No. _____

19-5842

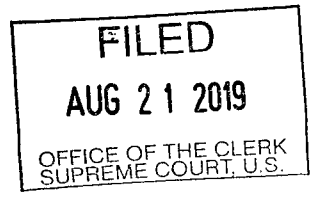
IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

WILLIAM SIM SPENCER— PETITIONER

vs.



MICHIGAN— RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE OAKLAND COUNTY CIRCUIT COURT OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

William Sim Spencer
15283 Wallin Road
Thompsonville, MI 49683
(231) 970-0810
williamsimspencer@gmail.com

QUESTION(S) PRESENTED

I. WHERE IT CAN BE SHOWN THAT THE ORDER TO REGISTER AS A SEX OFFENDER IS NOT LIMITED IN SCOPE TO STAND ON A VALID GUILTY PLEA SUPPORTED BY THE EFFECTIVE ASSISTANCE OF COUNSEL, DOES THE SEX OFFENDER REGISTRATION ACT VIOLATE A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY CREATING AN IRREBUTTABLE PRESUMPTION, AT NEW CRIMINAL TRIALS, THAT THE ORDER TO REGISTER AS A SEX OFFENDER IS LIMITED IN SCOPE TO STAND ON A VALID GUILTY PLEA THAT IS SUPPORTED BY THE EFFECTIVE ASSISTANCE OF COUNSEL?

II. DOES JUSTICE REQUIRE A DETERMINATION THAT MICHIGAN'S PRE-2018 STATUTE OF LIMITATIONS BARS RETRIAL OF THIS CASE WHERE THE RECORD MAKES CLEAR THAT THE ACTUS REUS ELEMENT OF A CRIME WAS NOT ACCUSED BY SPECIFIC FACTS AND WAS NOT PROVEN BY SPECIFIC FACTS?

LIST OF PARTIES

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

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the state trial court, which is the highest state court to review the merits of this sex-offender registration case, appears at Appendix A to the petition and is unpublished.

JURISDICTION

My lawyer failed to warn me that my decision to plead guilty to a sex crime would expose me to an irrebuttable presumption, at new criminal trials under the Sex Offender Registration Act (SORA), regarding the validity of the order to register as a sex-offender which arises from the guilty plea. In a companion 2016 SORA Michigan criminal case against me, I relied on the record of this 2001 Michigan sex-crime case to show that the order to register as a sex offender is tainted by both ineffective assistance of counsel and an involuntary guilty plea. The state did not dispute either my in-court record-supported demonstrations of factual innocence in the 2001 case, or the fact that the order to register was not sufficiently narrow to stand on the effective assistance of counsel. The Michigan Court of Appeals, however, has held that the Finality rule prevents me from confronting the state's evidence-in-chief of a new crime - - *specifically, the* demonstrably invalid *order to register that issued in this instant case*, and a copy of the order appears at Appendix B. So, I moved the trial court in this instant case for relief from judgment under MCR 6.500. The trial court thereafter reopened this 2001 case and ordered the prosecutor to respond. But right after I appended my challenge that the trial court had never properly acquired jurisdiction to hear and determine the 2001 case where the actus reus of a sex-crime was never alleged or proven by specific facts anywhere in the record, the trial judge immediately reclosed *and re-archived* the case before the prosecutor could respond to my jurisdictional challenge.

The date on which the highest state court decided my case was 4/25/2019. A copy of that decision appears at Appendix A. The trial court clerk thereafter refused to file my timely petition for rehearing, apparently because the case had already been administratively re-closed by the trial judge before the 21-day period to file a petition for rehearing had expired. My timely appeal to the Michigan Court of Appeals was denied on 5/22/2019, on the basis that the 4/25/2019 order is not a final order as defined in MCR 7.202(6)(b), and a copy of that decision appears at Appendix C. My timely bypass petition to the Michigan Supreme Court was denied on 7/02/2019 for the very same reason, and a copy of that decision appears at Appendix D. Thus, there is no adequate opportunity for judicial review under SORA of a final order to register as a sex offender that is demonstrably invalid. The Michigan Supreme Court administratively closed the case on 8/08/2019 without addressing my timely motion for rehearing, and a copy of the MSC register of actions appears at Appendix E. The jurisdiction of this Court is invoked under 28 USC 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Am. VI: "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ... and to have the Assistance of Counsel for his defence."

U.S. Const. Am. XIV; Sex Offender Registration Act: Michigan Public Act 295 of 1994, *as amended.*

STATEMENT OF THE CASE

This case initiated in 2001 at Oakland County, Michigan, and resulted in an order that I register as a sex offender. This case was reopened in 2019 as a result of new evidence uncovered during a new criminal proceeding in 2016, at Benzie County, Michigan, under the Sex Offender Registration Act (SORA). In the 2016 companion case, Michigan sought to impose a new 15-year prison sentence to enforce the 2001 order to register as a sex offender. The 2016 proceedings resolved in my favor on other grounds, but I remain exposed to repeated unconstitutional arrests and prosecutions because Michigan has declined to reach the merits of my claim, made in each of these cases, that the 2001 order to register as a sex offender is based on an involuntary guilty plea and tainted by ineffective assistance of counsel.

In order to show probable cause to believe that a SORA violation had occurred in the 2016 case, Michigan relied on the 2001 order to register as a sex-offender to assert that I am an individual required by court order to register as a sex offender. To rebut the presumption of the validity of that order, I introduced certified copies of the record of this 2001 case to demonstrate that the order to register as a sex-offender is undeniably based on an invalid guilty plea tainted by prejudicial ineffective assistance of counsel.

In the 2016 SORA criminal case, the court denied my affirmative defense that in 2001 my trial lawyer failed to inform me that a consequence of my decision to plead guilty would be the waiver of my due process right, at new criminal trials, to rebut the presumption that the order to register as a sex-offender is limited in scope to stand on the effective assistance of counsel. After the 2016 bind over was quashed on other grounds, the state appealed, and I counter-appealed to claim that the 2001 order to register as a sex offender is tainted by ineffective assistance of counsel which resulted in an invalid guilty plea. After oral argument, the Michigan Court of Appeals upheld the lower court's decision to quash the bind over and explained:

> "Because *[Oakland County Case: 2001-180525-FH]* is not on direct appeal, the circuit court properly declined to allow defendant to collaterally attack his prior judgment of sentence."

(Appendix B.) On 7/02/2019 the Michigan Supreme Court affirmed the Michigan Court of Appeals decision that the Rule of Finality prevents me from challenging the validity of the state's evidence-in -chief against me at new criminal trials under SORA. To preserve my right to review of this patently unconstitutional deprivation of my right to confrontation, I moved the Oakland County Circuit Court to reopen the case and sought relief from the 2001 order to register. On 2/21/2019 the Oakland County Circuit Court re-opened the case and found:

> "The matter is before the Court on Defendant's 'Motion for Relief From Judgment Based on New Evidence.' After reviewing the pleading, the Court finds that it is necessary to the People to file a response within 56 days of the date of this Order. See MCR 6.504(B)(4); MCR 6.506(A)."

With the procedural bar thus lowered by the trial court, I immediately exercised my right to challenge the trial court's subject matter jurisdiction by claiming there was no specific factual accusation or evidence of actus reus to support the 2001 conviction. Three days later *(more than a month before the prosecutor's response was due)* the trial court sua sponte reclosed the case

and relieved the prosecutor of her burden to respond to any of my jurisdictional claims, stating that the court was "not persuaded." The state appellate courts declined to reach the merits of my subject matter jurisdiction claim.

Appellate counsel, whose unopposed application for leave to appeal was summarily denied, failed to raise the "dead-bang winner" claim that my guilty plea was, in fact, involuntary given the lack of notice concerning the forfeiture of my future due process liberty interests at new criminal trials. The register of actions at the Oakland County 52-1 District Court of Oakland County (Appendix F) shows that the prosecution filed a felony complaint (Appendix G) which alleged:

> CRIMINAL SEXUAL CONDUCT SECOND DEGREE. Defendant did engage in sexual contact with another person, to-wit: [*name of alleged victim*], said person being under 13 years of age; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan. Sec. 750.520c(1)(a), C.L. 1979; MSA 28.788(3)(1)(a). [750.520C1A].

The arrest warrant (Appendix H) alleged the very same facts set forth by the felony complaint. The arraignment transcript (Appendix I) indicates at page 4, lines 5 – 11, that the magistrate said:

> THE COURT: Mr. Spencer, it is alleged that on or about March 23rd, 2001, through March 29th, 2001, in the City of Wixom; Count One, you did engage in sexual contact with another person, that person being under 13 years of age, contrary to the statute in such case made, provided and against the peace and dignity of the People of the State of Michigan.

Preliminary examination was waived by defense counsel and the matter was bound over for trial. The Information filed at the trial court (Appendix J) accused me of violating MCL § 750.520c without alleging specific facts to establish the actus reus element of a touching of a victim's or actor's genital area, groin, inner thigh, buttock, breast or clothing covering those areas.[1]

[1] *Fuller v Lafler*, 826 F Supp. 2nd 1040 (ED Mich. 2011); M. Crim. JI 20.2(2).

REASONS FOR GRANTING THE PETITION

A. Entitlement to Relief Where the Order to Register as a Sex Offender is Based on an Invalid Guilty Plea Tainted by Ineffective Assistance of Trial Counsel.

In asserting a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that defense counsel's deficient performance so prejudiced the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[2]

I believe that my right to effective assistance of counsel guaranteed under the Sixth Amendment was violated where: (1) trial counsel's performance fell below an objective standard of reasonableness, under prevailing professional norms, by failing to advise me that my decision to plead guilty would result in a waiver of my substantive rights at new criminal trials, where new penalties are sought, based on an irrebuttable presumption that the order to register as a sex offender is not tainted by ineffective assistance of counsel, and (2) trial counsel's deficient performance so prejudiced me that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different because I would not have pleaded guilty had I known that, as a result of the plea, I was waiving my due process rights *forever*, where new 15-year penalties would be sought at future criminal trials, based on an irrebuttable presumption that the order to register as a sex offender is not based on an invalid guilty plea tainted by ineffective assistance of counsel.

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[2] *Strickland v Washington*, 466 U.S. 668, 694 (1984); and *People v Pickens*, 446 Mich. 298, 302-303 (1994).

In proving the elements of an ineffective assistance of counsel claim, a defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy.[3] It is reasonable to conclude that counsel was expected to know that the waiver of constitutional rights at new criminal trials, where new penalties are sought on an irrebuttable presumption that the order to register as a sex offender is not based on an invalid guilty plea tainted by ineffective assistance of counsel, is a serious consequence of which a defense attorney must inform a client who wishes to plead guilty of a sex offense.[4] Counsel's failure to so do may not reasonably be found to have benefited me and, therefore, it should not be found to constitute sound trial strategy. I was prejudiced where, but for the serious derelictions on the part of counsel I would not have pleaded guilty to a sex offense.

People v Fonville[5] is precedential and is not overruled or negatively treated on appeal. The *Fonville* Court found that:

> "Jansen, J. *(concurring in part and dissenting in part).* I fully concur with the majority's determination that defendant's attorney rendered ineffective assistance by failing to inform defendant that his guilty plea would require him to register as a sex offender. The majority correctly concludes that, like the consequence of deportation at issue in *Padilla v Kentucky*, 559 U.S.356 (2010), the requirement to register as a sex offender is a serious consequence of which a defense attorney must inform a client who wishes to plead guilty of certain offenses."

I rely on the reasoning of *Fonville* and the cases cited therein to support my claim that I was prejudiced by the ineffective assistance of counsel, resulting in the denial of my due process rights at new criminal trials, where new penalties are sought on an irrebuttable presumption that

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[3] *People v Fonville*, 291 Mich. App. 363, 395 (2011).
[4] *See, e.g., Padilla v Kentucky*, 559 U.S.356 (2010).
[5] *People v Fonville*, 291 Mich. App. 363 (2011).

the order to register as a sex offender is not based on an invalid guilty plea tainted by ineffective assistance of counsel.

Borrowing from the logic of the reasoning announced in *Fonville*, I claim that the involuntary waiver of my substantive right to challenge the government's *evidence-in-chief* against me at new criminal trials is a serious consequence of which, under the test announced in *Strickland v Washington*[6] and adopted by Michigan in *People v Pickens*,[7] a defense attorney must inform a client who wishes to plead guilty of a sex offense. *Fonville* further provides - -

> "Additionally, we note that the prosecution argues that *Padilla* is not applicable to this case because the Supreme Court's decision in that case does not apply retroactively. However, as stated, we are not applying the *Padilla* decision to dictate the result in this case. Rather, we are simply borrowing the logic of its rationale. Moreover, we are mindful that concerns for finality caution that the validity of guilty pleas not be called into question when entered under the law applicable on the day the plea is taken. However, the sex offender-registration requirement was on the books at the time of Fonville's plea. And more importantly, Fonville has shown "serious derelictions on the part of both trial and appellate counsel sufficient to show that his plea was not, after all, a knowing and intelligent act'."

The result in *Fonville* is applicable to my claims where the registration requirement was on the books at the time of my plea, and the judgment of sentence in this 2001 case constituted the state's evidence-in-chief in the 2016 SORA criminal case against me. The Court is asked to find that I have asserted a viable claim of ineffective assistance of counsel by showing: (1) that defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that defense counsel's deficient performance so prejudiced me that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

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[6] *Strickland v Washington,* 466 U.S. 668, 694 (1984).

[7] *People v Pickens*, 446 Mich. 298, 302-303 (1994).

B. Entitlement to Relief Where the Order to Register as a Sex Offender is Based on an Invalid Guilty Plea Tainted by Ineffective Assistance of Appellate Counsel.

Appellate counsel may deliver deficient performance and cause prejudice to a defendant by omitting a "dead-bang winner," that is, an issue obvious from the trial record that would have resulted in a reversal on appeal.[8] My appellate counsel failed to raise a "dead-bang winner" issue, recognizable by a practitioner familiar with criminal law and procedures on a current basis and failed to engage in diligent legal research, which would have offered a reasonable prospect of meaningful postconviction or appellate relief, in a form that protects where possible my option to pursue collateral attacks in state or federal courts. Because appellate counsel failed to disclose to me the issue of ineffective assistance of counsel resulting in prejudice to my due process rights at new criminal trials, I was unable to insist that the particular claim be raised on appeal against the advice of counsel. Appellate counsel failed to inform me of the right to present the claim in propria persona.

Based on the facts set forth herein, (1) appellate counsel's performance fell below an objective standard of reasonableness under prevailing professional norms by failing to raise the "dead-bang winner" claim that trial counsel was ineffective, where the guilty plea was made without my knowledge that a consequence of the plea would be the forfeiture of my due process rights, at future criminal trials, to confront the state's evidence against me, and (2) that appellate counsel's deficient performance so prejudiced me that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Appellate counsel's strategy was not sound.[9]

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[8] *See Meade v Lavigne*, 265 F.Supp.2d 849 (E.D. Mich. 2003) at 870.

[9] *People v Fonville*, 291 Mich. App. 363, 395 (2011), citations omitted.

It is reasonable to conclude that my appellate lawyer was expected to know that "no procedural principle is more familiar to the [courts] than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."[10] The Court should find that the decision not to raise the ineffective assistance of trial counsel claim was not sound strategy. My appellate lawyer was deficient by failing to inform me that the failure to raise the claim would result in forfeiture of my due process rights at new criminal trials. I was prejudiced where, but for the serious derelictions on the part of appellate counsel, I would have raised the claims myself. Appellate counsel rendered ineffective assistance and prejudiced me by failing to advise me that, as a result of my decision to plead guilty in 2001, I had waived my right to confrontation at new criminal trials, and that I was at risk of forfeiture of my due process rights at new criminal trials forever - - unless I challenged the *ineffective-assistance-of-counsel based* order to register under SORA on direct appeal.

The order to register as a sex offender was not appropriately limited in scope to stand on the effective assistance of appellate counsel and, thus, the Court should vacate it as being prospectively inequitable.[11] The Court has held that the prosecution must bear the burden of persuasion beyond a reasonable doubt if the factor makes the difference between guilt and innocence.[12] Whether I have been properly required to register as a sex offender is explained by Michigan Model Criminal Jury Instruction 20.39e(2) which requires a jury to find proof of a defendant's obligation to register as a sex offender. The jury instruction makes plain that the

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[10] *Yakus* v. *United States*, 321 U. S. 414 (1944) at 444.
[11] See, e.g., *U.S. v. Holtzman*, 762 F.2d 720 (9th Cir. 1985) at 722.
[12] *Patterson v New York*, 432 U.S. 197 (1977), at page 226.

difference between guilt and innocence is whether there is a valid court order to register as a sex offender. To withstand constitutional muster, such an order must not be tainted by the ineffective assistance of counsel.

A conclusive presumption has been explained as follows: "In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all."[13] Application of the judgment of sentence with the procedural Rule of Finality, as demonstrated by the newly discovered evidence here, establishes a *"conclusive implication,"*[14] or an *"imputation (as a matter of law),"*[15] or a *"conclusive presumption"*[16] of the implied validity of the order to register as a sex offender out of factual proof that a judgment of sentence exists.

I concede that a conclusive presumption, with respect to an element of a crime, does not necessarily render the element a nullity. It only does so when the presumption's basic fact is an element of the crime,[17] as it unmistakably is here. Upon examining the structure of a criminal charge under SORA, it might be said that the *"presumed fact"* is that the order to register as a sex offender is valid, and the *"basic fact"* is that an undisturbed order to register as a sex offender exists. When the presumed fact is truly an element of the crime, the presumption, especially if it is conclusive, may run afoul of the Fourteenth Amendment Due Process Clause.[18] Such

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[13] *People v Aaron*, 409 Mich. 672 (1980) fn. 12; McCormick, Evidence (2d ed), § 342, p 804.

[14] *See and compare Mullaney v Wilbur*, 421 U.S. 684 (1975) at 686

[15] *See, e.g., People v Fountain*, 71 Mich. App 491 (1976), 494-495, fn 2 ("In effect malice was imputed to the act of killing from the intent to commit the underlying felony by operation of law.").

[16] A conclusive presumption has been explained as follows: "In the case of what is commonly called a conclusive or irrebuttable presumption of a new crime, when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all." *McCormick, Evidence* (2d ed), § 342, p 804.

[17] *People v Aaron*, 409 Mich. 672 (1980) at 743.

[18] See *In re Winship*, 397 U.S. 358 (1970); *Mullaney v Wilbur*, 421 U.S. 684 (1975) ; *Ulster County Court v Allen*, 442 U.S. 140 (1979).

presumptions may unconstitutionally dilute the "beyond a reasonable doubt" standard of criminal culpability.[19]

The judgment of sentence based on the 2001 involuntary guilty plea constituted the state's *evidence-in-chief* during the 2016 SORA criminal proceedings against me. The state used the judgment of sentence to establish the essential element of "an order which required me to register as a sex offender." Thus, the injury that I have suffered as a direct result of the deficiencies of my lawyers in this instant case was not harmless. I would not have been defending against a new SORA criminal prosecution in 2016, but for the ineffective assistance of counsel I received in 2001. That I was unaware of this fact before the Michigan Court of Appeals issued its 1/18/2019 Opinion & Order (Appendix B) which made manifest and clear the irrebuttable presumption that the state's *evidence-in-chief,* in a SORA criminal proceeding shall not be assailed, further makes probable a finding that I received ineffective assistance of counsel.

In *Sandstrom v Montana,*[20] the Court held that the effect of a presumption in a jury instruction is determined by the way in which a reasonable juror could have interpreted it, not by a prosecution court's interpretation of its legal import. Because a jury may interpret the challenged presumption as conclusive, like the presumptions in *Morissette v United States,*[21] and *United States v U.S. Gypsum Co.,*[22] or as shifting the burden of persuasion, like that in *Mullaney v Wilbur,*[23] and because either interpretation would have violated the Fourteenth Amendment's requirement that the prosecution prove every element of a criminal offense beyond a reasonable

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[19] *People v Aaron*, 409 Mich. 672 (1980) at 743.
[20] *Sandstrom v Montana*, 442 US 510 (1979), starting at page 514.
[21] *Morissette v. United States*, 342 US 246 (1952).
[22] *United States v. United States Gypsum Co.*, 438 US 422 (1978).
[23] *Mullaney v. Wilbur*, 421 US 684 (1975).

doubt, the instruction is unconstitutional. Justice Brennen, writing for a unanimous Court, advised that conclusive presumptions "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and they "invade the factfinding function," which, in a criminal case, the law assigns to the jury. SORA, by depriving without remedy my due process right to rebut the validity of the evidence presented by the government to establish the indispensable element of a valid court order to register under SORA, runs afoul of Justice Brennen's Opinion of the Court in *Sandstrom*.

The presumption announced by SORA itself, at MCL § 28.723, may well lead to exactly the same consequences described in *Sandstrom*, since upon finding proof of actual facts to establish the existence of an undisturbed order to register as a sex offender, and of facts insufficient to establish that the order is limited in scope to stand on the effective assistance of counsel, a jury could reasonably conclude that it was directed to find against me on the element of legal status, as one properly required to register as a sex offender. The state has thus been relieved of the burden of "proving beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged," as set forth by: *In re Winship*.[24] The Court explained its holding in *Mullaney v. Wilbur*[25]as follows:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. [] Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.[26]

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[24] *In re Winship*, 397 U.S. 358 (1970).

[25] *Mullaney v. Wilbur*, 421 US 684 (1975).

[26] *Patterson v. New York, 432 U.S. 197 (1977) at 215.*

In *Almendarez-Torres v. United States,*[27] the Court looked to the statute before them and asked what Congress intended. Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, the Court looked to the statute's language, structure, subject matter, context, and history - - factors that typically help courts determine a statute's objectives and thereby illuminate its text.[28] The Court has also noted that "the title of a statute and the heading of a section" are "tools available for the resolution of a doubt" about the meaning of a statute.[29] The title of SORA's 1999 amendment is –

> "AN ACT to amend 1994 PA 295, entitled "An act to ... prescribe penalties and sanctions."[30]

A title that contains the word *"penalties"* more often, but certainly not always, signals a provision that deals with penalties for a substantive crime. SORA's 1999 amendment contains language that indicates the Legislature intended to create a new substantive crime and not a sentencing factor.

The legal principle announced in *Apprendi v New Jersey*[31] is not applicable in this case. In *Apprendi* the 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 proved beyond a reasonable doubt." *(Emphasis added).* To properly apply the legal principle

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[27] *Almendarez-Torres v. United States,* 523 U.S. 224 (1998) at 228-29

[28] See, *e.g., United States v Wells,* 519 U.S. 482, 490-492 (1997); *Garret v United States,* 471 U.S. 773, 779 (1985).

[29] *Trainmen v Baltimore Ohio R. Co.,* 331 U.S. 519, 528-529 (1947); see also *INS v National Center for Immigrants' Rights, Inc.,* 502 U.S. 183, 189 (1991).

[30] Public Act 85 of 1999.

[31] *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

announced in *Apprendi* would require attention to the phrase: *"other than* any fact that *increases the penalty for a crime."* While the fact of a prior conviction was used to *"increase the penalty for a crime"* in *Apprendi*, that is not what the fact of the conviction was used for against me. Instead, the fact of the conviction was used to establish the primary element of a new criminal offense created by SORA, and to call for a new 15-year penalty. In short, *Apprendi* has no application where the fact of a prior conviction is not being used to increase the penalty for a crime in a SORA criminal proceeding.

SORA's lack of an exception to the Finality Rule has prejudiced my substantive rights. There is not - - *and more importantly, there was not when I pleaded guilty* - - an exception to the Rule of Finality such that would protect my due process rights at new criminal trials. In the interest of sound public policy, SORA should be found to be unconstitutional as applied because it allows criminal convictions to be based on less evidence than is required by law.[32]

I believe that the error here is non-harmless. My conduct would not have been illegal if not for the application of the tainted order.

Here, we have a plausible account of how it can be unjust to create a remedial program and then not implement it with sufficiently accurate procedural safeguards. The Due Process Clause was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[33] My liberty interests are daily proven to be fragile.

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[32] *In re Winship,* 397 U.S. 358 (1970).

[33] *Stanley v Illinois,* 405 US 645 (1972) at 656.

C. Entitlement to relief with prejudice if the court determines that my guilty plea does not properly support the court-ordered requirement to register as a sex offender

Surely by now the reader has been pondering: "But, he did plead guilty, didn't he?" As I recounted in my jurisdictional challenge at the trial court, I intended to rely on the exculpatory testimony of the grandmother of the complaining witnesses in 2001 to establish that the accusations were false and retaliatory. But a few days before trial, without notice, I was transported from the Oakland County Jail to a child-removal hearing initiated by Oakland County. My children, one of whom was yet lactating, were not involved in the case in any way and I had already been incarcerated for months. I was mortified when told that my children could remain at home with their mother ONLY if I agreed to plead guilty in the sex-crime case. I looked at my family, I did what I thought I had to do, and I have regretted it every day since.

When a count of the indictment fails to set forth an essential element of the crime, the court has no jurisdiction to try the accused under that count of the indictment.[34] Where a court is without jurisdiction in a particular case, its acts and proceedings can be of no force or validity, and are mere nullity and void.[35] Parties' consent or conduct could not give the court jurisdiction over the subject matter where it otherwise would have had no jurisdiction.[36] Where a trial court had, under the law, no jurisdiction of the case - - that is, no right to take cognizance of the offense alleged - - the case must be entirely discharged.[37]

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[35] *Fox v Board of Regents*, 375 Mich. 238 (1965).
[36] *Shane v Hackney*, 341 Mich. 91 (1954).
[37] *In Re: Bonner*, 151 US 242 (1893).

The Court has emphasized that elements in felony complaints are mandatory and jurisdictional and "that a court cannot permit a defendant to be tried on charges that are not made in the felony complaint against him[. Thus], when a felony complaint fails to set forth an essential element of the crime [the court] has no jurisdiction to try him under that count."[38] Here, the charging documents each omit essential elements of the accusation, and each therefore result in structural error.[39]

The felony complaint (Appendix G) and Information (Appendix J) each cite MCL § 750.520c and accuse me of: "engaging in sexual contact with another person." But neither document specifically alleges a "touching" of the victim's or actor's genital area, groin, inner thigh, buttock, breast or clothing covering those areas. And neither document cites MCL § 750.520a to provide notice of the existence of, and the definition of, the legal artifice: *"sexual contact."* The arraignment transcript demonstrates that neither the prosecution, defense counsel, or even the magistrate judge, knew that a felony charge under MCL § 750.520c required an allegation of a "touching" of the victim's or actor's genital area, groin, inner thigh, buttock, breast or clothing covering those areas.

The right to be given actual notice with specificity of the accusation is indeed a pillar of due process. This right is established by the Fourteenth Amendment, and MCL § 767.45 and is guarded with vigilance by the courts.[40] A "radical defect in jurisdiction" contemplates an express legal requirement in existence at the time of the act or omission.[41] Michigan has held that relief

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[38] *United States v Cotton*, 261 F 3rd 397, 405 (4th Cir. 2001).
[39] *United States v Resendiz-Ponce*, 549 US 102 (2007).
[40] *People v Lightstone*, 330 Mich. 672 (1951); See also, Const.1963, art. 1, § 20.
[41] *People v Price*, 23 Mich. App 663 (1970).

is appropriate where a radical jurisdictional defect exists which renders a judgment or proceeding absolutely void.[42]

The legal term: *"sexual contact,"* was created by Michigan to establish the primary element of *actus reus* of Criminal Sexual Conduct Second Degree ("CSC2") and CSC4. The legal term: "sexual contact," is different from, and inconsistent with, a reasonable understanding of the common dictionary definition of those same words. The legal term is not defined by the CSC2 statute: MCL § 750.520c. The text of MCL § 750.520c does not refer to MCL § 750.520a. Neither MCL § 750.520a, or the *actus reus* elements set forth therein, are referred to by any of the pleadings, transcripts, or authorities invoked by the state's pleadings. The record provides no specific accusation or specific evidence to connect the requisite elements of MCL § 750.520a, to either the CSC2 statute, or any alleged act by me.

Where, as here, "guilt depends so crucially upon such a specific identification of fact[,] an indictment must do more than simply repeat the language of the felony statute."[43] The Court is asked to find that it was not sufficient for the charging documents "to set forth the offense in the words of the statute," because those words do not "of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."[44] "Where the definition of an offense... includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must also state the species - - it must descend to the particulars."[45]

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[42] *Ex Part' Palm.* 255 Mich. 632 (1931); *Cross v Department of Corrections*, 103 Mich. App 409 (1981).
[43] *Russel v United States*, 369 U.S. 749 (1962).
[44] *United States v Carll*, 106 US 611 (1882).
[45] *United States v Cruikshank*, 92 US 542 (1875).

The charging documents in this case improperly invoked the state court's subject matter jurisdiction to hear and determine an accusation of CSC2 by using only the same generic terms set forth by the CSC2 statute.[46] There was no judicial finding of specific facts to support probable cause to believe that a "touching" of the victim's or actor's genital area, groin, inner thigh, buttock, breast or clothing covering those areas had occurred.[47] I was not notified that the legal term: "*sexual contact*," was intended to supersede the common-dictionary definitions of those same words. This case exemplifies, therefore, why it is well-settled law in Michigan that felony charges may not be brought by intendment.[48]

It is well-settled law that "when certain facts are to be proved to a court of special and limited jurisdiction as a ground for issuing process, if there is a total defect of evidence as to any essential fact, the process will be declared void in whatever form the question may arise."[49] What should have happened here, but did not, is that the magistrate must always find that there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred" in order to bind over.[50] In other words, the magistrate must restrict his or her attention to whether there is evidence regarding each of the elements of the offense,[51] after examining the whole matter.[52]

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[46] MCL § 750.520c "A person is guilty of criminal sexual conduct in the second degree if the person engages in *sexual contact* with another person").

[47] *Fuller v Lafler*, 826 F Supp. 2nd 1040 (ED Mich. 2011) ("'Sexual contact' includes the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts. The phrase 'intimate parts' includes the primary genital area, groin, inner thigh, buttock or breast of a human being. MCL § 750.520a*(e)*").

[48] *People v Johnson*, 190 Mich. 170, 178 (1916) ("An information must clearly charge the elements of the offense and leave nothing to inference or intendment").

[49] *Johnson v Maxon*, 23 Mich. 129, 128 (1871).

[50] *People v. Selwa*, 214 Mich. App. 451, 457 (1995).

[51] *People v. Coons*, 158 Mich. App. 735, 738 (1987).

[52] *People v. King*, 412 Mich. 145, 154 (1981).

When *actus reus* is neither alleged or proven by specific facts, the courts have consistently ruled against the prosecution.[53] The magistrate clearly abused discretion by failing to discharge me where no specific fact was alleged to constitute an accusation of "touching" of the victim's or actor's genital area, groin, inner thigh, buttock, breast or clothing covering those areas.[54] The record does not support a probable cause finding of the "sexual contact" described by Michigan law. The prosecution was required to, but did not, introduce evidence at the preliminary examination to support an accusation of a "touching" of the victim's or actor's genital area, groin, inner thigh, buttock, breast or clothing covering those areas had occurred. Indeed, even the plea transcript is void of facts to establish the actus reus element of CSC2.

Contrary to Michigan's definition of "legal process" at MCL §§ 750.217c(7)(b) and 750.368(b), the 2001 charging documents did not provide me with "notice of a legal claim against a person or property" since it is not a crime to engage in a meeting of or relating to the sexes. Michigan essentially put me on notice that engaging in a meeting of or relating to the *sexes (Webster's Dictionary definition of the words "sexual" and "contact")*[55] is a crime. Not being involved in a "touching" of any kind, I could not rule out criminal conduct under the terms of the notice. Accordingly, the documents could not be used to properly exercise or acquire subject matter jurisdiction.

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[53] *People v Lee*, 477 Mich. 552, 564 (1994); See also, *People v Baugh*, 249 Mich. App 125, 130 (2002) (n. 2 "As was the case in *Glass*, 464 Mich., at 283, the present record does not contain a 'complaint stating the substance of the accusation or reasonable cause to believe [defendant] committed the offense as required by MCL 764.1d, nor was there a preliminary examination on a complaint as required by MCL 767.42").

[54] *People v Deason*, 148 Mich. App 27 (1985) ("The statutory duty of the magistrate at a preliminary examination is to bind the defendant over for trial if it appears ... but there must be evidence of each element of the crime charged or evidence from which those elements may be inferred").

[55] *Webster's Dictionary* (1995). pp. 490 and 3032.

Any assertion that, since it may be implied that "sexual contact" means something other than its common dictionary meaning it is not necessary to charge and prove, runs contrary to the decision in *United States v Foley,*[56] which held that an "indictment charging the offense of which one element is implicit was insufficient, because the indictment tracked the language of the statute but failed to allege the implicit element explicitly."[57] These omissions by the prosecution contravened an express legal requirement in existence at the time of the omissions and have resulted in a radical defect in the subject-matter jurisdiction of the trial court, which renders all judgments and orders issued in this case absolutely void.

I stand on the record to support my claim that I was prejudiced by my lawyer whose performance fell below an objective standard of reasonableness, under prevailing professional norms, because he: raised no objections to the charges made without specific facts to allege the element of *actus reus*; Failed to move to quash the factually insufficient charging documents; Waived the arraignment and preliminary examination without obtaining my authenticated acknowledgment whether I understood what constituted the *actus reus* of the alleged violation - - - contrary to MCR 6.113(D) ; Did not object when the district court bound the matter over for criminal trial without notice to me that the legal artifice: "sexual contact" is defined in MCL § 750.520a and contravened my understanding of the common dictionary definition of the words *"sexual contact."* (i.e.: *"A meeting of or relating to the sexes"*). Had counsel performed any of these critical functions I would have known exactly what I was charged with, and the result would have been different because I mistakenly believed that I had been charged with "engaging in a

[56] *United States v Foley*, 73 F 3rd 484, 488 (2nd Cir. 1996).
[57] Quoting *United States v Carll*, 106 US 611 (1882) at 613.

meeting of or relating to the sexes" with a minor.

The record must affirmatively show jurisdiction.[58] "No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."[59] The complete omission of specific factual allegations to establish the element of *actus reus* denied me "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge."[60]

No statute of limitations or repose runs on a void judgment.[61] In 2018, after limitations had expired in this case, Michigan expanded the time when a CSC2 indictment could be found and filed from 10 years to 15 years. It also expanded the time when an indictment could be found and filed from before the alleged victim's twenty-first birthday, to before their twenty-eighth birthday. So, as relevant here, the 2018 amendment looks backward and requires inquiry whether, as here, the alleged victim had attained twenty-one years of age by the time the 2018 amendment became law.

Regarding in delays in prosecution, Michigan has held that once the eighteen-month mark is reached, the prosecutor must show that the defendant was not prejudiced by the delay.[62] The inability of a defendant to adequately prepare his case skews the fairness of the entire system."[63] If the Court finds this 2001 conviction to be invalid, and Michigan responds by re-prosecuting me, I will be prejudiced by the 18-year delay because a witness with first-hand

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[58] *Wedel v. Green*, 70 Mich. 642, 38 N. W. 638 (1945).
[59] *United States v Hess*, 124 US 483 (1988).
[60] *Cole v Arkansas*, 333 US 106, 201 (1948).
[61] *Fritts v. Krugh*, 354 Mich. 97 (1958).
[62] *People v. Holtzer*, 255 Mich. App. 478, 492 (2003).
[63] *Williams, supra* at 264 (quotation marks and citations omitted).

knowledge favorable to the defense, the great-grandmother of the first three complaining witnesses, is now deceased.

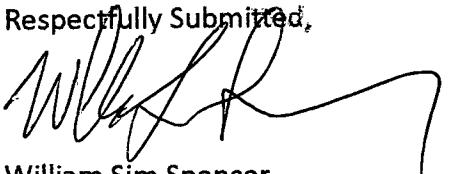
The witness with first-hand knowledge favorable to the defense contacted me shortly before I was arrested on 8/14/2001. She confided in me only after I had promised that I would not repeat what she said, for fear of exacerbating an already volatile situation involving the complaining witnesses' parents, who were experiencing marital problems. She told me that she had just spoke with one of the complaining witnesses, who had confessed to her that every accusation against me by each complaining witness was false and retaliatory. She further warned that the police were interviewing the fourth complaining witness who had originally agreed with the other three complaining witnesses to be part of the false and retaliatory plan. Had I not been coerced into pleading guilty by the ongoing threat of removal of my children from home unless I pleaded guilty, I could have counted on the exculpatory testimony of the witness with first-hand knowledge favorable to the defense at trial.

I therefore ask that the Court grant appropriate relief with prejudice.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



William Sim Spencer

Date: August 21, 2019.