

No. _____

IN THE
SUPREME COURT FOR THE UNITED STATES

October Term, 2019

JOHN JOSEPH BARRERA,

Petitioner,

vs.

BRYAN MORRISON, Warden,

Respondent.

PETITIONER'S APPENDIX
FOR PETITION FOR WRIT OF CERTIORARI
WITH INDEX

Submitted by:

John Joseph Barrera, #160094
In Propria Persona
Lakeland Correctional Facility
141 First Street
Coldwater, Michigan 49036

Dated: January 7, 2020

JOINT APPENDIX INDEX

<u>Appendix Entry:</u>	<u>Description of Entry:</u>	<u>Page Entry:</u>
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On remand, the trial court sentenced Barrera to the same term of 280 to 600 months in prison. Barrera appealed, and both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. *People v. Barrera*, No. 342493 (Mich. Ct. App. Apr. 5, 2018); *People v. Barrera*, 917 N.W.2d 662 (Mich. 2018) (mem.).

Barrera then filed the present § 2254 petition, claiming primarily that his sentence was based on inaccurate information, which resulted in an increased sentence, in violation of his due process rights as set forth in *Townsend v. Burke*, 334 U.S. 736 (1948). He also claimed that his sentence is disproportionate, in violation of his Eighth Amendment right against cruel and usual punishment.

The district court denied the petition and declined to issue a COA, reasoning that Barrera's claims lacked merit. Barrera now moves for a COA from this court, in which he reiterates his claim that his sentence violates due process under *Townsend*. Because Barrera failed to raise his Eighth Amendment claim in his COA motion, it is forfeited on appeal. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

This court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Reasonable jurists could not debate the district court's denial of Barrera's petition. The minimum guidelines range for his initial charges was 117 to 320 months, and his plea agreement provided for a minimum sentence of 84 to 280 months. After the Michigan Supreme Court determined that the trial court improperly scored OV 11, Barrera's total offense level was reduced by fifty points. In view of that reduction, Barrera's new minimum guidelines range was 99 to 320 months. Nevertheless, the trial court resentenced Barrera to the same term of 280 to 600 months.

Barrera claims that he should have received a lesser sentence on remand in view of the fifty-point reduction for OV 11, and that the imposition of the same sentence violates due process

under *Townsend*. In *Townsend*, the Supreme Court held that it is a due process violation for a court to sentence a defendant based on materially false information that the defendant had no opportunity to correct. 334 U.S. at 740-41. But Barrera has failed to identify any materially false information that the trial court relied upon in determining his sentence. Moreover, as set forth by the district court, Barrera's sentence is within the statutory limits for the offenses to which he pleaded guilty because he is a fourth-offense habitual offender, and therefore he cannot show that he is entitled to habeas relief. *See id.* at 741 ("The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus."). Under these circumstances, no reasonable jurist could disagree with the district court's denial of Barrera's habeas petition.

Accordingly, the court **DENIES** the motion for a COA and **DENIES** as moot the motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JOHN JOSEPH BARRERA,

Petitioner,

v.

Case. No. 2:19-cv-11175
Hon. Nancy G. Edmunds

NOAH NAGY, Warden,

Respondent.

**OPINION AND ORDER SUMMARILY DENYING THE PETITION FOR WRIT OF
HABEAS CORPUS AND DECLINING TO ISSUE A CERTIFICATE OF
APPEALABILITY OR LEAVE TO APPEAL *IN FORMA PAUPERIS***

Petitioner John Joseph Barrera, presently confined at the Lakeland Correctional Facility in Coldwater, Michigan, seeks issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his *pro se* application, Petitioner challenges his sentence following his plea-based convictions of second- and third-degree criminal sexual conduct. Mich. Comp. Laws §§ 750.520c and 750.520d. For the reasons stated below, the application for writ of habeas corpus is summarily denied.

I. BACKGROUND

The Michigan Supreme Court reported the facts of Petitioner's conviction as follows:

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c, related to sexual assaults he perpetrated on his wife's granddaughter. Defendant entered into a plea deal under which he pleaded no contest as a fourth-offense habitual offender to the two CSC-II counts and to two added counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d.

4A

People v. Barrera, 500 Mich. 14, 17 (2017). Following his plea conviction, Petitioner was sentenced to a prison term of 280 months to 600 months. (Pet. at 10, ECF No. 1.)

Petitioner filed an application for leave to appeal to the Michigan Court of Appeals, which was denied. *People v. Barrera*, No. 324831 (Mich. Ct. App. Jan. 21, 2015). The Michigan Supreme Court rejected Petitioner's challenge to sentencing guidelines Offense Variable (OV) 8. *Barrera*, 500 Mich. at 22. However, the Court remanded Petitioner's case for resentencing, "because the parties have agreed there was an error in the scoring of OV 11." *Id.* at 17 n.1.

The sentencing guidelines range for the minimum term under Petitioner's original charges was 117 to 320 months. (Pet. at 10, ECF No. 1.) The plea agreement called for a minimum sentence between 84 and 280 months. (*Id.*)

Correction of the scoring error reduced Petitioner's total offense variable score by 50 points. (*Id.*) With the reduction in the guidelines calculation, Petitioner's new sentencing range on remand was 99 to 320 months. (*Id.*) The trial court resentenced Petitioner to the same term, 280 months to 600 months, that he received before the appeal and remand. (*Id.* at 10, 11.)

Petitioner appealed the new sentence. The Michigan Court of Appeals denied his delayed application for leave to appeal in a standard form order, "for lack of merit in the grounds presented." *People v. Barrera*, No. 342493 (Mich. Ct. App. April 5, 2018) (unpublished). On October 2, 2018, the Michigan Supreme Court denied his application for leave to appeal the lower court's decision. *People v. Barrera*, 503 Mich. 875 (2018) (Mem). The Court also denied Petitioner's motion for reconsideration. *People v. Barrera*, 503 Mich. 951 (2019) (Mem).

In the habeas corpus petition before the Court, Petitioner challenges his sentence on a single ground:

PETITIONER IS ENTITLED TO BE RESENTENCED WHERE HIS SENTENCE IS BASED ON INACCURATE INFORMATION WHICH INCREASED HIS PUNISHMENT IN VIOLATION OF HIS RIGHT TO DUE PROCESS UNDER U.S. SUPREME COURT'S RULING IN *TOWNSEND V. BURKE*; U.S. CONST. AMENDMENT XIV.

II. DISCUSSION

A. Summary dismissal

Upon receipt of a habeas corpus petition, a federal court must “promptly examine [the] petition to determine ‘if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief.’” *Crump v. Lafler*, 657 F.3d 393, 396 n. 2 (6th Cir. 2011) (quoting Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts). “Federal courts are authorized to dismiss summarily any habeas petition that appears legally insufficient on its face[.]” *McFarland v. Scott*, 512 U.S. 849, 856 (1994); *see also Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004). A habeas petition may also be summarily dismissed if it does not set forth facts that give rise to a cause of action under federal law. *See Perez v. Hemingway*, 157 F.Supp.2d 790, 796 (E.D. Mich. 2001).

The Sixth Circuit disapproves of ordering a response to a habeas petition “until after the District Court first has made a careful examination of the petition.” *Allen v. Perini*, 424 F.2d 134, 140 (6th Cir. 1970). A district court therefore has the duty to screen out any habeas corpus petition which lacks merit on its face. *Id.* at 141. No response to a habeas petition “is necessary when the petition is frivolous, or obviously lacks merit, or where the

necessary facts can be determined from the petition itself without need for consideration of a response.” *Id.*; see also 28 U.S.C.A. § 2243.

After undertaking the review required by Rule 4, this Court concludes, for reasons stated in greater detail below, that Petitioner’s claims do not entitle him to habeas relief and the petition must be summarily denied. See *McIntosh v. Booker*, 300 F.Supp.2d 498, 499 (E.D. Mich. 2004).

B. State sentencing claims and habeas relief

In general, “a state court’s interpretation of state law . . . binds a federal court sitting in habeas corpus,” and federal habeas relief is not available for errors of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). More specifically, “[e]rrors in the application of state sentencing guidelines . . . cannot independently support habeas relief.” *Kissner v. Palmer*, 826 F. 3d 898, 904 (6th Cir. 2016). A claim that the state trial court incorrectly scored, calculated, or applied state legislative sentencing guidelines is not a cognizable claim for federal habeas review because it is based solely on state law. *Paris v. Rivard*, 105 F. Supp. 3d 701, 724 (E.D. Mich. 2015) (citing *McPhail v. Renico*, 412 F.Supp.2d 647, 656 (E.D. Mich. 2006)). Habeas petitioners have “no state-created interest in having the Michigan Sentencing Guidelines applied rigidly” in their sentence determinations. *Mitchell v. Vasbinder*, 644 F. Supp. 2d 846, 867 (E.D. Mich. 2009). Petitioners have “no federal constitutional right to be sentenced within Michigan’s guideline minimum sentence recommendations.” *Doyle v. Scutt*, 347 F. Supp. 2d 474, 485 (E.D. Mich. 2004).

Habeas relief is potentially available where “[v]iolations of state law and procedure . . . infringe specific federal constitutional protections[.]” *Cook v. Stegall*, 56 F. Supp. 2d

788, 797 (E.D. Mich. 1999) (citing 28 U.S.C. § 2254; *Estelle v. McGuire*, 502 U.S. 62 (1991)). This may occur when the sentence imposed exceeds statutory limits or is wholly unauthorized by law. *Vliet v. Renico*, 193 F. Supp. 2d 1010, 1014 (E.D. Mich. 2002). However, “a sentence within the statutory maximum set by statute generally does not constitute ‘cruel and unusual punishment.’” *United States v. Organek*, 65 F.3d 60, 62–63 (6th Cir.1995) (citing *United States v. Williams*, 15 F.3d 1356, 1364 (6th Cir.1994)).

Further, an alleged violation of state law “could, potentially, ‘be sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment.’” *Bowling v. Parker*, 344 F.3d 487, 521 (6th Cir. 2003). A sentence may violate due process if it is based upon “material ‘misinformation of constitutional magnitude.’” *Koras v. Robinson*, 123 F. App’x 207, 213 (6th Cir.2005) (quoting *Roberts v. United States*, 445 U.S. 552, 556 (1980)); see also *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948). To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was materially false, and (2) that the court relied on the false information in imposing the sentence. *Koras*, 123 F. App’x at 213 (quoting *United States v. Stevens*, 851 F.2d 140, 143 (6th Cir.1988)); see also *United States v. Polselli*, 747 F.2d 356, 358 (6th Cir.1984).

While Petitioner had a right not to be sentenced on “extensively and materially false” information which he had no opportunity to correct through counsel, *Townsend*, 334 U.S. at 741, he was sentenced pursuant to the parties’ plea agreement. By consenting to a specific sentence as part of the plea bargain, he waived review of his challenge to the scoring of the sentencing guidelines. *United States v. Livingston*, 1 F.3d

723, 725 (8th Cir. 1993); *People v. Billings*, 770 N.W.2d 893, 900 (Mich. Ct. App. 2009) (citing *People v. Wiley*, 693 N.W.2d 800 (Mich. 2005)).

Neither of Petitioner's minimum or maximum terms provide a basis for habeas relief. Although he had no federal constitutional right to a minimum term within Michigan's guideline range, *Doyle*, 347 F. Supp. 2d at 485, Petitioner received such a term. At 280 months, his sentence minimum was within the range of 99 to 320 months after his guidelines were rescored on remand. (Pet. at 10.)

Petitioner argues that the reduction of 50 points in the calculation of his guidelines should have resulted in a commensurate reduction in his minimum term. Petitioner's argument misses the fact that while the re-calculated total OV score was reduced, the upper end of his guidelines range remained unchanged.

Further, Petitioner's maximum term does not violate the constitution's prohibition against "cruel and unusual punishment," because it is authorized by law. *Organek*, 65 F.3d at 62–63. Both CSC-II and CSC-III are 15-year felonies. Mich. Comp. Laws §§ 750.520c(2)(a), 750.520d(2). Petitioner was convicted and sentenced as a fourth-offense habitual offender. *Barrera*, 500 Mich. at 17. The pertinent statute governing sentencing of habitual offenders authorizes a maximum sentence of "imprisonment for life or for a lesser term[]" for felonies with at least a five-year maximum sentence for a first offense. Mich. Comp. Law § 769.12. Petitioner's fifty-year maximum is thus within statutory range.

Petitioner's challenges to his sentence are without merit and he is not entitled to habeas relief.

IV. Certificate of Appealability and *In Forma Pauperis* status on appeal

Before Petitioner may appeal this decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the court's assessment of the claim debatable or wrong. See *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000).

For the reasons stated in this opinion, the Court will deny petitioner a certificate of appealability because he has failed to make a substantial showing of the denial of a federal constitutional right. See *Allen v. Stovall*, 156 F. Supp. 2d 791, 798 (E.D. Mich. 2001). The Court will also deny petitioner leave to appeal *in forma pauperis*, because the appeal would be frivolous. *Id.*

V. ORDER

Based upon the foregoing, IT IS ORDERED that the petition for a writ of habeas corpus is **SUMMARILY DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that Petitioner is **DENIED** leave to appeal *in forma pauperis*.

SO ORDERED.

X

Nancy C. Edmunds

NANCY C. EDMUNDS

UNITED STATES DISTRICT JUDGE

Dated: 5-23-19

Order

Michigan Supreme Court
Lansing, Michigan

February 4, 2019

Bridget M. McCormack,
Chief Justice

157784(16)

David F. Viviano,
Chief Justice Pro Tem

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

v

SC: 157784
COA: 342493
Saginaw CC: 14-039708-FC

JOHN JOSEPH BARRERA,
Defendant-Appellant.

On order of the Court, the motion for reconsideration of this Court's October 2, 2018 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.



a0128

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 4, 2019

Clerk

11A

Order

Michigan Supreme Court
Lansing, Michigan

October 2, 2018

Stephen J. Markman,
Chief Justice

157784

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157784
COA: 342493
Saginaw CC: 14-039708-FC

JOHN JOSEPH BARRERA,
Defendant-Appellant.

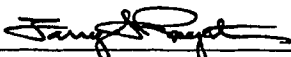
On order of the Court, the application for leave to appeal the April 5, 2018 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.



10924

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 2, 2018


Clerk

12 A

Court of Appeals, State of Michigan

ORDER

People of MI v John Joseph Barrera

Docket No. 342493

LC No. 14-039708-FC

Cynthia Diane Stephens
Presiding Judge

Karen M. Fort Hood

Michael J. Riordan
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

APR - 5 2018

Date


Chief Clerk

13A

Order

Michigan Supreme Court
Lansing, Michigan

September 29, 2016

Robert P. Young, Jr.,
Chief Justice

151282

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 151282
COA: 324831
Saginaw CC: 14-039708-FC

JOHN JOSEPH BARRERA,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the January 21, 2015 order of the Court of Appeals is considered. We DIRECT the Saginaw County Prosecuting Attorney to answer the application for leave to appeal within 28 days after the date of this order. The prosecutor shall specifically address whether, pursuant to *People v Thompson*, 488 Mich 888 (2010) and *People v Spanke*, 254 Mich App 642 (2003), Offense Variable 8, MCL 777.38, should not have been scored in this case where the movement was "incidental" to the offense of criminal sexual conduct in the second degree. See also *People v Hardy*, 494 Mich 430, 442 (2013) ("[A]bsent an express prohibition, courts may consider conduct inherent in a crime when scoring offense variables.").

The application for leave to appeal remains pending.



10922

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 2016

Clerk

14A

Defendants Copy-Admin Order 1983-7

Court of Appeals, State of Michigan

ORDER

People of MI v John Joseph Barrera

Docket No. 324831

LC No. 14-039708 FC

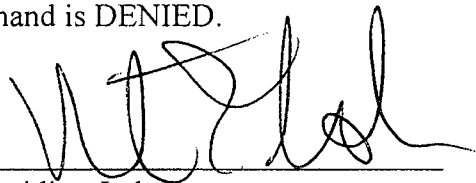
Kurtis T. Wilder
Presiding Judge

Christopher M. Murray

Michael J. Riordan
Judges

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

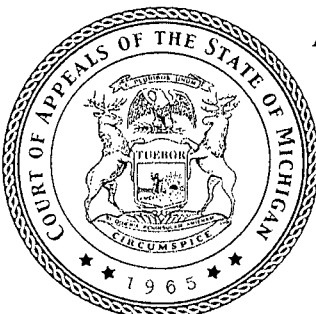
The Court further orders that the motion for remand is DENIED.


Presiding Judge

Received

JAN 23 2015

SADO Lansing



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN 21 2015

Date


Chief Clerk

15A

**Michigan Department of Corrections
Presentence Investigation
New Conviction Update Report**

CFJ-284A

Rev. 10/03

NO. 4 OF 10

Offense Date:	08/21/1979
Status at Time of Offense:	Not Applicable
Arrest Date:	Unknown
Arresting Agency:	Saginaw Police Department
Charge(s) at Arrest:	Criminal Sexual Conduct 1st Degree
Court of Jurisdiction:	10th Circuit
Final Charges:	None
Conviction Date/Method:	N/A
Sentence/Disposition:	01/10/1980, nol-prossed, case dismissed
Sentence Date:	N/A
Attorney Present:	Yes
Discharge Date:	N/A
Notes:	Victim - Rita Pena

NO. 5 OF 10

Offense Date:	08/24/1979
Status at Time of Offense:	Not Applicable
Arrest Date:	Unknown
Arresting Agency:	Saginaw Police Department
Charge(s) at Arrest:	Criminal Sexual Conduct 1st Degree
Court of Jurisdiction:	10th Circuit
Final Charges:	None
Conviction Date/Method:	N/A
Sentence/Disposition:	09/12/1979, dismissed, victim recanted statement
Sentence Date:	N/A
Attorney Present:	Yes
Discharge Date:	N/A
Notes:	Victim - Anne Barrera

NO. 6 OF 10

Offense Date:	08/24/1979
Status at Time of Offense:	Not Applicable
Arrest Date:	Unknown
Arresting Agency:	Saginaw Police Department
Charge(s) at Arrest:	I Criminal Sexual Conduct 1st Degree II Criminal Sexual Conduct 1st Degree
Court of Jurisdiction:	10th Circuit #79-00548-FY
Final Charges:	I Criminal Sexual Conduct 1st Degree } 1 Count and Degree II Criminal Sexual Conduct 1st Degree
Conviction Date/Method:	10/22/1979 / Plea
Sentence/Disposition:	2 1/2 - 15 years Prison
Sentence Date:	01/09/1980
Attorney Present:	Yes
Discharge Date:	02/05/2007