No. 20-6240

IN THE

SUPREME COURT OF THE UNITED STATES

Kyle Brandon Richards PETITIONER
(Your Name)

vs.

ORIGINAL

Kristopher Taskila — RESPONDENT(S)

FILED
OCT 02 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

United States
6th Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kyle Brandon Richards #641715
(Your Name)

Baraga maximum corr. Facility
13924 Wadaga rd.
(Address)

Baraga, MI, 49908
(City, State, Zip Code)

no Phone
(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1.1 Was Mr. Richards deprived of his constitutional rights to self representation by the trial courts summary denial of his timely request to go pro se.

2.1 Was Mr. Richards denied his due process rights by the destruction of evidence in bad faith. This court must reverse his conviction.

3.1 Did the trial court fail to impose a sentence that is proportionate to Mr. Richards circumstances and the circumstances of his offense, therefore entitling him to resentencing

4.1 Does a sentence near the top of the sentencing guidelines range constitute cruel and unusual punishment for an offender with serious mental health problems.

5.1 Does the top end of the sentence for spitting on a guard constitute cruel and unusual punishment because with appellants condition of Aspergers Syndrom and PTSD, 40 years is a 'death sentence'.

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(4) A SENTENCE NEAR THE TOP OF THE SENTENCING GUIDELINES RANGE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FOR AN OFFENDER WITH SERIOUS MENTAL HEALTH PROBLEMS

(5) THE TOP END OF THE SENTENCE FOR SPITTING ON A GUARD IS CRUEL AND UNUSUAL BECAUSE WITH APPELLANT'S CONDITION OF ASPERGER'S SYNDROME 40 YEARS IS A DEATH SENTENCE

(A) DEFENDANT'S SENTENCE IS DISPROPORTIONATE AND DISPARATE; THE TRIAL COURT FAILED TO TAKE INTO ACCOUNT SIGNIFICANT MITIGATING FACTORS AND FAILED TO TAILOR THE SENTENCE TO THE INDIVIDUAL OFFENDER

(B) DEFENDANT-APPELLANT OBJECTS TO THE PLAINTIFF-APPELLEE'S MISLEADING THIS HONORABLE COURT RE: THE PSIR

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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 B to the petition and is 6TH Cir. No# 20-1329

[X] reported at Lexis; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix E to the petition and is Case# 2:20-cv-22

[X] reported at Lexis; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix BC to the petition and is (Mich. 2020)

[X] reported at People vs. Richards, 939 NW2d 465; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the ~~Rec~~ MICHIGAN COURT OF APPEALS court appears at Appendix D to the petition and is

[ ] reported at People vs. Richards (Mich. 2017) 903 NW2d 555; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was September 1st 2020.

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

[X] 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 a 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 rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a 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

1.1 U.S Const. Am 5 and 14
"Destruction of material Evidence in bad Faith"

2.1 U.S Const. Am. 6 and 14
"Denial of Timely request To represent myself Pro Se"
(Self Representation)

3.1 U.S Const. Am. 8 and 14
"Excessive and extraordinarily Cruel Punishment of a mentally ill Offender who lacks The Social and Adaptive Skills To Survive his Sentence or One Day Achieve Parole"

Note: This case presents Very Unique Questions involving The moral Validity of The United States; "mass incarseration" of mentally ill Offenders. Over 3 million people in America are Locked Up in Prison. That means That 1 out of every 100 Americans Are incarcerated in Prison. Over 50 % Percent of That number Are mentally ill and Are Detiorating in Prison.

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:

STATEMENT OF The CASE

On September 1st 2020, The United States 6th Circuit Court OF Appeals ruled To Deny my Application For relief. The 6th Circuit BARELY investigated Each Claim And relied Soley Upon The michigan COA Opinion in making Their Decision.

In regard To The issue OF "Timeliness", The 6th Circuit Had ruled That "Farreta Vs. California, 422 U.S 806, 835-36, AFFORDS The Court unfettered Latitude in determining The 'Timeliness' OF A request. The 6th Cir. basicly STATED That The Trial Court can even Deny The request when it is made BEFORE Trial.

The 6th Circuit Needs A Lesson in 'Farretta' Apparently, Their interpretation OF The Supreme Courts ruling is distorted.

Second, is The 6th Cir. Absolutely "ignored" The Fact That NONE OF The OFFICERS / WITNESSES Saw me Spit On Anyone. They Claimed That Their "Periphial Vision" Saw me Spit OUT OF The Corner OF Their Eye.

The Video And Photographs Favored The Defense, because NIETHER Showed Any Evidence. The Case was So Weak That The 'material' Evidence (Spittle) Would Have Cirtianly been Exculpatory.

Last, is The 6th Cir. relied Soley Upon The Testimony OF SGT. Nicewicz To interpret 'Preservation' Policy, ignoring 'inspector' Weirons Expert Testimony.

Inspector Welton made very clear that the Policy for Evidence Preservation requires that the officers submitt their any clothing with "biological" substances on it, into evidence.

Nothing in policy requires a forensic team for extraction. The trial courts finding that a "officer shouldnt have to wait for a forensics team" is ridiculous. "plastic evidence bags" are available in every unit and the officer could have easily changed his uniform. (BAD FAITH is inexcusable)

Finally, my last 3 claims call to question the legal and moral validity of imprisoning seriously mentally ill people, for excessively long periods of time.

There are over 3 million people incarcerated in prison in the united states. meaning 1 out of every 100 americans are in prison. That is unacceptable.

The mass incarceration of the mentally ill is a human rights atrocity. As of now, no law exists to protect the mentally ill from prolonged incarceration. I humbly ask this court to establish clear precedent to protect the mentally ill from extraordinarily abusive prison sentences.

STATEMENT OF FACTS

Mr. Richards was convicted in the Ionia County Circuit Court on 10/20/14 by jury of Assault of Prison Employee, MCL 750.197c(A) with Fourth Habitual, MCL 769.12. The case arose out of Mr. Richards' spitting on a corrections officer's arm. See PSIR. Mr. Richards has previously appealed his case and was remanded for resentencing. See SC: 153694 and COA: 325192.

Mr. Richards has been diagnosed with Asperger's - a form of autism. As defined on Wikipedia:

> Asperger syndrome (AS), also known as Asperger's, is a developmental disorder characterized by significant difficulties in social interaction and nonverbal communication, along with restricted and repetitive patterns of behavior and interests. As a milder autism spectrum disorder (ASD), it differs from other ASDs by relatively normal language and intelligence. Although not required for diagnosis, physical clumsiness and unusual use of language are common.] Signs usually begin before two years old and typically last for a person's entire life.
>
> The exact cause of Asperger's is unknown. While it is probably partly inherited, the underlying genetics have not been determined conclusively. Environmental factors are also believed to play a role. Brain imaging has not identified a common underlying problem. The diagnosis of Asperger's was removed in the 2013 fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), and people with these symptoms are now included within the autism spectrum disorder along with autism and pervasive developmental disorder not otherwise specified (PDD-NOS). It remains within the tenth edition of the International Classification of Diseases (ICD-10) as of 2015.
>
> There is no single treatment, and the effectiveness of particular interventions is supported by only limited data. Treatment is aimed at improving poor communication skills, obsessive or repetitive routines and physical clumsiness. Interventions may include social skills training, cognitive behavioral therapy, physical therapy, speech therapy, parent training and medications for associated problems such as mood or anxiety. Most children improve as they grow up, but social and communication difficulties usually persist. Some researchers and people on the autism spectrum have advocated a shift in attitudes toward the view that autism spectrum disorder is a difference rather than a disease that must be treated or cured.
>
> In 2015, Asperger's was estimated to affect 37.2 million people globally. The syndrome is named after the Austrian pediatrician Hans Asperger, who in 1944 described children in his practice who lacked nonverbal communication, had limited understanding of others' feelings, and were physically clumsy. The modern conception of Asperger syndrome came into existence in 1981 and went through a period of popularization. It became a standardized diagnosis in the early 1990s. Many questions and controversies remain about aspects of the disorder. There is

> doubt about whether it is distinct from high-functioning autism (HFA). Partly because of this, the percentage of people affected is not firmly established.
>
> [See https://en.wikipedia.org/wiki|Asperger syndrome]

Most of Mr. Richards' criminal history stems from his struggles with Asperger's and ADHD and the resulting difficulties with social interactions.

Resentencing was on 5/1/18. Sentencing guidelines were originally 19 months to 38 months but changed to 12 months to 48 months during resentencing. R 5. Prior to resentencing, Defense Counsel submitted a sentencing memorandum on behalf of Mr. Richards. See Sentencing Memorandum. During resentencing, Defense Counsel addressed the programming Mr. Richards had been successfully participating in and asked for a minimum sentence of 40 months. R 5. In imposing sentence, the Court stated:

> So in this matter, the Court is mindful that we have an agreement that the sentencing guidelines range, at this point in time, is 12 to 48 months. The Court previously imposed a 50-month sentence when it was my understanding, or reliance, on the fact that the top end of the guidelines, at that point, was 58 months.
>
> Again, recognizing a change in the guidelines - I do want to note, Mr. Richards, that your presentation here today during the course of this proceeding is certainly much more positive than what it has been in the past, in terms of you being respectful to the Court and expressing yourself in a coherent and rational manner. I want to recognize that, but I also don't want to lose sight of the fact that we had a victim that was humiliated and certainly was concerned about infectious disease.
>
> So keeping those, I guess, balancing concerns here in mind, the Court will be imposing a sentence. Recognizing that the top end is 48 months, the Court will impose a 46-month sentence, on the bottom end, to the 40 years that the Court had previously imposed.
>
> So again, sir, I encourage you to continue to do everything that you can to improve and better yourself. I'm pleased that you have been engaged in learning. That has been certainly very positive for you.
>
> [R 10-11]

This case presents a very unique situation; Mr. Richards has been diagnosed and treated by "world renowned" doctors for a myriad of psychological disorders, which include:

1. Pervasive Developmental Disorder (diagnosed by Dr. Ismail Sendi – Exhibit A)
2. Major Depressive Disorder (diagnosed by Mamoun Dabbagh – Exhibit B)
3. Oppositional Defiance Disorder (diagnosed by Mamoun Dabbagh – Exhibit C)
4. Bipolar Disorder (diagnosed by Mamoun Dabbagh – Exhibit C)
5. Asperger's Syndrome (diagnosed in 2003-4 by Dr. Todd of Orchard Hill Psychological Center – Exhibit D)

Mr. Richards was engaged in intensive lifelong mental health treatment before coming to prison. He was treated extensively at the following facilities:

1. Havenwyck Hospital (In –Patient 1997 – 2005) (Exhibit E – Affidavit)
2. Fact to Face Clinic (2001 – 2005) (Exhibit E – Affidavit)
3. Orchard Hills Psychological Center (2003 - 2005) (Exhibit E – Affidavit)
4. Center for Forensic Psychiarty (2009 – 2018) (Exhibit E – Affidavit)

Mr. Richards was also treated by the following personnel:

1. Dr. Debbie Bastedo (2007 Shelby Township) (Exhibit E – Affidavit)
2. Dr. Debra Sand (2002 – 2003 Orchard Hills Psychological Center) (Exhibit E – Affidavit)
3. Dr. Hiten Patel (2000 – 2004 Orchard Hills Psychological Center) (Exhibit E – Affidavit)
4. Dr. Norman Ellis (2006 – 2007 Maxey Boys Training School) (Exhibit E – Affidavit)

Mr. Richards was sentenced on 5/1/18 to 46 months to 40 years for Assault of Prison Employee, MCL 750.197c(A). See Judgment of Sentence. Mr. Richards now appeals his sentence, because with his condition of Asperger's Syndrome, his sentence of 40 years is basically a death sentence.

ARGUMENT # 1

MR RICHARDS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO SELF REPRESENTATION BY THE TRIAL COURTS SUMMARY DENIAL OF HIS TIMELY REQUEST TO GO PRO SE

ISSUE PRESERVATION AND STANDARD OF REVIEW

The issue Is preserved before trial started Mr. Richards let his counsel know that he wished to represent himself at trial.

ARGUMENT

The trial court violated Mr. Richards constitutional right to self-representation by denying him the right to represent himself at trial. *Faretta* v *California* 422 U.S. 806; 95 S CT 2525; 45 LED2D 562 (1975) holding that the defendant has a constitutional right to proceed without counsel.

The trial court did so without making an inquiry whatsoever of Mr. Richards, refusing the request outright apparently because it was untimely as it had not been raised previously (TT. p. 16) The trial court erred.

The constitutional right to self-representation is well established and had been recognized since colonial times *Faretta* 422 U.S. at 818. The Sixth Amendment of the U.S. constitution guarantees the right to self-representation for all criminal defendants and has been incorporated to the States through the 14TH AM U.S. Const 6th and 14th AMS See *Faretta* 422 U.S. at 807.

The Michigan constitution expressly safeguards this right as well. Const 1963, art 1, section 13. *People* v *Russell*, 471 Mich at 182. The right of self-representation is also protected by Federal and State legislation, Judiciary Act of 1789 section 35/ 1 Stat 73, 92b; MCL 763.1

In *Faretta* the Supreme Court confirmed the defendants right to self-representation *Faretta* 422 at 806. The court held that the lower court violated *Farettas* 6th AM right to self-

representation after *Faretta* unequivocally told the Judge he wanted to represent himself before the start of trial. Id at 835-836. The Court stated the language and spirit of the 6TH AM contemplate that counsel, like other defense tools guaranteed by the am shall be an aid of a willing defendant, not an organ of the state interposes between an unwilling defendant and his right to represent defense himself personally is at 820. *Faretta* stressed that trial courts before permitting defendant to represent himself must determine that he is knowingly and intelligently relinquishing the benefits of representation of counsel.

Where the trial court absolutely no inquiry of Mr. Richards, instead she simply said NO to his request for self-representation, seemingly because of the timing and perceived inconvenience to the court. Although the trial court apparently believed the request for self-representation was late, the federal constitution right to el representation is not as circumscribed as the court believed.

Under *Faretta* as long as he defendant is not Seeking self-representation simply to delay trial, an unequivocal request cannot be denied purely on the basis of the courts convenience.

There was no indicating Mr. Richards was looking to delay trial by his request or requested to delay the start of trial when representing himself.

Mr. Richards did not believe he's got a fair trial unless he represented himself. TT P.15

Mr. Richards made his request before the jury had been empaneled TT p. 15. As such, his request was timely, see Lewis v Robinson< 67 Fed Appx 914, 919 (6TH CIR 2003). A self-representation request is typically timely is made prior to the election and swearing of the jury. In this case the jury was neither sworn or selected. Defendant made no request to adjourn trial, and self-representation would not have disrupted unduly inconvenienced or burdened the administration of he courts business. See Russel 471 Mich at 190. He was twice found competent to stand trial, wrote and argued several motions pro per and repeated his request during trial. PT

2-13-14 page 4; PT 4-22-14 page 20 PT 6-30-14 page 36 PT 9-9-14 page 43 PT 10-17-14 page 67.

faced with timely request by defendant to represent himself, *Faretta* requires the trial court to grant the request of the waiver is knowing, intelligent and voluntary. and there is no affirmative showing that the request is being made purely to delay. There was every indication Mr. Richards was making the decision to represent himself knowingly, intelligently and voluntary and even expressed his desire to represent himself twice. [redacted]. tt pp 151 and 180.

The trial court had abused its discretion and violated Mr. Richards right to self-representation when it denied his timely request without making any further inquiry, purely on the grounds of the convenience of the court.

Defendants request was not an 11th hour request. In fact, defendant advised his counsel weeks before trial started that he was going to represent himself.

In fact, that every morning defense counsel advised the judge of the defendant decision to go pro se. see TT pgs. 14-16.

In the words of defense counsel:

> Your Honor. I'm sorry. Mr. Richards communicated to me that he's like to represent himself. I stated in chambers earlier, my idea of how to try this case and his idea of how to try this case are diametrically opposed and he doesn't believe he's going to get a fair trial if he doesn't represent himself. TT page 15; ln 1-15.
>
> The trial court was well aware long before trial that defendant was going to represent himself. Even if the court wasn't the request was still timely. Since the jury neither sworn nor empaneled defense counsel iterated he spoke in chambers with the judge weeks before trial.

Self-representation would not have burdened disrupted nor inconvenienced the court.

Defendant made no request for adjournment or accommodation see TT p. 15. The prosecution never objected. In fact, Prosecutor Butler concurred with defendants' request.

> I think its defendants right to represent himself...but it's the discretion of the court, whether Mr. Richards can represent himself adequately or I he assistance of an attorney would be sufficient...basically sitting 2nd chair TT p 15.

Defendant going pro se, would have had the aid of advisory counsel, sitting 2nd chair throughout trial. defense counsel would have been there the entire time to take over if necessary.

The U.S. Supreme Court held that a trial courts erroneous denial of defendants right to self-representation is a structural defect necessitating automatic reversal. *U.S.* v *Gonzalez-lopez*, 126 S Ct 2557, 2564; 165 LED2D 409 (2006) listing the denial of self-representation as a structural error. *Mckaskie* V *Wiggens*, 465 U.S. 168, 177-178, N.8; 105 S CT 944L 79 LE2D 122 (1984) (finding the denial of ones right to counsel have consequences that are unquantifiable and indeterminate, unquestionably qualifies as structural error.)

In *Duncan*, The Michigan Supreme Court found the denial of the right to self-representation as one example of a structure error subject to automatic reversal. *People* v *Duncan* 462 Mich 44, 52; 610 NW2D 551 (2000) citing *Neder* v *U.S.* 527 U.S. 1; 11 S Ct 1827; 144 LED2d 35 (1999) see also *People* V *Knight*, 473 Mich 32, 369 n.11; 701 NW2d 715 (2005).

In sum Mr. Richards was denied his right to Self-representation this denial constitutes a structural error necessitating reversal of his conviction.

NOTE: A long list of authorities makes clear that a request for self-representation is timely if it is made before trial. see *U.S.* v *Bettanbcourt-Arretuche*, 933 F2d 89, 96 (1st Cir) in general a *Faretta* request is timely if its timely if it's made before the jury in empaneled. 11 S Ct 421 (1991); *Chapman* v *Price* 474 F2D 1223 1227 (9TH CIR) 484 F2D 485 (9TH Cir 1973) US V *Daughtery*, 473 F2D 12, 16 (2ND Cir 1965) 384 US 1007, 86 S CT 1950, 16 LED2D 1020 (1966).

ARGUMENT # 2

MR RICHARDS WAS DENIED HIS DUE PROCESS RIGHTS BY THE DESTRUCTION OF EVIDENCE IN BAD FAITH. THIS COURT MUST REVERSE HIS CONVICTION

ISSUE PRESERVATION AND STANDARD OF REVIEW

At a hearing on May 20th 2014 Defendant requested the case be dismissed because of the State's failure to preserve evidence either from the Saliva or the clothing. P.T. 5-20-14 his motion was denied. Additionally, Mr. Richards renewed his motion at a pretrial conference on September 9th, 2014 P.T. 5-2014 pg. 9. PT 9-9-14 pg. 43 This issue is well preserved.

ARGUMENT

Mr. Richards was denied his right to a fair trial and present a defense by the destruction of the evidence in this case. State actions had material and potentially exculpatory evidence in their possession namely saliva on the officer's arm clothing and rag used to wipe away the saliva. The officers failed to preserve the evidence in accordance with their own policy P.D. 03.03.105 page 3 and the evidence was destroyed before Mr. Richards had any opportunity to have it tested or analyzed.

A defendant has a constitutional right to request and obtain from the prosecution evidence that is either material to his guilt or relevant to the punishment he is to receive. *California* v *Trambetta*, 467 U.S. 479, 485: 104 S CT 2528; 81 LEd2d 413 (1984).

Evidence meets this standard of constitutional materiality when it possesses both an exculpatory value that was apparent before the evidence was destroyed and is of such nature that

the defendant would be unable to obtain comparable evidence by other reasonably available *Trombetta* 467 US. at 489.

Even in the absence of a specific request, the prosecutor has a constitutional duty to disclose evidence that would raise a reasonable doubt about a defendant's guilt. *Trombetta* 467 U.S. 479. Where the government's failure to provide evidentiary access to the accused deprives him of complete defense, the governments inaction violates the due process clause.

While the constitutional protection against destruction of evidence is more limited than 'then the government fails to disclose material exculpatory evidence. The privilege does include the safe keeping of potentially exculpatory evidence from loss or destruction while in government custody. *Arizona* v *Youngblood*, 488 US 51, 57; 109 S CT 333, 337; 102 LEd2d 281, 289 (1988). *Trombeta*, 467 U.S. 479. Police and prosecutors must act in good faith to preserve evidence that might be expected to play a significant role in a suspect's defense *Youngblood* 488 US at 58.

In Youngblood and Trombetta, supra, the Supreme Court determined that the government is not required to preserve all evidence that. could possibly be construed as exculpatory with respect to a defendants' trial or sentencing. Youngblood, 488 US at Rather the government violates a defendants' due process rights where the government acts in Bad faith destroying potentially useful evidence. rd.

The Supreme Court defined potentially useful evidence as evidences which might be exonerated the defendant Id at 57. In order to establish BAD FAITH, a defendant must show that the government destroyed evidence (1) Whose exculpatory significance was apparent before its destruction, and (2) the defendant remains unable to obtain comparable evidence by other reasonably available means *Trombetta* 467 U.S. at 489; see also *Illinois* v *Fisher*, 540 US 544; 124 S CT 1200; 157 LEd2d 1060 (1084).

In the case before this court, the exculpatory significance was apparent testing what the officers believed to be saliva, on either the officers arm, clothing the rag, could rule out Mr. Richards as the source or could have revealed that the was not saliva at all, but rather water. Since all samples have been destroyed, Mr. Richards is not able to obtain any such comparable evidence.

This was not case of destruction of evidence in accordance with a reasonable policy. See e.g. *People* v *Hardaway*, 67 Mich App 32; 240 NI,12d 276 (1976) The policy in this case was actually for preservation. Bellamy Creek (TRC) Operating Procedure O.P. 03.03.105 page 3 indicates that for a class J misconduct reporting staff is to:

> Ensure any evidence involved with the misconduct is properly marked, photographs, tagged, and placed in an appropriate container, i.e. plastic evidence tube, paper, or plastic bag, etc ...along with a copy of the misconduct report and contraband removal record (CSJ 284) Location of the evidence should be noted on the misconduct. Photographs should be taken of perishable items, properly signed, dated and description of evidence, attached to the misconduct report and after verified by the reviewing officer, the perishable items will be destroyed. IBC 03.03.105 page 3.

Here, there were photographs taken, but no efforts to save the saliva, clothes, or tag used to wipe off the saliva. No effort was top preserve the substance. In fact, officers made effort to the contrary. The evidence was knowingly and intentionally destroyed by the officers' actions. thus BAD FAITH should be presumed and a reversal warranted ensuring the justice system is not endangered by police misconduct. see *People* v *Albert* 89 Mich. App. 350, 354; 280 NW2d 523 (1979).

In *People* v *Paris*, "66 Mich App 276, 283; 420 NW2s 184 (1988) The Michigan Court of Appeals found reversible error where the original notes of the police interview with the accused were destroyed. The Court examined the following factors:

(1) Whether the suppression was deliberate;

(2) whether the evidence was requested and

(3) Whether hindsight discloses that the defense could have put the evidence to not insignificant use.

Id at 283 (citations omitted) Like in Paris, the officers not only failed to take a sample off the officers' arm, but also failed to preserve any samples from his clothing or the rag that was used to wipe off his arm. Failure to preserve any samples was in clear violation of MDOC's own policies.

Had the samples been preserved, they would have been instrumental in Mr. Richards defense to show that he had not spit on the officer. Mr. Richards had no other means for obtaining the lost evidence. Defendant was completely deprived of his ability to test the saliva to see if it was in fact saliva or merely water, or to analyze it for DNA to determine if it had come from him, in a case where it was his word versus the officers, this was crucial for his defense.

BAD FAITH IS PRESUMED

Bad Faith is presumed because officers failed to follow their evidence presentation Policy IBC 03.03-025 page 3.

Officers deliberate disregard of the state's evidence presentation Policy 02.03.105 page 3 also constituted a state felony, in violation of State law, concealing and compounding a criminal offense MCL 750. 140 Obstruction of Justice, Tampering with evidence, and neglect of duty, 750.478. By state law, destroying evidence is a criminal act,

* The prosecution absurdly tried to argue that it was not reasonable for an officer to wait for a forensic team to collect a sample. Such a notion is ridiculous. nothing in policy requires a forensic team for extraction.

Plastic evidence bags are available at every unit facility. The officer is merely obligated by state policy to place his pants, shirts and rag he used to his in. The facility evidence locker. Extra clothes are available at facility for the officer to change into.

Officers testimony at trial revealed that the alleged substance was visible on the victims clothing articles TT page 125.

> SGT. NICEWICZ: There may have been a very small amount on his pants leg.

Nothing in IBC 03.03.105 requires a forensic team. The Prosecutors assertion is absolutely baseless. All the officer had to do was place his clothing in an evidence bag, or transfer the saliva from his arm onto a rag and place the rag into a bag.

Instead the officer deliberately destroyed the saliva, pants, shirt and rag. The illegal destruction of evidence violated state MCL 750.149 MCL 750 .478, and constitutes illegal obstruction of justice: The controversy here is not that the officers merely failed to follow their own evidence preservation policy, but rather the officers committed an illegal felony act by destroying evidence.

State Law defines illegal destruction of evidence under the following felony statutes:

> MCL 750.149 Concealing evidence
> MCL 750.478 Neglect of Duty
> MCL 750. 478a Obstruction of Justice

Gross neglect of duty to preserve the evidence is a felony of itself.

When asked by the State at trial, if it was routine to collect articles of clothing with biological substances on it, the highest ranking officer stated: TT page 141:

> INSPECTOR WELTON: If it was something obviously that stood right out on it, yes we would take shirt or a pair of pants and put them in a paper bag so the evidence wouldn't degrade.

Inspector Welton is the highest ranking officer of relevant witnesses called. By rank alone the Inspector would be an expert witness in terms of addressing policy application of IBC 03.03 105-page Prison policy and state law were clearly violated Bad faith is irrefutable.

EVIDENCE WAS EXCULPATORY

The State absurdly claimed that the evidence was not potentially exculpatory simply because 2 officers testified that they vaguely saw or thought they saw Defendant spit through a slot. Worse, they claimed they witnessed the assault through their peripheral vision. See TT page 124.

PEOPLE: Did you see him get spit on?

* SGT NICEWICZ No Sir.
* C/O BAIMES I seen him out of the corner of my eye(See TT page 70)
* C/O HUDSON Through my peripheral vision I saw that when he bent down spitting through the slot.(See TT page 111.)

Absurdly the prosecution claims this testimony was enough to preclude that DNA would have had any exculpatory value. The prosecution is wrong. The entire case rested on the peripheral vision of 2 officers who thought they saw something.

VIDEO EVIDENCE

Video evidence proved the officers were lying. The video was played at, trial. The Video favored the defense. The Video shows explicitly that No substance of any kind was ever ejected from the slot. The Video has a direct view of the door slot. Nothing ever Ejects.

DEFENSE: What is the purpose of the photographs? (See Trial Transcripts AT PG. 131)
SGT NICEWICZ: Showing evidence
DEFENSE: Does it?
SGT NICEWICZ: NO
DEFENSE: IT DOESNT Show IT AT ALL(see TT 131)

Also the Video shows the officers hacks were turned in the opposite direction. If, was not physically possible for the officers to have saw the alleged act, even in their peripheral vision. There was no line of sight, not even peripheral. The video was exculpatory(See page TT131.)

PHOTOGRAPHS

The photographs were exculpatory. No substance was visible on any photographs. The photographs prove there was nothing on any officer. Any small visaged substances seen, reflected water & not spittle.

* NOTE: Officer Baimes is seen in the video kicking a trash can, then trash can be seen splashing him. (Please watch the video for proof of my innocence.)

BY all accounts, evidence greatly favored the defendants evidence. Officers testimony contradicted the video and photo evidence. The entire case rested on a credibility contest of which DNA testing would have resolved.

People lie. Any sentient creature can conjure a lie. However, DNA evidence cannot lie. Even in the case Where a 100 officers could claim to have saw one thing. A DNA test could overrule a million witnesses. IN terms of evidentiary value DNA science reigns supreme.

For the above reasons, Mr. Richards was hopelessly impeded in his attempts to mount his own defense or challenge the prosecutors case. The people cannot show this error was harmless beyond a reasonable doubt. *People* v *Carines*, 460 Mich 750,774; 597 NW2d 130 (1999) citing *People* v *Anderson*, (after remand) 446 Mich 392; 521 NW2s 538 (1994)

This Court should set aside Mr. Richards conviction.

ARGUMENT # 3

THE TRIAL COURT FAILED TO IMPOSE A SENTENCE THAT IS PROPORTIONATE TO MR. RICHARDS'S CIRCUMSTANCES AND THE CIRCUMSTANCES OF HIS OFFENSES AND IS THEREFORE ENTITLED TO RESENTENCING.

Introduction:

This Court should grant leave to appeal and undertake proportionality review of Mr. Richards's sentence. He acknowledges that his 46-month minimum term is at the top end of the controlling guidelines ranges for his offense of convictions, Assault of Prison Employee, MCL 750.197c(A) with Fourth Habitual, MCL 769.12. He further acknowledges this Court's determination that MCL 769.34(10) bars resentencing absent a showing that the trial court erred in scoring the guidelines variables or otherwise relied upon inaccurate information. *People* v. *Schrauben*, 314 Mich. App. 181, 196; 886 N.W.2d 173 (2016).

Mr. Richards submits, however, *Schrauben* that neither nor any other decision of the Michigan Court of Appeals or this Honorable Court addresses whether MCL 769.34(10) survives this court's ruling in *People* v *Lockridge*, 498 Mich. 358, 392; 870 N.W.2d 502 (2015). In addition, this Honorable Court, in *People* v *Steanhouse*, 500 Mich. 453 (2017), expressly acknowledged that it remains an open question "whether MCL 769.34(10), which requires the Court of Appeals to affirm a sentence that is within the guidelines absent a scoring error or reliance on inaccurate information in determining the sentence, survives Lockridge." For the reasons discussed below, this Court should hold that it does not.

Issue Preservation: This Court has not articulated a preservation requirement for challenging the proportionality of a sentence falling within the legislative guidelines range. This is not surprising, given that the legislative guidelines preclude a court from disturbing such a

sentence. MCL 769.34(10); *Schrauben*, 314 Mich. App. at 196. The issue, therefore, remains an open question. See *Steanhouse*, 500 Mich. 453 (2017). However, under the "principle of proportionality" standard set forth by *People* v *Milbourn*, 435 Mich. 630, 635-636; 461 N.W.2d 1 (1990), which is the same standard that this Court adopted to govern appellate review of post Lockridge sentences, *Steanhouse*, at 473, "even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." *Milbourn*, 435 Mich. at 661. "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range. 't Id

Here, the "unusual circumstances" surrounding Mr. Richards sentence include the nature of his prior convictions which all stem from his on-going struggle with mental health disabilities Asperger's Syndrome and ADHD along with occasional suicidal ideations. In addition, information was given to the sentencing Court to that effect. See PSIR. Given this record, this Court should consider this issue preserved for appeal.

Standard of Review:

An appellate court's proportionality review considers whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of the criminal record. *Steanhouse*, at 474; *Milbourn*, 435 Mich. at 635-636.

(A) HISTORICALLY, MILBOURN REVIEW HAS ALWAYS INCLUDED A MECHANISM FOR ALLOWING DEFENDANTS TO REBUT THE PRESUMPTION THAT A SENTENCE WITHIN THE CONTROLLING GUIDELINES RANGE IS PROPORTIONATE.

Before this Honorable Court's decision in *Lockridge*, the legislative sentencing guidelines were binding upon trial judges. *Lockridge*, 498 Mich. at 387 (citing MCL 769.34(2)). ***Lockridge*** held unconstitutional that portion of the guidelines that made them mandatory and replaced it

within an advisory scheme. Id at 364, 387-389, 391-392. After ***Lockridge***, sentencing courts still "must determine the applicable guidelines range and take it into account when imposing sentence". Id. at 365. But courts need not articulate substantial and compelling reasons for departing above or below that range; rather, the sentence only has to be "reasonable. " Id. at 392.

Even after ***Lockridge***, a sentencing court must "**justify**" its sentence in order to facilitate appellate review. Id. Appellate courts would then review for "reasonableness." *Lockridge*, 498 Mich. at 392. Although *Lockridge* limited it discussion of this "reasonableness" standard to departures from the guidelines range, there was no qualifier to the Court' s subsequent statement that "**resentencing** will be required when a sentence is determined to be unreasonable. " Id.

The Lockridge Court did not elucidate a framework for considering the reasonableness of a departure. The Supreme Court, however, recently adopted the ***Milbourn*** "principle of proportionality" test that once applied to departures from the judicial sentencing guidelines.

Steanhouse, at 473. Under ***Milbourn***, "an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines." Milbourn, 435 Mich. at 659-660. Specifically, reviewing courts must consider factors such as: (1) the seriousness of the offense, (2) factors not considered by the guidelines, and (3) factors given inadequate weight by the guidelines in a particular case. Id. at 660; *People* v *Houston*, 448 Mich. 312, 321-324; 532 N.W.2d 508 (1995).

As a general rule, a sentence that fell within the range recommended by the judicial guidelines were presumed to be neither excessive nor disparate. ***Milbourn***, 435 Mich. at 660-661. But Milbourn itself recognized that "conceivably, even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." Id at 661. Defendants could therefore overcome the presumption of proportionality by presenting evidence of "uncommon" or "rare" circumstances. Id.

(B) MCL 769.34(10) VIOLATES THE RULE OF LOCKRIDGE BY PRECLUDING DEFENDANTS FROM CHALLENGING DISPROPORTIONATE SENTENCES THAT HAPPEN TO FALL WITHIN A GUIDELINES RANGE CALCULATED THROUGH THE USE OF FACTS FOUND BY A JUDGE, NOT A JURY.

This Court should conclude as an initial matter that the first sentence of MCL 769.34(10) is no longer valid. That statutory subsection begins: "If a minimum sentence is within the appropriate sentence guidelines range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in the scoring of the sentencing guidelines or inaccurate information relied upon in determining the sentence." Because ***Lockridge*** declared the legislative sentencing guidelines to be advisory rather than mandatory, there can be no mandatory presumption of reasonableness. Rather, there must be a mechanism for rebutting the presumption— similar to the one that existed in the ***Milbourn*** era and to the one that continues to function in federal court. See *Rita* v. *United States* 551 U.S. 338, 347; 127 S. ct. 2456; 168 L. Ed. 2d 203 (2007) (discussed infra).

To cure the constitutional defect found in the mandatory sentencing guidelines, Lockridge "sever[ed] MCL 769.34(2) to the extent that it is mandatory and [struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)."

Lockridge, 498 Mich. at 391. It further recognized that other portions of MCL 769.34 might need to be severed in the future: "To the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." Id. at 2 and n. 1. Indeed, the Court of Appeals has already relied upon this holding to strike down that part of MCL 769.34(4) which made intermediate sanctions mandatory whenever the top end of the range equaled 1 8 months or less. *Schrauben*, 314 Mich. App. at 195.

The *Schrauben* Court did not address whether MCL 769.34(10) contained mandatory language of the same type that was fatal to the subsection addressed to intermediate sanctions. It simply assumed without analysis that sentences within the controlling guidelines range "must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information. Id. at 196 (citing MCL 769.64(10)). Consequently, a mandatory, irrefutable presumption of proportionality—fashioned by the Legislature to-fit a scheme in which adherence to the guidelines was mandatory—continues even though our Supreme Court has held that the guidelines, to pass constitutional muster, must now be treated as advisory.

This is far different than the approach used in the federal sentencing scheme which inspired the Lockridge remedy. In Rita, supra, the United States Supreme Court examined the reasonableness of a federal sentence imposed after the federal guidelines were declared advisory in *United States* v *Booker*, 543 U.S. 220, 261-263; 125 S. Ct. 738; 160 L. Ed. 2d 621 (2005). The ***Rita*** Court held that "[a] nonbinding appellate presumption that a Guidelines sentence is reasonable" does not violate the Sixth Amendment principles underlying Booker. ***Rita***, 551 U.S. at 352-353 (emphasis added). After all, "presumptively reasonable does not mean always reasonable; the presumption, of course, must be genuinely rebuttable." ***Rita***, 551 U.S. at 366 (Stevens, J., concurring) (emphasis in original).

An irrefutable presumption, on the other hand, raises Sixth Amendment problems. Even after *Lockridge*, sentencing courts must continue to score the guidelines using facts found by the judge by a preponderance of the evidence. *Lockridge*, 498 Mich. at 365. By imposing a mandatory presumption, MCL 769.34(10) ensures that "some sentences . . . will be upheld as reasonable only because of the existence of judge-found facts." Rita, 551 US at 373 (Scalia, J., concurring in part and concurring in the judgment). This Court should therefore determine that MCL 769.34(10) is incompatible with Lockridge.

(C) MR. RICHARDS'S 46 MONTH MINIMUM SENTENCE IS CONSTITUTIONALLY DISPROPORTIONATE TO HIS CIRCUMSTANCES AND TO THE CIRCUMSTANCES OF HIS CRIMES

Both the federal and state constitutions forbid the imposition of a disproportionate sentence. U.S. Const., Am. VIII, Const. 1963, art 1, § 16; People v. Bullock, 440 Mich. 15, 37; 485 N.W.2d 866 (1992). Sentences must be proportional to the seriousness of the circumstances surrounding the offense and the offender. *People* v. *Babcock*, 469 Mich. 247, 262; 666 N.W.2d 231 (2003); *Milbourn*, 435 Mich. at 636. Mr. Richards's 46-month minimum is not proportional to the seriousness of this offense - this is not a case where physical contact occurred that resulted in an injury, Mr. Richards spat on the correction officer's arm. Mr. Richards has no known communicable diseases.

Proportionality review examines two factors—the severity of the offense and the seriousness of the offender's criminal record. ***Milbourn***, 435 Mich. at 636. In the instant case, Mr. Richards's record comes from his struggle with his ongoing mental health issues that have gone untreated for the most part. See PSIR in general. In addition, Mr. Richards's near the top of the guidelines sentence is not reasonable because it was based on factors inadequately reflected in the guidelines range. ***Milbourn***, 435 Mich at 659-660.

In sum, Mr. Richards s mental health issues and the lack of treatment thereof was not given enough weight in justifying the imposition of a 46 months' sentence. The sentence is unreasonable and disproportionate. This Court should reverse and remand for resentencing and ORDER the MDOC to transfer Mr. Richards to an appropriate facility where Mr. Richards's mental health issues will be better addressed.

ARGUMENT # 4

A SENTENCE NEAR THE TOP OF THE SENTENCING GUIDELINES RANGE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT FOR AN OFFENDER WITH SERIOUS MENTAL HEALTH PROBLEMS.

Introduction: This Court should grant leave to appeal and undertake review of Mr. Richards's sentence. He acknowledges that his 46-month minimum term is at the top end of the controlling guidelines range for his offense of convictions, Assault of Prison Employee, MCL 750.197c(A) with Fourth Habitual, MCL 769.12. He further acknowledges this Court's determination that MCL 769.34(10) bars resentencing absent a showing that the trial court erred in scoring the guidelines variables or otherwise relied upon inaccurate information. *People* v *Schrauben*, 314 Mich. App. 181, 196; 886 N.W.2d 173 (2016).

Mr. Richards submits, however, *Schrauben* that neither nor any other decision of this Court or of the Michigan Court of Appeals addresses whether MCL 769.34(10) survives this Honorable Court's ruling in *People* v. *Lockridge*, 498 Mich. 358, 392; 870 N.W.2d 502 (2015). In addition, the Honorable Court, in *People* v. *Steanhouse*, 500 Mich. 453 (2017), expressly acknowledged that it remains an open question "whether MCL 769.34(10), which requires the Court of Appeals to affirm a sentence that is within the guidelines absent a scoring error or reliance on inaccurate information in determining the sentence, survives Lockridge." For the reasons discussed below, this Court should hold that it does not.

Issue Preservation: This Court has not articulated a preservation requirement for challenging a sentence falling within the legislative guidelines range. This is not surprising, given that the legislative guidelines preclude this Court from disturbing such a sentence. MCL 769.34(10); *Schrauben*, 314 Mich. App. at 196. The issue, therefore, remains an open question. See *Steanhouse*, 500 Mich. 453 (2017). However, under the "principle of proportionality" standard set forth by People v. *Milbourn*, 435 Mich. 630, 635-636; 461 N.W.2d 1 (1990), which is the same standard that this Court adopted to govern appellate review of post-Lockridge sentences, *Steanhouse*, at 473, "even a sentence within the sentencing guidelines could be an abuse of

discretion in unusual circumstances." *Milbourn*, 435 Mich at 661. "[T)he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range. Id

Here, the "unusual circumstances" surrounding Mr. Richards sentence include the nature of his prior convictions which all stem from his on-going struggle with mental health disabilities

Asperger's Syndrome and ADD along with occasional suicidal ideations. In addition, information was given to the sentencing Court to that effect. See PSIR. The MDOC is not adequately addressing his mental health needs. Given this record, this Court should consider this issue preserved for appeal.

Standard of Review: Generally, a Court reviews a trial court's sentencing decisions for an abuse of discretion. *People* v. *Conley*, 270 Mich. App. 301, 312; 715 N..2d 377 (2006). Questions of constitutional law, however, are subject to de novo review. *People* v. *Drohan*, 475

Mich. 140, 146; 715 N.W.2d 778 (2006).

Discussion: Mr. Richards'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 modem 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." ***People*** v. ***McFarlin***, 389 Mich. 557; 208 N.W.2d 504 (1973).

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. ***People*** v. ***Pulley***, 411 Mich. 523, 529-530; 309 N.W.2d 170 (1981). Although the Michigan sentencing guidelines are the presumptive indicia of the appropriate sentence in a given case, if there are factors which distinguish the crime or the criminal as more or less serious than same crimes by other offenders, the individual sentence should reflect these facts. ***People*** v. ***Kimble***, 470 Mich. 305, 310-311; 684 N.W.2d 689 (2004); Milbourn, supra, 645, 653.

In exercising sentencing discretion, the trial court must not apply his or her own subjective philosophy of sentencing, and should not rely on factors already taken into account. Milbourn, supra, 653, 658 (1990),

The above requirements are the underpinnings of proportionality principles. Proportionality is the threshold requirement for a valid sentence. It derives from both the federal and state constitutions, 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 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 U.S. 277; 103 S. Ct. 3001; 77 L. Ed. 2d 637 (1983); ***Hamelin*** v ***Michigan***, 501 U.S. 957; 1 11 S. ct. 2680; 115 L. Ed. 2d 836 (1991); US Const., Ams. V, XIV, Const. 1963, 17, 15. As this Honorable Court observed in ***People*** v ***Sinclair***, 387 Mich. 91, 151; 194 N.W.2d 878 (1972): 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. See also, ***People*** v ***Lorentzen***, 387 Mich. 167, 175; 194 N.W.2d 827 (1972) ["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. The Supreme Court in ***Milbourn*** defined "proportionality" as a consideration of the seriousness of the offense in conjunction with the seriousness of the offender. The most serious punishments are to be reserved for the "most serious combinations of the offense and the background of the offender." Id., 667. (Emphasis added). Offenders with prior criminal records are likewise subject to harsher punishment than those with no prior convictions, as is reflected in the specific habitual offender provisions of the penal statutes. Id. Although the guidelines are now legislative in origin, the basic constitutional principles are still in place.

Mr. Richards' case is a classic example of a situation in which adherence to the guidelines range alone, without consideration of his mental health disabilities in the circumstances of the offense, resulted in punishment which does not commensurate with constitutionally-mandated proportionality requirements. The trial court ignored the mitigating factors and focused solely on the number of circumstances of the incident. The trial court abused its discretion.

ARGUMENT # 5

THE TOP END OF THE SENTENCE FOR SPITTING ON A GUARD IS CRUEL AND UNUSUAL BECAUSE WITH APPELLANT'S CONDITION OF ASPERGER'S SYNDROME 40 YEARS IS A DEATH SENTENCE.

Introduction: This Court should grant leave to appeal and undertake proportionality review of Mr. Richards's sentence. He acknowledges that his 46-month minimum term is at the top end of the controlling guidelines range for his offense of convictions, Assault of Prison Employee, MCL 750.197c(A) with Fourth Habitual, MCL 769.12. He further acknowledges this Court's determination that MCL 769.34(10) bars resentencing absent a showing that the trial court erred in scoring the guidelines variables or otherwise relied upon inaccurate information. *People v. Schrauben*, 314 Mich. App. 181, 196; 886 N.W.2d 173 (2016).

However, it is the maximum that is not proportional and results in cruel and unusual punishment considering Mr. Richards' mental health issues.

Here, the "unusual circumstances" surrounding Mr. Richards sentence include the nature of his prior convictions which all stem from his on-going struggle with mental health disabilities - Asperger's Syndrome and ADD along with occasional suicidal ideations. (*See* Appendix A – Richard's History of Asperger's Syndrome).

Standard of Review: An appellate court's proportionality review considers whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of the criminal record. *People v. Steanhouse*, 500 Mich. 453, 474 (2017); *People v. Milbourn*, 435 Mich. 630, 635-636; 461 N.W.2d 1 (1990). Sentencing decisions are generally reviewed for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525 (1998).

(A).DEFENDANT'S SENTENCE IS DISPROPORTIONATE AND DISPARATE; THE TRIAL COURT FAILED TO TAKE INTO ACCOUNT SIGNIFICANT MITIGATING FACTORS AND FAILED TO TAILOR THE SENTENCE TO THE INDIVIDUAL OFFENDER.

Discussion:

Defendant had a jury trial because there was no evidence saved or produced that Defendant actually *spit* on the arm of the corrections officer. Mr. Richards, although 23 years old at the time of this offense, born 11/26/1989; offense date 01/03/2013; considering his form of autism, he may have had the mind of a 15-year-old. (*Please See* Exhibits A – D). The court did not mention Mr. Richard's tender age. Defendant submits that the court failed to consider the mitigating factors, in particular the fact that children are less culpable than adults, and it failed to tailor the sentence to the individual offender, resulting in a disproportionate sentence.

Because children are inherently less culpable than adults, the United States Supreme Court ruled that the Eighth Amendment prohibition on cruel and unusual punishment bars life without parole sentences for youth convicted of homicide offenses. *See* Miller ***v*** Alabama, 132 S Ct 2455, 2464-2469 (2012). The Court said, **"Children** are constitutionally different from adults for purposes of sentencing [and] they are less deserving of the most severe punishments." (internal citations omitted). Roper and Graham, *infra,* "establish that children are constitutionally different from adults for the purposes of sentencing." Miller, 132 S Ct at 2464. The hallmark features of transient youthful immaturity include recklessness, impulsivity, risk-taking, and susceptibility to peer pressure, Roper *v* Simmons, 543 US 551, 569; 125 S Ct 1183 (2005) , and render them, as a class, "less culpable than adults." Graham *v* Florida, 560 US 48; 130 S Ct 2011, 2028 (2011). The ***Roper*** Court looked at scientific research showing that juveniles' brains were less developed, a physiological truth. Accordingly, it held that children were categorically different than adults and could not be treated the same way at sentencing. Roper**,** *supra* at 1195-1200.

Youth is a mitigating factor in *any* juvenile crime, because of the inherent vulnerability to peer pressure, impulsiveness, poor appreciation of consequences, and the less fixed nature of character traits. *Miller*, 132 S Ct at 2463. These qualities separate the acts of children from the acts of adults as to culpability; the two classes of offenders are different by definition. It is the difference between these classes of offenders that is the heart of the *Roper*, *Graham*, and *Miller* decisions. Without consideration of these differences at sentencing, the adult sentence imposed on Kyle Richards, a juvenile offender by way of disease, is disproportionate. *Id.* Certainly it was incumbent upon the trial judge to consider these factors.

Because the trial court failed to consider mitigating factors, the sentence was disproportionate and excessive. As noted in *People v Babcock, supra* at 262, the "relevancy of proportionality is obvious .... in any civilized society, punishment should be made to fit the crime and the criminal." See *Weems v United States*, 217 US 349, 367 (1910) ("[I]t is a precept of justice that punishment for the crime should be graduated and proportioned to the offense.") A proportionality analysis examines two factors – the severity of the offense and the seriousness of the offender's criminal record.

In *People v Milbourn*, 435 Mich 630 (1990), the Michigan Supreme Court said:

> "As stated over three quarters of a century ago by the United States Supreme Court, "[I]t is a precept of justice that punishment for the crime should be graduated and proportioned to the offense." *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910). In more recent times, the Court has found defects of constitutional magnitude in sentences which are disproportionate to the offense".

The *Milbourn* Court further said:

> "Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty, respectively.

> Accordingly, if the maximum or minimum penalty is unjustifiably imposed in this regard contrary to the legislative scheme, the reviewing court must vacate the sentence and remand the case to the trial court for resentencing. This discretion conferred by the Legislature does not extend to exercises thereof which violate legislative intent; such exercises are, therefore, an abuse of discretion."

The principle of proportionality requires the maximum sentence to be imposed for the *most* serious offenses committed by those with the *most* serious prior criminal records:

> In our judgment, it is appropriate-if not unavoidable-to conclude that, with regard to the judicial selection of an individual sentence within the statutory minimum and maximum for a given offense, the Legislature similarly intended more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher sentences than relatively less serious breaches of the same penal statute by first-time offenders. People v Milbourn, *supra* at 635.

When the guidelines were judicial in nature, a situation not unlike the advisory guidelines of today, the Supreme Court concluded that there may be circumstances in which a within-guidelines sentence is substantively unreasonable. As the Court in Milbourn held: "Conceivably, even a sentence within the sentencing guidelines could be an abuse of discretion in unusual circumstances." People v Milbourn, *supra* at 658. Considering the mitigating factors in the instant case, the sentence of 25 to 40 years is disproportionate and disparate. Again, Mr. Richards was only 15 years old, mentally.

While the prosecution clearly showed there was an assault on a C/O, it was mere spittle through a food slot in a cell door. There was no intent or attempt to injure.

The Court in Lockridge emphasized that the goal of the sentencing guidelines, both in Michigan and in the federal courts, is to eliminate disparity in sentencing. Holding that trial courts must consult the Guidelines, the Court said:

> Such a system, while 'not the system [the legislature] enacted, nonetheless continue[s] to move sentencing in [the legislature's] preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences

> where necessary.'" *Lockridge*, *supra* (quoting *Milbourne* and *United States v Booker*, 543 US 220, 264-265 (2004)).

18 USC 3553(a)(6) is also concerned with national disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct. *See United States v Poynter*, 495 F3d 349, 351-56 (6th Cir 2007); *United States v LaSalle*, 948 F2d 215, 218 (6th Cir 1991); *United States v Parker*, 912 F2d 156, 158 (6th Cir 1990); *United States v Simmons*, 501 F3d 620, 623 (6th Cir. 2007).

The trial court in the instant case failed to individualize the sentence by failing to adequately account for Mr. Richard's tender age and his minimal involvement in an actual assault. Although Mr. Richards had been in trouble before, the petty crime does not fit the time. The sentencing court is required to individualize the sentence to the particular offender. In *People v McFarlin*, 389 Mich 557, 574 (1973), the Court emphasized its commitment to the principles that criminal punishment must fit the offender rather than the offense alone and that sound discretion must be exercised in sentencing matters:

> "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 rehabilitative 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." (Emphasis supplied.) *See North Carolina v. Pearce*, 395 U.S. 711, 723, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), citing *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)."

The Court emphasized the importance of individualized sentencing in *People v Triplett*, 407 Mich 510, 515-516 (1980):

> "**Sentencing** must be individualized and tailored to the particular circumstances of the case and the offender at the time of sentencing. **Sentencing** a defendant without an adequate knowledge of his needs would thereby reduce the sentencing process from a first step toward

> rehabilitation to the dignity of a game of chance.' *People v. Amos*, 42 Mich.App. 629, 638, 202 N.W.2d 486, 490-91 (1972), cited with approval in *People v. Brown*, 393 Mich. 174, 180, 224 N.W.2d 38 (1974). As correctly recognized by both the Court of Appeals majority and dissent below: 'The sentencing court should make every effort to individualize sentences in order to further the goal of rehabilitation.'"

And as the Court stated in ***Miller,*** *supra* at 2467:

> "Just as chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in assessing his culpability." Mr. Richards requests a resentencing.

Because the sentence is disproportionate and disparate, and the judge failed to adequately consider mitigating factors or individualize the sentence, Mr. Richards requests that this Court grant resentencing.

(B) DEFENDANT-APPELLANT OBJECTS TO THE PLAINTIFF-APPELLEE'S MISLEADING THIS HONORABLE COURT RE: THE PSIR.

Discussion:

On page 8, Appellee claims "He refused to provide signature for release of information regarding his mental-health history at the time of the PSI[R] interview." **Please take NOTICE** that Mr. Richard's attorney points out the "Lori Bonn" PSI writer as a Defendant in a civil action 13-cv-636; an ARUS for MDOC at Ionia; before she was a PSI writer. PLEASE see (Exhibit F, Transcript pages which rebut Appellees fallacious claims re: PSI).

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Mr. Richards asks that this Honorable Court to:

1.) Set aside Defendant-Appellants conviction and publish a Declaratory ruling expounding the constitutional duty of the State law enforcement, most especially prisons have to preserve material evidence & or materially potentially exculpatory evidence. In such 'Declarations', appellant ask this court to define the "scope" of preservation, in conjunction with policy expectations of Law enforcement officials, as well as amending the current 'evidentiary standards' to support a "Higher Grade of Protection" for criminal defendants. For too long, state law enforcement has been allowed to tamper, Destroy, and spoil evidence with impunity. We plead this court to issue a **'RED LINE'** in regards to evidence tampering, destruction, and spoliation, prescribing harsher penalties therefore.

2.) Set aside Appellant-Defendants conviction and publish a Declaratory ruling establishing a "**clear and concise**" measure of validity, relating to; **'time of request'** and **'circumstances of request'**, of a defendants' demand to proceed with Pro Se self-representation. As of now, there is excess Ambiguity manifest in a '**conflict**' of decisions that need a Dire uniformed conclusive Declaration of Supreme Authority, to Govern this sixth Amendment request.

3.) Remand for Resentencing along with a publication of a Declaratory ruling, setting forth a 'Red Line' relating to the prolonged incarceration of the Serious Mentally ill Offenders. Where does the federal court draw the line, when it comes to imposing **"Virtual Death Sentences"** on mentally disabled offenders who are unlikely to survive their sentences.

Dated: October 2nd 2020

Respectfully Submitted,

Kyle B. Richards #641715
Baraga Correctional Facility
13924 Wadaga Rd.
Baraga, MI 49908

REASONS FOR GRANTING THE PETITION

The 6th Circuit COA (US Court of Appeals) has run afowl of the lawful standard set by this Supreme Court. For nearly a decade the 6th Circuit COA has frequently misinterpreted and misapplied U.S Supreme Court precedent to disparge Supreme Court authority.

This case contraversy presents several instances where the 6th Circuit COA had significantly usurped well established Supreme Court authority. (The U.S Supreme Court must act)

What the 6th Circuit has done in this legal case is equitable to "judicial mutiny" on behalf of the lower courts.

(Still Undecided, Unclear Law)

Petitioner seeks a 'declaratory Ruling' from the United States Supreme Court, to clarify several matters of law addressed in this petition, including how 8th Am questions pertaining to "excessive" sentencing and "disproportionality" should be applied to "mentally ill" offenders. As of now, a sentence is presume valid if it is within the "Legislative Guidelines." But what if the "Legislative Guidelines" are themself disproportionate.

Second, is Due Process. How far will we allow police misconduct to disturb the course of justice. 'Arizona vs. youngblood, 109 S.Ct. 333, is no longer sufficient to redress DNA based evidence spoilation or police misconduct in this case.

A NEW RULE OF LAW IS NEEDED

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Mr. Richards asks that this Honorable Court to:

1.) Set aside Defendant-Appellants conviction and publish a Declaratory ruling expounding the constitutional duty of the State law enforcement, most especially prisons have to preserve material evidence & or materially potentially exculpatory evidence. In such 'Declarations', appellant ask this court to define the "scope" of preservation, in conjunction with policy expectations of Law enforcement officials, as well as amending the current 'evidentiary standards' to support a "Higher Grade of Protection" for criminal defendants. For too long, state law enforcement has been allowed to tamper, Destroy, and spoil evidence with impunity. We plead this court to issue a 'RED LINE' in regards to evidence tampering, destruction, and spoliation, prescribing harsher penalties therefore.

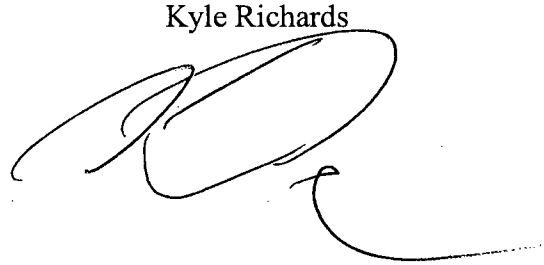
2.) Set aside Appellant-Defendants conviction and publish a Declaratory ruling establishing a "**clear and concise**" measure of validity, relating to; '**time of request**' and '**circumstances of request**', of a defendants' demand to proceed with Pro Se self-representation. As of now, there is excess Ambiguity manifest in a '**conflict**' of decisions that need a Dire uniformed conclusive Declaration of Supreme Authority, to Govern this sixth Amendment request.

3.) Remand for Resentencing along with a publication of a Declaratory ruling, setting forth a 'Red Line' relating to the prolonged incarceration of the Serious Mentally ill Offenders. Where does the federal court draw the line, when it comes to imposing "**Virtual Death Sentences**" on mentally disabled offenders who are unlikely to survive their sentences.

Respectfully submitted,

Dated: Oct 2nd 2020

Kyle Richards



Relief Sought

1.1 Vacate Conviction
And remand

2.1 Publish A New
Declaratory Ruling
Of Law Establishing
Higher Authority regarding
Issues Presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: October, 2nd, 2020