is not whether the Fourteenth Amendment requires a State to accord a jury trial to a defendant on a charge such as the Petitioner faced here. The issue concerns, rather, the nature of the jury trial that the Fourteenth Amendment commands, when trial by jury is what the State has purported to accord. We had occasion to consider this precise question almost 10 years ago in *Irvin v Dowd,* 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 [(1961)]. There we found that an Indiana conviction could not constitutionally stand because the jury had been infected by community prejudice before the trial had commenced. What the Court said in that case is wholly relevant here:
>
> > In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 US 257; 68 S Ct 499; 92 L Ed 682 [(1948)]; *Tumey v Ohio,* 273 US 510; 47

> S Ct 437; 71 L Ed 749; 50 ALR 1243 [(1927)]. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942, 946 [(1955)]. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co Litt 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v City of Louisville,* 362 US 199; 80 S Ct 624; 4 L Ed 2d 654; 80 ALR2d 1355 [(1960)]. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 ...." 366 US at 722; 6 L Ed 2d at 755 [footnotes omitted].

In *People v DeHaven*, ,321 Mich 327, 334 (1948), the Court defined an impartial jury as follows:

> "The 'impartial jury' guaranteed by constitutional provisions is one which is of impartial frame of mind at the beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged" and further, "consists of twelve impartial men."

An impartial jury is one that determines guilt on the basis of the judge's instructions and the evidence introduced at trial, rather than preconceptions or other extraneous sources of decision. *Skilling v United States*, 561 US 358, 438 (2010). Here, the entire jury pool heard highly inflammatory remarks from a policeman prior to the empanelment of a jury which alleged that Petitioner had been previously arrested. Trial counsel did ask for the entire pool to be stricken based upon such remark (TT Vol. I, pp 38-40), and the trial court simply refused to rule upon such objection. This was a situation in which there was a substantial likelihood of at least one partial juror being seated. If even one of the twelve jurors is biased, then the jury as a whole cannot be considered impartial. *Parker v Gladden*, 385 US 363, 365-366 (1966). If the court becomes aware of a possible source of bias, the court must determine the circumstances, the impact upon a juror and whether or not it was prejudicial. *Remmer v United States*, 347 US 227, 230 (1954)

> "A court's refusal to excuse a juror will not be upheld 'simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial.'" *Wolfe v Brigano,* 232 F3d 499 (CA 6, 2000) (quoting *Kirk v Raymark Indus, Inc*, 61 F3d 147, 156 (CA 3, 1995)).

Here, the trial court failed to fulfill its clear legal duty to make findings of fact as to whether the jury was excusable for cause, or if they could disregard the officer's comment and render a fair and impartial verdict based only on the evidence. This failure of duty not only paved the way for a partial jury to be seated, but any evidence of Petitioner's criminal history was improperly bolstered by the office's inflammatory comments. It is the duty of the trial judge to protect and enforce the right of the Petitioner to an impartial jury. *People v Kamischke*, 3 Mich App 236 (1966). Here, the trial court erred in failing to perform its basic duty to investigate whether the potential jurors were all able to render an impartial verdict notwithstanding the officer's improper remarks in violation of Petitioner's federally protected due process rights.

INEFFECTIVE COUNSEL

Petitioner also asserts that trial counsel was ineffective for failing to request a hearing on whether the prosecutor acted in bad faith in losing the evidence (i.e., the names of Ms. Beth Ann Ruth's brother and grandfather), and failing to request an 'adverse inference' instruction as required by *People v Pearson*, 404 Mich 698, 722 (1979). (See Argument II). Although the trial court deemed this issue barred by MCR 6.508(D)(2), Petitioner respectfully disagrees with this conclusion and for the reasons stated above, requests this Court to grant leave to appeal.

ARGUMENT II.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING RELIEF FROM JUDGMENT WHERE MR. PEREZ ALLEGED A DUE PROCESS VIOLATION BASED ON THE PROSECUTION'S REFUSAL TO PROVIDE COMPLETE DISCOVERY OF THE NAMES OF WITNESSES THAT WOULD HAVE PROVIDED HIM WITH A VIABLE DEFENSE, AND WHERE THE TRIAL COURT FAILED TO DECLARE A MISTRIAL FOR THE AFOREMENTIONED BRADY VIOLATION.

ANALYSIS

Whether the prosecutor suppressed evidence in violation of *Brady v Maryland,* 373 US 83 (1963), is a mixed question of law and fact which must be reviewed de novo.

DISCUSSION

The bedrock principle of criminal law is that a prosecutor's duty is to seek justice, not merely to convict. *Brady v. Maryland*, supra, 373 U.S. 83, 87-88 (1963). Disclosure of all material and exculpatory evidence to the defense is fundamental to that duty. As this Court explained in *Brady*, the axiom underlying this prosecutorial responsibility is the "avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). The prosecution admitted that Beth Ann Ruth told police that her brother and grandfather were present during the alleged allegations. (TT, Aug.2, 2010, p 5). The defense requested the names of these alleged *res gestae* witnesses, but the prosecutor failed to provide the same despite being duty bound to do so. **MCL 767.40a,** *Brady v Maryland, supra.*

The prosecutor is responsible for obtaining the police reports and providing them to the defense, and the officer's knowledge must be imputed to the prosecutor. *People v Cassell*, 63 Mich App 226 (1975); *Kyles v Whitley*, 514 US 419, 432-33 (1995).

The prosecutor in this case was bound by the rules of discovery, which provide:

> (A) **Mandatory Disclosure** . . .[A] party upon request must provide all other parties:. . .
> (2) Any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial. Mich Ct R 6.201(A)(2).

Michigan follows a policy of liberal discovery, which requires prosecutors to provide the defense with all materials admissible at trial or essential to the preparation of a defense and a fair trial. *People v Johnson*, 356 Mich 619 (1959); *People v Maranian*, 359 Mich 361, 368-369 (1960); *People v Florinchi*, 84 Mich App 128, 133-134 (1978). "When a prosecutor suppresses pretrial statements that are material to defense preparation, nondisclosure will be considered at least prejudicial, . . .and perhaps a violation of due process. *See Brady v Maryland*, supra." *People v Hayward*, 98 Mich App 332, 336 (1980).

In keeping with this general principle, the Court of Appeals has held that a prosecutor's violation of a discovery order, "even if inadvertently in good faith," requires reversal of the resulting conviction "unless it is clear that failure to divulge was harmless beyond a reasonable doubt." *People v Pace*, 102 Mich App 522, 530-531 (1980).

Petitioner did not have any similar evidence that could have rebutted Ms. Ruth's similar acts claims and the suppression of the evidence was material inasmuch as it could have cast light on Petitioner's guilt or innocence. Petitioner was denied a fair trial without access to the witnesses Ms. Ruth asserts was present when alleged other bad acts were being committed by him. This non-

disclosure violated the discovery rules and *Brady v Maryland* supra. Once a *Brady* violation is established, it can never be harmless, *Kyles v Whitley*, supra, 514 US at 437.

Alternatively, trial counsel was ineffective for failing to seek dismissal due to the *Brady* violation and failing to request an adverse inference (missing witness) instruction. *People v Pearson,* supra, 404 Mich 698, 722 (1979). Petitioner was deprived of critical evidence that was material to guilt or punishment and the prosecutor's failure to divulge the same denied Petitioner a fair trial, a trial whose result if reliable.

ARGUMENT III.

MR. PEREZ IS ENTITLED TO RESENTENCING OR A CROSBY REMAND BASED UPON THIS COURT'S OPINION IN PEOPLE V LOCKRIDGE WHICH INVALIDATED THE MANDATORY CLAUSE OF MCL 769.34(2), AND THE UNITED STATES SUPREME COURT'S DECISION IN MONTGOMERY V LOUISIANA, WHICH HELD THAT ANY CONVICTION OR SENTENCE BASED UPON AN UNCONSTITUTIONAL LAW IS VOID AB INITIO.

ANALYSIS

The exercise of discretion at sentencing must be based on the nature of the offense and the offender's background and circumstances. *People v McFarlin_*, 389 Mich 557 (1973). The imposition of a prison sentence must be based on accurate information. A sentence based on inaccurate information constitutes a denial of due process. *Townsend v Burke*, 334 US 736 (1988). As the Court stated in *People v McKernan*, 185 Mich App 780, 783 (1990):

> "The fact that the sentence . . . was within the guidelines range . . . is of no consequence. Since the trial judge sentenced defendant to the maximum minimum allowed by the guidelines, the judge using proper criteria might sentence defendant to a lesser term within the guidelines."

Petitioner respectfully submits that his sentence is invalid as it is based upon incomplete information and does not reflect an individualized sentence.

DISCUSSION

Mr. Perez respectfully submits that he was denied his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to fair notice when the trial court found aggravating factors beyond the verdict or admitted by him to mandatorily increase the floor of his minimum sentencing guidelines range. **US Const Ams VI, XIV;** *People v Lockridge,* 498 Mich 358 (2015). Petitioner claims entitlement to relief based upon the Michigan Supreme Court's opinion in *People v Lockridge,* supra, which created a new rule that nullified the state's power to mandatorily increase a defendant's punishment based upon aggravating factors found by the judge, but not supported by admissions of the Petitioner or proof beyond a reasonable doubt.

It is the Petitioner's position that the assessment of points for **OV's 4, 10, & 13** were improper in light of *Lockridge*, supra, where they were not supported by his admissions or proof beyond a reasonable doubt. Thus, this honorable Court should grant leave to appeal or alternatively, vacate the trial court's order and remand for resentencing.

I. A Sentence Based Upon An Unconstitutional Law Is Void. Thus, The Trial Court Clearly Erred In Scoring 10 points For OV 4 Where Mr. Perez Was Not Charged or Convicted of Causing Psychological Injury To The Victim, Nor Did He Admit To The Same.

Under the Sixth and Fourteenth Amendments to the United States Constitution, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490; 120 SCt 2348; 147 LEd2d 435 (1999). The "statutory maximum" for purposes of this rule "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict

or admitted by the defendant." *Blakely v Washington,* 542 US 296; 124 SCt 2531; 159 LEd2d 403 (2004). Under *Apprendi, Blakely* and its progeny, where further fact-finding is required to increase a sentence – by increasing a guidelines range, departing from the guidelines, or otherwise – a defendant has a due process right to a jury determination of those facts beyond a reasonable doubt unless those facts are admitted by the defendant. US Const, Amends VI, XIV.

The trial court mistakenly scored OV 4 at 10 points. OV 4 authorizes a 10-point score upon proof of "serious psychological injury requiring professional treatment." **MCL 777.34(1)(a)**. The victim need not have actually sought professional treatment; the score is justified if the evidence shows a serious psychological injury that may need treatment. **MCL 777.34(2)**. However, there must be evidence in the record to support a finding of serious psychological injury. *People v Lockett*, 295 Mich App 165, 183 (2012); *People v Hicks*, 259 Mich App 518, 534-35 (2003). The circumstances of the crime itself are not enough. "The trial court may not simply assume that someone in the victim's position would have suffered psychological harm because **MCL 777.34** requires that serious psychological injury '*occurred* to a victim.'" *Lockett*, 295 Mich App at 183 (emphasis in original); *see also Hicks*, 259 at 531, 534-35 (holding no evidence of serious psychological harm although record showed victim physically injured in struggle with purse-snatching defendant).

Ten points may be scored under OV 4 "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." **MCL 777.34(2).** In this case, OV 4 was scored 10 points to reflect "serious psychological injury" to the complainant. **MCL 777.34(1)(a).** Mr. Perez respectfully submits that the trial court erroneously scored ten points for OV 4, where the jury made no such finding but rather the sentencing judge made this determination. Mr. Perez respectfully submits that there is insufficient evidence that he caused serious psychological injury to the victim.

Thus, the mandatory increase of Mr. Perez's sentence based upon the judicially found fact that he caused serious psychological injury to the victim violated Mr. Perez's right to a jury trial as guaranteed by the Sixth and Fourteenth Amendments. In *Montgomery v Louisiana*, 136 S Ct

718, 729-731 (2016), the Supreme Court held that collateral review courts are not at liberty to leave in place a punishment that the constitution forbids. Specifically, the Court held:

> "A conviction under an unconstitutional law is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment..." *Id.* 136 S Ct at 730-731
>
> **********
>
> "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." *Id.* (emphasis added)
>
> **********
>
> "There is no grandfather clause that permits States to enforce punishments the Constitution forbids." *Id.* at 731.

Based on the language of *Montgomery*, supra, Mr. Perez respectfully submits that *Lockridge*, supra, must be applied retroactively. The scoring of OV 4 unjustly added 10 points to Mr. Perez's guidelines and in totaling the aggregate of OV points scored in violation of *Lockridge*, supra, plain error has occurred.

The *Lockridge* Court concluded:

> To make a threshold showing of plain error that could require resentencing, a defendant must demonstrate that his or her 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. If a defendant makes that threshold showing and was not sentenced to an upward departure sentence, he or she is entitled to a remand for the trial court for that court to determine whether plain error occurred, i.e., whether the court would have imposed the same sentence absent the unconstitutional constraint on its discretion. If the trial court determines that it would not have imposed the same sentence but for the constraint, it must resentence the defendant. [*Id.* at 395-396].

II. The Trial Court Clearly Erred In Scoring 15 points For OV 10 Where Mr. Perez Was Not Charged or Convicted of Exploiting a Vulnerable Victim, Nor Did He Admit To The Same.

A sentencing court scores OV 10 when a defendant exploits a vulnerable victim. Fifteen points are assigned where predatory conduct was involved in the exploitation. For purposes of this variable, (a) "Predatory conduct" means pre-offense conduct directed at a victim for the primary purpose of victimization. (b) "Exploit" means to manipulate a victim for selfish or unethical purposes. (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation. MCL 777.40(3)(C).

As used in **MCL 777.40(1)(a),** " '[p]redatory conduct means *pre-offense* conduct directed at a victim or a law enforcement officer posing as a potential victim, for the primary purpose of victimization." **MCL 777.40(3)(a).** " 'Vulnerability' means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." **MCL 777.40(3)(c).** In *People v Cannon,* 481 Mich 152 (2008), the Supreme Court provided eight factors to consider in deciding whether a victim was "vulnerable." However, "[t]he mere existence of one of these factors does not automatically render the victim vulnerable," *Cannon*, 481 Mich at 159, nor does the absence of a factor "preclude a finding of victim vulnerability," *id,* at 158 n 11. In general, the "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." is what is determinative. **MCL 777.40(3)(c).**

The Michigan Supreme Court clarified the relationship between predatory conduct and vulnerability in *People v Huston*, 489 Mich 451 (2011), observing that "predatory conduct" ... does not encompass any "pre-offense conduct," but rather only those forms of "pre-offense conduct" that are commonly understood as being "predatory" in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or pre-offense conduct involving nothing more

than run-of-the-mill planning to effect a crime or subsequent escape without detection. [*Huston*, 489 Mich. at 462 (quotation marks and citation omitted).]

As applied. Here, there was no pre-offense predatory conduct and it certainly was not proven beyond a reasonable doubt. Finally, Mr. Perez did not admit to engaging in predatory conduct and thus, a *Lockridge* violation has occurred.

III. The Trial Court Clearly Erred In Scoring OV 13 Where Mr. Perez Was Not Charged With Nor Convicted of Committing 3 Or More Crimes Against A Person.

OV 13 allows scoring of 25 points where the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. **MCL 777.43(1)(c)** (formerly MCL 777.43(1)(b)). For brevities sake, the same rationale outlined for OV's 4 and 10 also apply here. Mr. Perez did not admit to committing 3 or more crimes against a person and the verdict does not support such score. Therefore, the scoring of 25 points for OV 13 was error.

IV. Good Cause For Not Raising This Issue In The Trial or Appeals Courts

Mr. Perez respectfully submits that there is good cause for not raising this issue in the lower courts. Specifically, the claim now being presented was not justiciable at that time. In *People v Reed*, 449 Mich 375, 385 n 8 (1995), the Court recognized that where the legal basis for the claim was not available to counsel, the good cause requirement of **MCR 6.508(D)(3)(a),** may be satisfied, citing *Reed v Ross*, 486 US 1, 16 (1984). Mr. Perez respectfully submits that the United States Supreme Court's ruling in *Montgomery v Louisiana*, supra, compels the retroactive application of *Lockridge*, supra, since his sentence was based in part upon an unconstitutional law. See *Montgomery*, supra, 136 S Ct at 730-731.

V. Plain Error and Prejudice Suffered

Mr. Perez was unfairly prejudiced by the errors complained of herein. Thus, the 10 points for OV 4, 15 points for OV 10 and the 25 points for OV13, unjustly added 50 points to his total OV score and also raised his grid from an F-IV 87-290 months to F-VI 99-320 months. Absent the error complained of, Mr. Perez would have had a reasonable probability of a more favorable sentence. However, the plain error complained of here unjustly inflated his sentence and this Honorable Court should order a *Crosby* remand.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner prays that his petition for certiorari be read and granted.

Respectfully submitted,

Peter Perez #230341
In *pro per*
R.A. Handlon Correctional Facility
1728 W. Bluewater Hwy.
Ionia, Michigan 48846

Dated: December 27, 2018

APPENDIX-A

Decision of the Michigan Supreme Court on 6.500