No. _____

19-7500

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

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QUESTION(S) PRESENTED

I. DOES THE OMISSION OF AN EXCEPTION TO THE FINALITY RULE IN MICHIGAN'S SEX OFFENDER REGISTRATION ACT ("SORA") ALLOW THE PROSECUTION TO BUILD ITS CASE AGAINST CRIMINAL DEFENDANTS IN NEW CRIMINAL TRIALS UNDER SORA CRIMINAL PROCEDURE WITH EVIDENCE ACQUIRED IN CONTRAVENTION OF CONSTITUTIONAL GUARANTEES AND THEIR CORRESPONDING JUDICIALLY CREATED PROTECTIONS CONTRARY TO THE LEGAL PRINCIPLE ANNOUNCED BY *MICHIGAN V HARVEY*, 494 US 344 (1990) WHERE THE UNDISTURBED ORDER TO REGISTER IS DEMONSTRABLY INVALID AS IT IS IN THIS CASE?

II. DOES SORA VIOLATE A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WHERE, UNDER THE RULE OF FINALITY, IT ESTABLISHES AN IRREBUTTABLE PRESUMPTION AT NEW CRIMINAL TRIALS UNDER SORA CRIMINAL PROCEUDRE THAT THE ORDER TO REGISTER AS A SEX OFFENDER IS LIMITED IN SCOPE TO STAND ON THE EFFECTIVE ASSISTANCE OF COUNSEL?

III. IF THE COURT DETERMINES THAT THE UNDERLYING GUILTY PLEA SUPPORTING SEX-OFFENDER REGISTRATION WAS INVOLUNTARY AND TAINTED BY INEFFECTIVE ASSISTANCE OF COUNSEL, DOES THE STATUTE OF LIMITATIONS BAR RETRIAL WHERE THERE IS NEITHER A SPECIFIC ACCUSATION NOR PROOF TO ESTABLISH THE ACTUS REUS ELEMENT OF A CRIME ANYWHERE IN THE RECORD?

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 Oakland County Circuit Court is the highest state court to review the merits and its opinion and order appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was 7/02/2019. A copy of that decision appears at Appendix C. A timely petition for rehearing amended to include a copy of this petition was thereafter denied on the following date: 12/23/2019, and a copy of the order denying rehearing appears at Appendix D. The jurisdiction of this Court is invoked under 28 U. S. C. § 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: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
- Sex Offender Registration Act: Michigan Public Act 295 of 1994, *as amended.*

STATEMENT OF THE CASE

Under SORA's criminal procedure, the primary element which must be proven at every new trial under SORA is a prior order which compels the defendant to register as a sex offender. Mr. Spencer had obtained the certified record of his 2001 CSC-II conviction, and relied on it to demonstrate at a new criminal trial under SORA that the undisturbed order which compels the defendant to register was constitutionally invalid. New facts were revealed by the Michigan Court of Appeals on 1/22/2019 (APPENDIX L) which bear on the validity of SORA's criminal procedure *(not to be confused with SORA's remedial procedure).* The 1/22/2019 Opinion and Order states:

> "In this case, defendant had the opportunity to challenge on direct appeal his CSC-II judgment's requirement that he comply with SORA. This Court denied defendant's application for leave to appeal. People v Spencer, unpublished order of the Court of Appeals, entered September 21, 2012 (Docket No. 308103). Because this case is not on direct appeal, the circuit court properly declined to allow defendant to collaterally attack his prior judgment of sentence."

This is an attack against Michigan's Sex Offender Registration Act (SORA.) The state-criminal case was instituted in 2001 at the Oakland County Circuit Court of Michigan and resulted in an order that Mr. Spencer register as a sex offender. The 2001 case was reopened in 2019 as a result of the new evidence described above, after Michigan sought to impose a new 15-year prison sentence to enforce the 2001 order to register as a sex offender. The SORA criminal proceedings resolved in Mr. Spencer's favor on other grounds, but he remains exposed to repeated unconstitutional arrests and prosecutions because Michigan has declined to reach the merits of his claim, on the underlying motion for relief from judgment filed in 2019, that the 2001 order to register as a sex offender is tainted by an involuntary guilty plea and prejudicial ineffective assistance of counsel.

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

In the 2016 case, the court denied Mr. Spencer's affirmative defense that in 2001 his trial lawyer failed to inform him that a serious consequence of his decision to plead guilty would be the waiver of his 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 Mr. Spencer 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 in 2001. On 1/18/2019, after oral argument, the Michigan Court of Appeals upheld the lower court's decision to quash the 2016 criminal case, but explained:

> "Because *[the 2001 Oakland County Case]* is not on direct appeal, the circuit court properly declined to allow defendant to collaterally attack his prior judgment of sentence."[1]

On 7/02/2019 the Michigan Supreme Court affirmed the Michigan Court of Appeals decision in the related 2016 case: that the Rule of Finality prevents Mr. Spencer from challenging the validity of the state's primary evidence against him at future criminal trials under SORA. To vindicate his right to confrontation at future trials, Mr. Spencer relied on the new evidence of an

[1] Appendix J: *People v Spencer*, COA # 343467, Opinion & Order dated: 1/18/2019.

irrebuttable presumption which materialized by virtue of the 1/18/2019 Opinion & Order of the Michigan Court of Appeals, and moved the Oakland County Circuit Court to reopen the 2001 case to grant relief based on the prejudicial ineffective assistance of counsel uncovered by the Michigan Court of Appeals on 1/18/2019. 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)."[2]

With the case reopened, Mr. Spencer immediately exercised his right to challenge the trial court's subject matter jurisdiction by demonstrating that the record is void of specific factual accusation and evidence of actus reus to support the 2001 arrest and conviction. On 4/25/2019 *(several weeks before the prosecutor's response was due)* the trial court waived oral argument and issued two separate orders (Appendix A) which extinguished the prosecutor's burden to respond to Mr. Spencer's jurisdictional claims. One of the orders disregarded the written facts set forth by the motion for relief from judgment to incorrectly hold that Mr. Spencer did not establish that his new evidence claim fell within one of the exceptions in MCR 6.502(G)(2) *because the court refused to acknowledge that the evidence created by the 1/18/2019 Opinion & Order of the Michigan Court of Appeals would have been impossible to discover before it was created - - eight years after Mr. Spencer's previous motion for relief from judgment was denied in 2011.* The other 4/25/2019 order denied Mr. Spencer's jurisdictional challenge on the basis that the trial court was not convinced

[2] **Appendix K: 2/21/2019 State Court order to reopen case**

that the record-documented failure of the prosecution to allege specific facts to establish the actus reus of a crime did fail to properly invoke the trial court's subject matter jurisdiction.

Mr. Spencer appealed from each of the 4/25/2019 orders of the trial court. The state appellate courts refused to reach the merits of his appeal stating that the 4/25/2019 orders are not the final orders of the 2001 case as defined by MCR 7.202(6)(b). Mr. Spencer moved for rehearing and re-explained that it would have been impossible for him to discover the evidence that nobody knew existed before it was created by the Michigan Court of Appeals on 1/18/2019; and further that it would constitute a miscarriage of justice to deny as moot under MCR 7.202(6)(b) a challenge to subject matter jurisdiction that was properly raised while the 2001 case was reinstated in 2019. Before the 21-day filing period for rehearing had expired, Mr. Spencer filed an amended motion for rehearing and attached a copy of this petition. Rehearing was denied on 12/23/2019. (Appendix D).

Appellate counsel failed to raise the "dead-bang winner" claim that Mr. Spencer's guilty plea was, in fact, involuntary given the lack of notice concerning the forfeiture of his 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 E) shows that the prosecution filed a felony complaint (Appendix F) 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 G) alleged the very same facts set forth by the felony complaint. The arraignment transcript (Appendix H) indicates at page 4, lines 5 – 11, that without further explanation 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. The Information filed at the trial court (Appendix I) accused Mr. Spencer 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.[3] Accordingly, Mr. Spencer asserts that the order to register as a sex offender is invalid and the statute of limitations has expired where the trial court's jurisdiction was not properly invoked.

REASONS FOR GRANTING THE PETITION

I. SORA'S OMISSION OF AN EXCEPTION TO THE FINALITY RULE ALLOWS THE PROSECUTION TO BUILD ITS CASE AGAINST CRIMINAL DEFENDANTS WITH EVIDENCE ACQUIRED IN CONTRAVENTION OF CONSTITUTIONAL GUARANTEES AND THEIR CORRESPONDING JUDICIALLY CREATED PROTECTIONS WHERE THE UNDISTURBED ORDER TO REGISTER IS DEMONSTRABLY INVALID

Michigan v Harvey, 494 US 344, 351 (1990) instructs that the prosecution may not "build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections." *Crane v. Kentucky*, 476 U.S.

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

683, 690 (1986) advises that "whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Plaintiff could not reasonably be expected to know before the 1/22/2019 Opinion of the Court of Appeals (APPENDIX B) issued that under SORA he was subject to criminal conviction on evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections.

An involuntary plea of guilty renders a conviction based thereon constitutionally invalid. *Boykin v. Alabama*, 395 U.S. 238 (1969). A guilty plea will be deemed involuntary unless there is a showing that it was intelligently and knowingly entered — an issue governed by federal standards. *Boykin, id.* In 2001 Plaintiff was convicted of violating MCL §750.520c. The 2001 felony complaint (APPENDIX I) and Information (APPENDIX J) each cite MCL §§ 750.520c and accuse Plaintiff of engaging in *"sexual contact,"* 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.

The legal artifice: *"sexual contact,"* was created by the legislature to establish the primary element of *actus reus* of Criminal Sexual Conduct Second Degree ("CSC2") and CSC4. The legal artifice: *"sexual contact,"* is different from, and inconsistent with, a reasonable understanding of the common dictionary definition of those same words, *e.g., "a meeting of or related to the sexes."* The legal artifice 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 established by any of the pleadings, transcripts, or authorities invoked by the government's pleadings.

The certified record of the 2001 criminal proceedings provides no specific evidence to connect the requisite elements of MCL §§ 750.520a, to either the CSC2 statute, or any alleged act by Plaintiff. The arraignment transcript and plea transcript demonstrate that neither the Plaintiff, the prosecution, defense counsel, or even the 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 plea transcript reveals that the trial judge failed to explain to Plaintiff that a consequence of his decision to accept the government's offer to plead guilty would be sex-offender registration with enhanced sentencing for any subsequent criminal violation. At no time during the plea colloquy was the words *"touch"* or *"Sex Offender Registration Act"* or *"enhanced sentencing"* mentioned by anyone.

The plea transcript reveals that following a 22-minute adjournment and subsequent bench conference that included the trial judge, the prosecutor and Plaintiff's counsel, the court asked Plaintiff:

> "**THE COURT:** Is it true that on or about March 23rd, 2001 through March 29, 2001, that in Oakland County that did you engage in *sexual contact* with [] and that she was under the age of 13?"

The plea transcript reveals that Plaintiff's one-word affirmative response to the trial judge's query constitutes the entire factual basis of the guilty plea. The Constitution requires, at a minimum, that there be an affirmative showing that a guilty plea was intelligent and knowing before it is accepted by the judge. *Boykin v. Alabama, supra, at 242*. In *Henderson v. Morgan, 426 U.S. 637, 645, (1976)* the Supreme Court, holding that a defendant must receive "real notice of the true charges against him," observed:

> "A plea may be involuntary either because the accused does not understand the nature of the constitutional protection that he is waiving or because he has such an incomplete

understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense."

In view of the trial judge's refusal to apprise Plaintiff in 2001 that he was pleading guilty to a *"touching,"* and it nowhere affirmatively appearing in the transcript that he was aware that his plea was to the charge of a *"touching,"* and further it nowhere affirmatively appearing in the transcript that Plaintiff was aware that mandatory registration as a sex offender and habitual offender status would attach to his decision to plead guilty, the Court should conclude that the plea transcript, on its face, reveals that Plaintiff understood neither the charge to which he was pleading or the consequences of his decision to plead guilty.

In *Hughes v Gault,* 271 US 142 (1926), the Court held that the accused has a constitutional right to rebut the evidence against him. But according to the 1/22/2019 Opinion of the Michigan Court of Appeals SORA's primary criminal element, i.e., "an order that requires the defendant to register as a sex offender," may be established by presenting an undisturbed order to register, even if it demonstrably constitutes prejudicial evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections.

Plaintiff has diligently exhausted all available remedies without obtaining meaningful relief. Plaintiff did not violate the CSC2 statute and believed that he was pleading guilty to the common dictionary definition of the words: *"sexual contact."* Plaintiff would not have agreed to plead guilty in 2001 had he understood the charge, and had he known that the result of his decision to plead guilty would be an order to register as a sex offender.

Plaintiff has no opportunity within the framework of SORA's criminal procedure construed with the Finality rule to rebut the government's primary evidence against him at a future SORA

criminal trial. Therefore, Plaintiff has been denied due process of law. He is thus forced to waive his substantive rights in order to avoid arrest. This is not an issue that requires the validity of the prior conviction to be ascertained in order to ascertain that the lack of an exception to the Finality rule renders SORA criminal prosecutions unfair and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution for the united States of America. The cure lies in the Legislature's future clarification that: *"the Finality rule shall not apply in new SORA criminal proceedings upon a showing of good cause by the defendant."* See, e.g., *Michigan v Harvey*, 494 US 344, 351 (1990), *supra.* In the meantime, Plaintiff is entitled to the relief he sought by his motion for preliminary injunction which was contemporaneously denied in the order now appealed.

II. Entitlement to Relief Where the Order to Register as a Sex Offender is Tainted by Prejudicial 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.[4]

Mr. Spencer asserts that his right to effective assistance of counsel under U.S. Const. Am. VI was violated where: (1) trial counsel's performance fell below an objective standard of reasonableness, under prevailing professional norms, by failing to advise Mr. Spencer that his

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

decision to plead guilty would result in a waiver of his substantive rights at new criminal trials, where new penalties are sought both within and without Michigan, based on an irrebuttable presumption that the order to register under SORA is not tainted by ineffective assistance of counsel, and (2) trial counsel's deficient performance so prejudiced Mr. Spencer that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different because Mr. Spencer asserts that he would not have pleaded guilty had he known that, as a result of the plea, he was waiving his due process rights *forever*, where new 15-year penalties would be sought anywhere in the country, based on an irrebuttable presumption that the order to register is not tainted by ineffective counsel. The record supports Mr. Spencer's assertion that he was coerced to plead guilty under prosecutorial threats/action to place his children in foster care *(they were not involved in any way)* unless he chose to plead guilty - - despite his actual factual innocence.

It is reasonable to conclude that counsel was expected to know that the waiver of constitutional rights at new criminal trials everywhere in the country, where future penalties are sought on an irrebuttable presumption that the conviction on a sex crime charge is not 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.[5] Counsel's failure to so do may not reasonably be found to have benefited Mr. Spencer and, therefore, it should not be found to constitute sound trial strategy.[6] Mr. Spencer was prejudiced where, but for the serious derelictions on the part of counsel he would not have pleaded guilty of a sex offense.

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

People v Fonville[7] 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."

Mr. Spencer relies on the reasoning of *Fonville* and the cases cited therein to support his claim that he was prejudiced by the ineffective assistance of counsel, resulting in the denial of his due process rights at new criminal trials *in any state that has adopted SORNA*, where new penalties are sought on an irrebuttable presumption that the sex-crime conviction is not tainted by prejudicial ineffective assistance of counsel.

Borrowing from the logic of the reasoning announced in *Fonville*, Mr. Spencer claims that the involuntary waiver of his substantive right to challenge the evidence brought against him by any state which has adopted SORNA[8] is a serious consequence of which, under the test announced in *Strickland v Washington*[9] and adopted in *People v Pickens*,[10] 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

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[7] *People v Fonville*, 291 Mich. App. 363 (2011).

[8] Even if Michigan removes Mr. Spencer from its sex-offender registry, by the invalid 2001 guilty plea under SORNA, he would be subject to the irrebuttable presumption at future criminal trials everywhere else in the United States.

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

[10] *People v Pickens,* 446 Mich. 298, 302-303 (1994). See Meade v Lavigne, 265 F.Supp.2d 849 (ED Mich. 2003 at 870.

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 Mr. Spencer's claims where the 2001 conviction constitutes an indispensable element when the state seeks new prison sentences under SORA. The Court is asked to find that Mr. Spencer has 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 Mr. Spencer that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

III. Entitlement to Relief Where the Order to Register as a Sex Offender is Tainted by Prejudicial 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.[11] Mr. Spencer's 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 Mr. Spencer's option to pursue collateral attacks in state or federal courts. Because appellate counsel failed to disclose to Mr. Spencer the issue of ineffective assistance of counsel resulting in prejudice to his due process rights at new criminal trials, Mr. Spencer was unable to insist that the particular claim be raised on appeal against the advice of counsel. Appellate counsel failed to inform Mr. Spencer of the right to present the claim in propria persona.

[11] *See Meade v Lavigne*, 265 F.Supp.2d 849 (ED Mich. 2003 at 870.

Based on the facts set forth herein, Mr. Spencer asserts: (1) that appellate counsel's performance fell below an objective standard of reasonableness under prevailing professional norms by failing to raise a "dead-bang winner" claim that trial counsel was ineffective with regard to the guilty plea which was made without Mr. Spencer's knowledge that a consequence of the plea would be the forfeiture of his due process rights at future criminal trials to challenge any state's evidence against him, and (2) that appellate counsel's deficient performance so prejudiced Mr. Spencer 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.[12]

It is reasonable to conclude that Mr. Spencer's appellate counsel 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."[13] The Court should find that the decision not to raise the ineffective assistance of trial counsel claim was not sound strategy. Mr. Spencer's appellate lawyer was deficient by failing to inform him that the failure to raise the claim would result in forfeiture of his due process rights at new criminal trials anywhere in the country. Mr. Spencer asserts that he was prejudiced where, but for the serious derelictions on the part of appellate counsel, he would have raised the claims himself. Appellate counsel rendered ineffective assistance and prejudiced Mr. Spencer by failing to advise him that, as a result of his decision to plead guilty in 2001, he had waived his right to confrontation at new

[12] *People v Fonville*, 291 Mich. App. 363, 395 (2011), citations omitted.
[13] *Yakus* v. *United States,* 321 U. S. 414 (1944) at 444.

criminal trials, and that he was at risk of forfeiture of his due process rights at new criminal trials unless he challenged the *ineffective-assistance-of-counsel based* guilty plea on direct appeal.

The order to register as a sex offender was not appropriately limited in scope to stand on the effective assistance of counsel and, thus, the Court should vacate it as being prospectively inequitable.[14] 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.[15] Whether Mr. Spencer has been properly required to register under SORA 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 difference between guilt and innocence is whether there is a valid 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."[16] Application of the judgment of sentence with the procedural Rule of Finality, as demonstrated by the newly discovered evidence here, establishes a *"conclusive implication,"*[17] or an *"imputation (as a matter of law),"*[18] or a

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[14] See, e.g., *U.S. v. Holtzman*, 762 F.2d 720 (9th Cir. 1985) at 722.
[15] *Patterson v New York*, 432 U.S. 197 (1977), at page 226.
[16] *People v Aaron*, 409 Mich. 672 (1980) fn. 12; McCormick, Evidence (2d ed), § 342, p 804.
[17] *See and compare Mullaney v Wilbur*, 421 U.S. 684 (1975) at 686
[18] *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.").

"conclusive presumption"[19] of the implied validity of the order to register under SORA out of factual proof that a judgment of sentence exists.

Mr. Spencer concedes 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,[20] as it plainly is here. Upon examining the structure of a criminal charge under SORA, it might be said that the *"presumed fact"* is that the conviction for a sex offense is valid, and the *"basic fact"* is that an undisturbed conviction for a sex offense 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.[21] Such presumptions may unconstitutionally dilute the "beyond a reasonable doubt" standard of criminal culpability.[22]

The result of the 2001 involuntary guilty plea comprised the entirety of the state's evidence in 2016 to establish the essential element of "an order which required Mr. Spencer to register under SORA." Thus, the injury that Mr. Spencer has suffered as a direct result of the deficiencies of his lawyers in the 2001 case was not harmless. He would not have been defending against a SORA prosecution in 2016, but for the ineffective assistance of counsel he received in 2001. That Mr. Spencer was unaware of this fact before the Michigan Court of Appeals issued its January 18, 2019 Opinion & Order further makes probable a finding that he received ineffective assistance of counsel.

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[19] 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.

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

[21] 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).

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

In *Sandstrom,*[23] 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,*[24] and *U.S. Gypsum Co.,*[25] or as shifting the burden of persuasion, like that in *Mullaney,*[26] 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 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 Mr. Spencer's due process right to rebut the validity of the evidence presented by the government to establish the indispensable element of "a 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 Mr. Spencer on the element of legal

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[23] *Sandstrom v Montana,* 442 US 510 (1979), starting at page 514.
[24] *Morissette v. United States,* 342 US 246 (1952).
[25] *United States v. United States Gypsum Co.,* 438 US 422 (1978).
[26] *Mullaney v. Wilbur,* 421 US 684 (1975).

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.*[27] The Court explained its holding in *Mullaney v. Wilbur*[28]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.[29]

In *Almendarez-Torres v. United States,*[30] 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.[31] 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.[32] The title of SORA's 1999 amendment is –

"AN ACT to amend 1994 PA 295, entitled "An act to ... prescribe penalties and sanctions."[33]

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[27] *In re Winship,* 397 U.S. 358 (1970).
[28] *Mullaney v. Wilbur,* 421 US 684 (1975).
[29] *Patterson v. New York, 432 U.S. 197 (1977) at 215.*
[30] *Almendarez-Torres v. United States,* 523 U.S. 224 (1998) at 228-29
[31] See, *e.g., United States v Wells,* 519 U.S. 482, 490-492 (1997); *Garret v United States,* 471 U.S. 773, 779 (1985).
[32] *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).
[33] Public Act 85 of 1999.

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*[34] 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 announced in *Apprendi* would require attention to the phrase: *"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 2001 conviction was used for here. Instead, the fact of the prior conviction was used to establish the primary element of a 2016 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.

SORA's lack of an exception to the Finality Rule has prejudiced Mr. Spencer's Substantive rights. There is not - - *and more importantly, there was not when Mr. Spencer pleaded guilty* - - an exception to the Rule of Finality such that would protect his due process rights at new criminal trials. In the interest of sound public policy, SORA should be found to be unconstitutional on its face and it should be stricken because it allows criminal convictions to be based on less evidence than is required by law.[35]

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[34] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[35] *In re Winship*, 397 U.S. 358 (1970).

Mr. Spencer asserts that the error claimed herein is non-harmless. It should be clear, beyond a reasonable doubt, that the challenged order to register is tainted by the ineffective assistance of counsel, and that but for counsels' deficiencies, Mr. Spencer would not have been arrested in 2016 over to stand a new trial under SORA. Mr. Spencer's 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."[36] Mr. Spencer's liberty interests have already proven to be fragile.

III. IF THE COURT DETERMINES THAT THE UNDERLYING 2001 GUILTY PLEA SUPPORTING SEX-OFFENDER REGISTRATION WAS TAINTED BY INEFFECTIVE ASSISTANCE OF COUNSEL, IT SHOULD ALSO FIND THAT THE STATUTE OF LIMITATIONS PROHIBITS RETRIAL OF THE 2001 CASE

This issue of subject matter jurisdiction was timely before the state courts - - and it was ignored. Mr. Spencer affirms that he would not have pleaded guilty in 2001 had he been advised prior to plea that SORA obligations that would be foisted upon him as a direct result of his decision to plead guilty. Unless the Court intervenes, it is doubtful that Michigan will simply follow the law and allow him to live in peace after all these years.

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

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.[37] Even more, 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.[38] Parties' consent or conduct could not give the court jurisdiction over the subject matter where it otherwise would have had no jurisdiction.[39] 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.[40]

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."[41] The charging documents from 2001 each omit essential elements of the accusation, and each therefore result in structural error.[42]

The 2001 felony complaint (Appendix F) and Information (Appendix I) each cite MCL § 750.520c and accuse Mr. Spencer of: "engaging in sexual contact with another person." But neither 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

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[38] *Fox v Board of Regents*, 375 Mich. 238 (1965).
[39] *Shane v Hackney*, 341 Mich. 91 (1954).
[40] *In Re: Bonner*, 151 US 242 (1893).
[41] *United States v Cotton*, 261 F 3rd 397, 405 (4th Cir. 2001).
[42] *United States v Resendiz-Ponce*, 549 US 102 (2007).

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 U.S. Const. Am. XIV, and MCL § 767.45 and is guarded with vigilance by the courts.[43] A "radical defect in jurisdiction" contemplates an express legal requirement in existence at the time of the act or omission.[44] Michigan has held that relief is appropriate where a radical jurisdictional defect exists which renders a judgment or proceeding absolutely void.[45]

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 evidence to connect the requisite elements of MCL § 750.520a, to either the CSC2 statute, or any alleged act by Mr. Spencer.

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[43] *People v Lightstone*, 330 Mich. 672 (1951); See also, Const.1963, art. 1, § 20.
[44] *People v Price*, 23 Mich. App 663 (1970).
[45] *Ex Part' Palm*. 255 Mich. 632 (1931); *Cross v Department of Corrections*, 103 Mich. App 409 (1981).

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."[46] 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."[47] "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."[48]

The 2001 charging documents improperly invoked the state court's subject matter jurisdiction over an accusation of CSC2 by using only the same generic terms set forth by the CSC2 statute.[49] 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.[50] Mr. Spencer 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.[51]

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[46] *Russel v United States*, 369 U.S. 749 (1962).
[47] *United States v Carll*, 106 US 611 (1882).
[48] *United States v Cruikshank*, 92 US 542 (1875).
[49] 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").
[50] *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)*").
[51] *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").

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."[52] 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.[53] In other words, the magistrate must restrict his or her attention to whether there is evidence regarding each of the elements of the offense,[54] after examining the whole matter.[55]

When *actus reus* is neither alleged or proven, the courts have consistently ruled against the prosecution.[56] The magistrate clearly abused discretion by failing to discharge Mr. Spencer 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.[57] 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.

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[52] *Johnson v Maxon*, 23 Mich. 129, 128 (1871).
[53] *People v. Selwa*, 214 Mich. App. 451, 457 (1995).
[54] *People v. Coons*, 158 Mich. App. 735, 738 (1987).
[55] *People v. King*, 412 Mich. 145, 154 (1981).
[56] *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").
[57] *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").

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 Mr. Spencer 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 Mr. Spencer on notice that engaging in a meeting of or related to the *sexes (Webster's Dictionary definition of the words "sexual" and "contact")*[58] is a crime. Mr. Spencer, who was not involved in a "touching" of any kind, could not rule out criminal conduct under the terms of the notice. Accordingly, the documents could not be used to exercise or acquire subject matter jurisdiction.

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,*[59] 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."[60] These omissions by the prosecution in 2001 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 state court, which renders all judgments and orders issued in the 2001 case absolutely void. (see *Fox, supra*).

Mr. Spencer points to the state record to color his claim that he was prejudiced by his 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

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[58] *Webster's Dictionary* (1995). pp. 490 and 3032.
[59] *United States v Foley*, 73 F 3rd 484, 488 (2nd Cir. 1996).
[60] Quoting *United States v Carll*, 106 US 611 (1882) at 613.

documents; Waived the arraignment and preliminary examination without obtaining Mr. Spencer's authenticated acknowledgment whether he 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 Mr. Spencer that the legal artifice: "sexual contact" is defined in MCL § 750.520a and contravened his 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 Mr. Spencer would have known exactly what he was charged with, and the result would have been different because Mr. Spencer believed he was charged with "engaging in a meeting of or relating to the sexes."

The record must affirmatively show jurisdiction.[61] "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."[62] The complete omission of specific factual allegations to establish the element of *actus reus* denied Mr. Spencer "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge."[63]

No statute of limitations or repose runs on a void judgment.[64] 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.

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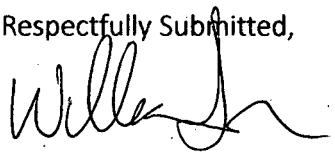
[61] *Wedel v. Green*, 70 Mich. 642, 38 N. W. 638 (1945).
[62] *United States v Hess*, 124 US 483 (1988).
[63] *Cole v Arkansas*, 333 US 106, 201 (1948).
[64] *Fritts v. Krugh*, 354 Mich. 97 (1958).

So, 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.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



William Sim Spencer

Date: 1/06/2020.