

19-6380

ORIGINAL

No.



IN THE

SUPREME COURT OF THE UNITED STATES

EMERSON L. BEVERLY — PETITIONER

vs.

SHERRY L. BURT — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Emerson Beverly #218035

(Your Name)

In Pro Se

2400 S. Sheridan Drive

(Address)

Muskegon, Michigan 49442

(City, State, Zip Code)

RECEIVED

OCT 23 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION(S) PRESENTED

I. DID THE PROSECUTOR'S REPEATED REFERENCE TO PETITIONER'S DEFENSE AS A "RED HEARING" CONSTITUTE MISCONDUCT THEREBY DENYING PETITIONER A FAIR TRIAL IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS?

Petitioner says "YES"
Respondent says "NO"
Lower Courts says "NO"

II. DID FAILURE TO BE CONSISTENT DEPRIVE PETITIONER OF NOTICE THAT HE WAS NOT WELCOME IN THE VICTIM'S HOME WHICH EXCUSES THE ENTRY RENDERING THE CONVICTION INSUFFICIENT IN VIOLATION OF THE 14TH AMENDMENT?

Petitioner says "YES"
Respondent says "NO"
Lower Courts says "NO"

III. DOES THE CONSIDERATION OF INACCURATE AND UNSUPPORTED INFORMATION VIOLATE TOWNSEND V BURKE, 334 U.S. 736 RENDERING THE SENTENCE A VIOLATION OF DUE PROCESS?

Petitioner says "YES"
Respondent says "NO"
Lower Courts says "NO"

IV. IS A COMBINED 50 YEARS FOR AN ASSAULT AND HOME INVASION A VIOLATION OF THE EIGHTH AMENDMENT?

Petitioner says "YES"
Respondent says "NO"
Lower Courts says "NO"

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of

all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is
[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is
[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is
[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the state appeals court appears at Appendix _____ to the petition and is
[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was July 23, 2019.

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

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

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

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

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Am V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Am 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 the 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 defence.

U.S. Const. Am VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Am 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 any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was convicted by a jury in Michigan State Court of first-degree home-invasion, MCL 750.110a and assault with intent to commit murder, MCL 750.83. The trial court sentenced Petitioner as a fourth degree habitual offender to consecutive terms of 20 to 40 years for the home-invasion and 30 to 45 years for the assault, MCL 769.12.

Petitioner appealed by right to the Michigan Court of Appeals. That court affirmed the convictions but remanded for proceedings under *People v Lockridge*, 870 NW2d 502(2015). The State Supreme Court denied leave in a standard order.

The district court denied Petitioner's requests for writ of habeas corpus and the United States Court of Appeals for the Sixth Circuit denied the request for a certificate of appealability.

REASONS FOR GRANTING THE PETITION

I. PETITIONER WAS DENIED A FAIR TRIAL BY THE PROSECUTOR REFERING TO HIS DEFENSE AS A “RED HEARING” AND THE EVIDENCE BEING “UNCONTROVERTED.”

The prosecutor's burden of proving all elements of a crime beyond a reasonable doubt is constitutionally mandated. *In Re Winship*, 397 US 358 (1970). Arguments that shift the burden of proof to defendant or that imply the defendant has some duty to present evidence of his innocence violate fundamental principles of due process. US Const, Am XIV. The prosecutor may not suggest the defendant must prove something, or explain damaging evidence, as this tends to shift the burden of proof. The prosecution may never shift its burden to prove that defendant is guilty beyond a reasonable doubt and obligate the defendant to prove his innocence. Such arguments can constitute reversible error even where there has been no objection.

A defendant has a constitutional right against compelled self-incrimination and may elect to rely on the presumption of innocence. US Const, Ams V, XIV. To protect this right, the prosecutor may not reference or comment on the defendant's failure to testify on his own behalf. *Griffin v California*, 380 US 609 (1965). Direct references to the defendant's failure to testify are forbidden, as well as any argument that is “of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.” *United States v Dansker*, 537 F2d 40, 63 (CA 3, 1976).

Criminal defendants have a due process right to a fair trial as guaranteed by the federal Constitution. US Const, Ams V, XIV. Misconduct on the part of the prosecutor can result in a deprivation of that right. The prosecutor's role in the criminal justice system is two-fold; he must not only vigorously argue the people's case, he must also ensure that a defendant receives a fair

trial. Thus, the role of the prosecutor is clearly distinguished from that of other attorneys. His duty is not merely to seek a conviction, but also to seek justice. *Berger v United States*, 295 US 78 (1935).

In light of their dual role, prosecutors are allowed great latitude in their arguments and conduct, but must refrain from denigrating a defendant with prejudicial remarks. While a prosecutor can argue reasonable inferences from the evidence, he is prohibited from misrepresenting the evidence. Misrepresentation of the evidence has a profoundly negative effect on the fairness of trial because "a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Washington v Hofbauer*, 228 F3d 689, 700 (CA 6, 2000).

Put simply, a prosecutor's primary obligation is not to obtain convictions, but to ensure that justice is done. *Berger v United States*, 295 US 78, 88-89, 55 S Ct 629; 79 L Ed 1314 (1935). The key test in evaluating claims of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. As a result of prosecutorial misconduct in this case, Petitioner was denied his constitutional right to a fair trial. US Const, Am V, VI, XIV.

In the instant case, the prosecutor argued that defense counsel was "like a magician," and "wanting to get their attention over here while the truth is over here," "be careful of red herrings and smoke and mirrors, hello I'm over here." The prosecutor continued by arguing "Don't chase the rabbit." These comments suggested that Petitioner was trying to mislead the jury and was highly prejudicial and constitutes plain error.

A prosecutor must avoid inflaming the prejudices of a jury. A prosecutor strikes "foul blows" in violation of due process when he denigrates the defendant's character in an attempt to inject issues broader than the defendant's guilt or innocence based on the evidence into the

proceedings. *Martin v Parker*, 11 F3d 613, 615-616 (CA6, 1993).

When the prosecutor argues that defense counsel is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. It is improper for the prosecutor to engage in arguments that attack defense counsel. Such arguments undermine the defendant's presumption of innocence and impermissibly shift the jury's focus from the evidence itself to the defense counsel's personality.

In *People v Dalessandro*, 165 Mich App 569, 578-580 (1988), the Court of Appeals held that the prosecutor's comments, which attacked defense counsel, and which characterized the defense as a "pack of lies" and "red herrings" were grounds for reversal, even without an objection. *See also, People v Kent*, 157 Mich App 789, 794 (1987) (disapproving prosecutor's arguments that defense counsel was trying to mislead the juror with "fairy tails," "changing black to white," etc); *People v Howard*, 226 Mich App 528, 544-545 (1997) (argument that defense counsel was "playing games" was error, but reversal was not required because the reference was brief and went to a non-material subject). In *People v Watson*, 245 Mich App 572 (2001), the Court of Appeals agreed that the prosecutor's arguments, that the defense attorney did not want the jury to pay attention to the truth, and had thrown out a "boatload of red herrings" were improper, but that reversal was not required as the comments were made in response to the defense attorney's suggestion that the prosecutor was not concerned with the truth.

In this case, the prosecutor engaged in various forms of misconduct throughout Petitioner's trial, including repeated and extensive comments designed to have the jury focus less on the evidence and more on the defense. The prosecutor continued to make statements about "red herrings, distractions, smoke and mirrors", which deprived Petitioner of the fair and

impartial trial he was entitled to. By stating that the evidence was “uncontroverted” the prosecutor placed the burden on Petitioner’s shoulders to prove his innocence. The prosecutor highlighted the fact that Petitioner did not take the stand and defend against the allegation. The district court applied the wrong standard. In its conclusion the district court stated “even assuming the prosecutor’s remarks about the victim’s uncontroverted testimony were unconstitutional, the error was harmless, given the strength of the evidence against Petitioner at trial.” (ECF No. 12 ID 944). The standard is not whether state’s case was strong, but, whether Petitioner received a fair trial. These comments denied Petitioner a fair trial.

II. PETITIONER'S CONVICTION VIOLATES DUE PROCESS WHERE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH ENTERING WITHOUT PERMISSION.

The Due Process Clauses of the federal constitution prohibit a criminal conviction unless the prosecution establishes the essential elements of the crime beyond a reasonable doubt. US Const, amends V, XIV; *In re Winship*, 397 US 358, 361-362; 90 S Ct 1068; 25 L Ed 2d 368 (1970). Due process requires reversal if, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude the evidence insufficient to establish each element of the offense beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 316; 99 S Ct 2781; 61 L Ed2d 560 (1979).

Although the evidence presented at trial is viewed in light most favorable to the prosecution, the factfinder may draw reasonable inferences from the record, the jury may not indulge in an inference that is unsupported by competent, material and substantial evidence on the record. Mere presence is insufficient to sustain a finding of guilt. *Fuller v Anderson*, 662 F 2d

420, 424 (CA 6 Cir.).

The prosecutor had the burden of proving that “first, the defendant entered a dwelling without permission. It does not matter whether the defendant got his entire body inside. If the defendant put any part of his body into the dwelling without permission, that is enough to count as an entry.” M Crim JI 25.2c

Concerning the Home Invasion charge there is insufficient evidence that Petitioner entered the dwelling without permission. The victim did not testify that she told Petitioner he was not welcome at her home any longer. On the contrary, even though they had broken up Petitioner was still allowed to sleep there. (ECF No. 12 ID 949). While she told the police that she broke up with Petitioner earlier that day due to past events Petitioner would not have known that he was not welcome at her home. Without the element of entering without permission Petitioner’s conviction for home invasion is insufficient.

III. PETITIONER'S SENTENCE VIOLATES DUE PROCESS WHERE PART OF THE SENTENCE IS BASED ON INACCURATE AND UNSUPPORTED INFORMATION.

A sentence based on inaccurate information violates due process and entitles the defendant to a resentencing. *Townsend v Burke*, 334 US 736, 68 S Ct 1252, 92 L Ed 1690 (1948). A sentence based in part on the erroneous scoring and application of the sentencing guidelines likewise requires resentencing. Unpreserved error requires reversal where there is an error, the error is clear or obvious, the error affected the appellant’s substantial rights, and the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

For argument sake, the district conceded the error for OV 1. (ECF No. 12 ID 952). As for OV 3 the complainant testified that she had damage to her retina. There was no evidence that it was damaged to the point of being within the definition of permanently incapacitating. There

was insufficient information for this OV to be scored. Any decision made on this basis is rooted in inaccurate information. The facts of this case do not support a scoring for OV 7. There is no evidence in the record that the conduct was “designed to substantially increase the fear and anxiety” of the victim during the offense. In fact the record is silent other than the assault. Petitioner is entitled to a resentencing.

IV. PETITIONER'S 50 YEAR SENTENCE FOR AN ASSAULT AND HOME INVASION IS CRUEL AND UNUSUAL AND VIOLATES THE EIGHTH AMENDMENT.

Petitioner phrased his issue as one of gross disproportionality in violation of the US Const. Am VIII. This Court in *Lockyer v Andrade*, 538 US 63; 123 S Ct 1166; 155 L Ed 2d 144 (2003), recognized that consecutive sentencing may be reviewed by federal courts to the extent the sentence constitutes a cruel and unusual punishment.

The Due Process Clause of US Const, Am XIV protects a defendant from more punishment than the Legislature specifically allows for an offense. See generally, *North Carolina v Pearce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969). More particularly, consecutive sentences are improper absent specific statutory authorization. Concurrent sentences are the norm. Consecutive sentencing may not be used except when specifically authorized by statute.

MCL 750.110a provides: “The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.”

Bell v United States, 349 U.S. 81, 83; 75 S Ct 620; 99 L Ed 905 (1955), wherein it was stated:

‘When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly

be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.'

Accordingly, even if the statutes are held to be ambiguous, the criminal defendants at issue must receive the benefit of lenient statutory interpretation."

Petitioner submits that the stacking of consecutive sentences violates the rule of lenity, and he must be resentenced. In addition, the resulting sentences of 30 to 45 for the assault and 20 to 40 years for the home invasion is disproportionate and constitutes cruel and unusual punishment.

Proportionality. Petitioner's claim is based on long-established principles, that a fair and proportionate sentence is based upon a trial court's consideration of the nature of the offense and the culpability and criminal history of the offender. Sentences must also be individualized to fit the offender and the offense:

The modern view of sentencing is that the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitation potential. While the resources allocated for rehabilitation may be inadequate and some persons question whether rehabilitation can be achieved in the prison setting, this view of sentencing is the present policy of the state. A judge needs complete information to set a proper individualized sentence.

To tailor the sentence to the individual, the judge must gather complete and detailed information about the defendant, assess the reliability of the information received, assure that it is reasonably up-to-date, determine its competency as a sentencing consideration, and resolve challenges to its accuracy.

Proportionality is the threshold requirement for a valid sentence. It derives from the federal constitution, which are sources of due process protections separate and distinct from the

statutory guidelines, which are legislative. Accordingly, the proportionality requirement is not extinguished or “trumped” by a state statute, including the sentencing guidelines statute. A disproportionate sentence may violate the US Constitution Amendment VIII's ban on cruel and unusual punishment regardless of whether it is based on accurate Michigan guidelines scoring. *Solem v Helm*, 463 US 277; 103 S Ct 3001; 77 L Ed 2d 637 (1983); *Harmelin v Michigan*, 501 US 957; 111 S Ct 2680; 115 L Ed 2d 836 (1991); US Const, Ams V, XIV.

It is ludicrous to suppose that the people who prohibited excessive fines and bail and cruel or unusual punishment intended thereby to vest unbridled power in judges to require bail, impose fines and inflict punishments. It is equally unrealistic to conclude that the people intended to permit the legislature to give such unbridled power to the trial courts in the name of indeterminate sentencing.

The Constitution has not left the liberty of the citizen of any state entirely to the indiscretion or caprice of its judiciary, but enjoins upon all that unusual punishments shall not be inflicted.

Tests for proportionality under the federal and state constitutions are similar. A court's proportionality analysis under the Eighth Amendment is guided by objective criteria, including (1) the gravity of the offense and harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v Helm, supra*. Petitioner's case is a classic example of a situation in which adherence to the guidelines range alone, does not commensurate with constitutionally-mandated proportionality requirements. A 50-year sentence cannot be constitutionally proportionate. The trial court failed to acknowledge numerous mitigating factors that provide a fuller and more accurate portrayal of Petitioner and that warrant leniency in

sentencing. Petitioner's sentence is also improper in another sense: its imposition runs afoul of the well-established principle that courts must consider a broad range of factors in imposing sentence and must fashion a sentence that recognizes the import of those considerations given the particular circumstances and characteristics.

Additionally, the Eighth Amendment's prohibition against cruel and unusual punishment is applicable to the states through the Fourteenth Amendment, making state sentences challengeable under the federal constitution, US Const, Am VIII, See *Robison v California*, 370 US 660; 82 S Ct 1417; 8 L Ed 2d 758 (1966). Petitioner is entitled to be resentenced. Based upon the foregoing points and authorities, the Petitioner respectfully requests this Honorable Court to grant the within writ and reverse the judgment of the court below. The petition for a writ of certiorari should be granted as Petitioner was denied his federal constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Emerson Beverly

Emerson Beverly

Date: October 14, 2019

No. [Redacted]		
IN THE		
SUPREME COURT OF THE UNITED STATES		
	EMERSON L. BEVERLY	PETITIONER
	(Your Name)	
vs.		
	SHERRY L. BURT	RESPONDENT(S)