ORIGINAL

20-8221

No._____

IN THE SUPREME COURT OF THE UNITED STATES

2021

TERRENCE LAVARON THOMAS,

Petitioner,

v.

MICHIGAN,

Respondent,

On Petition for Writ of Certiorari to the Michigan Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

BY: Terrence Lavaron Thomas #769198
In Pro-Per
St. Louis Correctional Facility
8585 N. Croswell Rd.
St. Louis, MI 48880

QUESTION(S) PRESENTED

Argument I

Was Defense counsel ineffective in failing to contest the sufficiency of evidence against Mr. Thomas, as he was charged with assault with a dangerous weapon against Mr. Shackleford?

Argument II

Was Defense counsel ineffective for refusing to address Mr. Thomas repeated request to withdraw his plea before sentencing?

Argument III

Was Defendant's Due process rights of the United States Constitution violated, where he was sentenced on the basis of inaccurate information?

Argument IV

Was Defendant's right to a preliminary examination within 14 days a violated under the United States Constitution?

Argument V

Was Defendant's Constitutional right to a speedy trial and to a speedy resolution of all matters violated?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover pages.

[ ] 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 issues to review the judgment below.

OPINIONS BELOW

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

The opinion of the highest state court to review the merits appears at Appendix B____ to the petition and is

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[ ] is unpublished.

The opinion of the ____Court of Appeals_____court
appears at Appendix A__ to the petition and is

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[X] is unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257

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

The date on which the highest state court decided my case was, February, 2 2021. A copy of that decision appears at Appendix,-B.

[ ] 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

U.S. Const. amend. V

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

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Following convictions by Nolo Contendere Terrence L. Thomas plea in the Oakland County Circuit Court on 3/14/2016, case #2015-253748-FC of Carry Weapon w/Unlawful Intent, MCL 750.226; Assault with Dangerous Weapon (Felonious Assault), MCL 750.82; Assault w/Intent to Commit Murder, MCL 750.83.

Mr. Thomas stood at a bus stop outside a mall and preached the tenets of Islam. Calvin Archer walked into the bus stop's shelter and sat down to wait for a bus. Archer overheard Thomas's attempted proselytization, and quietly remarked that he was glad to be a Christian. But not quietly enough. While Archer sat on the bench and looked down at the ground, Thomas hit him in the face. Archer attempted to defend himself by retaliating, but Thomas kept flailing and thrusting at Archer. Raymond Shackleford stood nearby and realized that Thomas was not just hitting Archer, but that he had stabbed him repeatedly. So, Shackleford intervened and stopped Thomas. In the process of Shackleford aiding Archer he was injured on his hand as well.

Mr. Thomas took a plea deal by Oakland County Circuit Judge Hala Jarbou to concurrent sentences of 4 years 10 months to 30-year prison term for the Carry Weapon w/Unlawful Intent conviction, 4 years to 15 years for the Assault with Dangerous Weapon (Felonious Assault) conviction, and 15 years to 30 years for the Assault w/Intent to Commit Murder. Defendant-Appellant filed for direct appeal and was **DENIED** in the Michigan Court of Appeals, case #334776, on 2/16/2017. He was **DENIED** appeal in the Michigan Supreme court, case #155519, on 7/25/2017. Defendant-Appellant filed a Writ of Habeas Corpus and was **DENIED** on April 22, 2019, case #1:18-cv-11906 by Judge Thomas L. Ludington and Magistrate Judge Anthony P. Patti.

Subsequently, Defendant-Appellant filed a Motion for Relief of Judgment in the 6th Circuit Court, which was denied on 01/09/2020. Two additional Applications for Leave of Appeal was summited and both Denied. COA

on 06/12/2020, and then the MSC on 02/02/2021. Defendant-Appellant now seeks relief from judgment by the United States Supreme Court.

ARGUMENT I

Defense counsel was ineffective in failing to contest the sufficiency of evidence against Mr. Thomas. As he was charged with assault with a dangerous weapon against Mr. Shackleford. MCL 750.82

Standard of Review:

Sufficiency of the evidence is reviewed *de novo*. *United States v Canan*, 48 F3d 954, 962 (CA6 1995). "The sufficient evidence requirement is a part of every criminal defendants due process rights." *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, 751 (1992); US Const, Am V; Const 1963 art 1, § 17. "When reviewing sufficiency of evidence in a criminal case, this Court must view the evidence of record in the light most favorable to the prosecution to determine whether a trier of fact could find that each element of the crime was proved beyond a reasonable doubt." *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176, 180 (1999). A claim regarding insufficient evidence need not be preserved at trial. *People v Patterson*, 428 Mich 502, 514; 410 NW2d 733 (1987).

Argument:

The Due Process Clauses of the state and federal constitutions prohibit a criminal conviction unless the prosecution establishes the essential elements of the crime beyond a reasonable doubt. US Const, amends V, XIV; Mich Const 1963, art 1 § 17; *In re Winship*, 397 US 358, 361-362; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Wolfe, 441 Mich 1201*; 489 NW2d 748 (1992). Due process requires reversal if, after viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude the evidence insufficient to establish each element of the offense beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 316; 99 S Ct 2781; 61 L Ed2d 560 (1979); *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Although the evidence presented at trial is viewed in light most favorable to the prosecution, *People v Hammons*, 210 Mich App 554 (1995), *People v Wolfe supra*, and the factfinder may draw reasonable inferences from the record, the jury may not indulge in an inference that is unsupported by competent, material and substantial evidence on the record. See *People v Gonzalez*, 468 Mich 636, 640-641 (2003). Mere presence is insufficient to sustain a finding of guilt. *People v Norris*, 236 Mich.App. 411, 600 NW 2d 658, 663 (1999)(citing) *People v Wilson*, 196 Mich. App. 604, 614; 493 NW 2d 471 (1999); *Fuller v Anderson*, 662 F 2d 420, 424 (CA 6 Cir.)

To convict Mr. Thomas of assault with assault with a dangerous weapon, the prosecution was required to prove beyond a reasonable doubt: **(1)** an assault; **(2)** with a dangerous weapon, and; **(3)** with the intent to injure or place the victim in reasonable apprehension of an immediate battery; *People v. Russell*, 297 Mich. App. 707, 721; 825 NW2d 623 (2012)

In the instant case, the totality of the circumstances leads to the conclusion that Mr. Thomas did not intentionally stab Mr. Shackleford., even if he did injury him, he did not intend to harm him at all. His anger and frustration was centered on the original victim not anyone else. In police report # (0523) written by: Sohancockh, Mr. Thomas was attacking victim Archer at northland bus stop and Raymond Shackleford was at no time being threatened by Mr. Thomas when he decided to put himself at risk of injury by aiding to Archer. In the process of helping victim Archer, Mr. Shackleford was supposedly injured once in the hand. The question at hand is at what point does Mr. Shackleford take any responsibility of his choice to aid in the defense of victim Archer?

Furthermore, there are other factors which must be considered like, the nature of the defendant's acts constitution the assault; the temper or disposition of mind with which they were apparently performed, whether the instrument and means used were naturally adapted to produce harm, his conduct and declarations prior to, at the time, and after the assault, and all other circumstances calculated to throw light upon the intention with which the assault was made. With applying these aspects, the third element cannot be proved beyond a

reasonable doubt. Mr. Thomas' conduct and declarations prior to the altercation with Mr. Shackleford shows his clear intentions were directed away from Mr. Shackleford and strictly on Mr. Archer.

The facts supporting a claim of ineffective assistance must either exist in the trial record or be established in an evidentiary hearing on the issue. In any event, a showing of prejudice is not required. In *US v Morris*, 470 F. 3d 596 (CA 6, 2006) the Sixth Circuit ruled that the district court did not err in finding that defendant was denied effective assistance of counsel. Oakland County's practice of assigning counsel shortly before the pre-preliminary examination amounted to a constructive denial of counsel, under *US v Crank*, 21 Fed Appx. 521 (2001). This practice allowed an extremely short time period for counsel to prepare for the hearing, denied counsel from having a confidential, privileged conversation with defendant, and forced defendant to make an immediate decision regarding a plea offer.

With all the above into consideration the trail council at no point considered the sufficiency of evidence presented by the prosecution for Mr. Thomas to get charged with assault with a dangerous weapon against Mr. Shackleford (Second Victim). If the trail council would have diligently investigated the case, then Mr. Thomas wouldn't have felt the pressure to even accept a plea deal. The counsel's actions caused the outcome of the proceedings to be different.

The record does reflect that Mr. Thomas retired two attorneys doing his entire court proceedings which by itself is sufficient to say that the frustration between client and attorney remained at a high level. Unfortunately, competent advice never existed between the defendant and his attorney because if such existed then he would have never resolved to a 15-year plea when neither him nor the defendant had gone over his PSI. Which of course wasn't correct once the defendant actually laid eyes on it.

These jurisdictional defects could have been raised in the Defendants direct appeal if his appellate attorney wouldn't have also deprive him of effective assistance of counsel. The trial court asserts that "Good

Cause" may be established by proving the ineffective assistance of appellate counsel or by showing that some external factor prevented counsel from previously raising the issue. It is beyond obvious that the defendant would have no need to bring up the below issues if his appellate counsel would have spent the proper time researching the details of the trial proceeding in-depth.

On direct appeal the argument that the appellate counsel asserted was that "The guilty plea was invalid because it was not knowing and voluntary." Just because a defendant takes a plea deal doesn't mean that doing the court proceedings error didn't exist. The issue concerning whether Mr. Shackleford could be considered a victim due to transferred intent was a legal issue that was addressed during the preliminary exam but it also should have been one of Mr. Thomas's strongest issues on direct appeal but it wasn't because of the ineffective assistance of appellate counsel. This alone explains the good cause for failure to raise the issues previously.

Actual prejudice exists given the above facts and the outcome of the plea process would have been different with competent advice. *People v Pennington,* 323 Mich App 452, 451; 917 NW2d 720 (2018)
The aforementioned facts demonstrate that Mr. Thomas never aimed a knife or other weapon at the complainant. Construing the evidence in the light most favorable to the prosecution, the evidence that Mr. Thomas intentionally injured the complainant was insufficient., and even if he Mr. Shackleford was injured in the course of the altercation, evidence of intent to injure or place the victim in reasonable apprehension of an immediate battery is completely lacking.

ARGUMENT II

Defense counsel was ineffective when he refused to address Mr. Thomas repeated request to withdraw his plea before sentencing.

Standard of Review:

Whether defendant was denied the effective assistance of counsel is a constitutional question, which this Court reviews *de novo*. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Toma*, 462 Mich 281; 613 NW2d 694 (2000). The performance and prejudice prongs of an ineffective assistance of counsel claim are mixed questions of law and fact reviewed *de novo*. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Argument:

The voluntariness requirement mandates that a defendant entering a plea be "fully aware of the direct consequences" of the plea. *Brady v United States*, 397 U.S. 742, 755; 90 S Ct 1463; 25 L Ed 2d 747 (1970). "The most obvious 'direct consequence' of a conviction is the penalty to be imposed," thus requiring that a defendant be notified of the sentence he or she will be forced to serve because of the plea. *Blankenship v State*, 858 SW2d 897, 905 (Tenn, 1993). It is therefore apparent that habitual-offender enhancement is a direct consequence of pleading guilty because it affects the defendant's sentence. Thus, a defendant must be fully aware of the consequences of that enhancement before pleading guilty.

The record is pellucid in showing that Mr. Thomas was not satisfied with the advice given by his attorney. He was hesitant and reluctant throughout the entire proceedings. **(TT: 02/14/16)**

THE COURT: Are you satisfied with the advice given by your attorney?

MR. THOMAS: Not exactly, but we've got to get it over with?

* * *

THE COURT: Has—has anyone threatened you to get you to plead?

MR. THOMAS: No

THE COURT: Is it your own choice to plead?

MR. THOMAS: I have no choice.

THE COURT: Huh?

MR. THOMAS: I didn't have a choice; I just want to get this over with.

In situations where a defendant has a mandatory 25 yr. minimal hanging over their head, it's typically in the best interest for the attorney and the defendant to resolve the case with a plea deal. Mr. Thomas's mental oppression at this time period influence him to proceed on, but that doesn't mean his right to adequate counseling guaranteed by the Sixth Amendment doesn't apply.

The Sixth Amendment right to counsel applies all the way through the court proceedings including outside of court when Mr. Thomas and his attorney are discussing trail strategies. In this matter it was critical for defense counsel to take Mr. Thomas's request to withdraw his plea serious even if it meant he would suffer from that decision by having to renegotiate with the prosecutor.

The Sixth Amendment right to counsel attaches at all "critical stages" of a criminal proceeding. *Powell, 287 US at 57.* A "critical stage" is one "where counsel's absence might derogate from the accused's right to a fair trial." *People v Bladel,* 421 Mich 39, 52; 365 NW2d 56 (1984). The Court has indicated that one test for whether a portion of a criminal proceeding constitutes a "critical stage" is if "potential substantial prejudice to defendant's rights inheres in the . . . confrontation and ... counsel [may] help avoid that prejudice." *Coleman v Alabama,* 399 US 1, 9; 90 SCt 1999; 26 LEd2d 387 (1999). In *US v Moody* 206 F3d 609 (CA 6, 2000).

Lawyers in criminal cases "are necessities, not luxuries." *United States v. Cronic,* 466 US at 653*; quoting Gideon v Wainwright,* 372 US 335; 83 SCt 792; 9 LEd2d 799 (1963). The defendant "requires the guiding hand of counsel at every

step in the proceedings against him." *Gideon, supra* @ 345, quoting, *Powell v. Alabama*, 287 US 45, 69; 53 RCt. 55; (1932). Counsel's presence is essential because it is the means through which the other rights of the person on trial are secured. *Cronic*, 466 US at 653. This right's special value explains why it "has long been recognized that the right to counsel is the right to the effective assistance of counsel." *Cronic, supra @ 648,* quoting *McMann v Richardson,* 397 US 759, 771, n. 14; 90 SCt 1441; 25 LEd2d 763 (1970).

Before the recent revisions of the court rules, doubts regarding substantiation of a defendant's reasons for withdrawal were resolved in the defendant's favor. *People v Lewis*, 176 Mich App 690, 693-694; 440 NW2d 112 (1989); *People v Rush*, 104 Mich App 668, 671; 305 NW2d 288 (1981). Mr. Thomas's plea was not "an intentional relinquishment of a known right or privilege." *Johnson v Zerbst*, 304 U.S. 458. Defendant-Appellant expressed his confusion about the 15-year minimum sentence in the sentence agreement. (TR, Sentencing, 03/14/2016, p. 16, lines 18-25). The court attempted to help the defendant to understand the guidelines vis-à-vis the sentence agreement. (TR, Sentencing, 03/14/2016, p. 17). Even the prosecutor commented about the defendant's apparent confusion. (TR, Sentencing, 03/14/2016, p. 17, lines 1-21). Unequivocally, the defendant's colloquy with the court during the sentencing hearing reflected the lack of intelligence in his plea. The plea is therefore invalid and cannot stand. This court should therefore, grant the petition and remand the case to the trial court for plea withdrawal in the case *sub judice*, as the plea was not knowingly, voluntarily, and intelligently entered, in violation of Defendant's state and federal constitutional rights, US Const Am V, VI; Const 1963, Art 1, §§ 17, 20. *North Carolina v Alford,* 400 U.S. 25 supra. *People v Lewis*, supra. *People v Rush* supra.

Once it has been established that the plea withdrawal is in the interest of justice, the burden shifts to the prosecution to establish that the withdrawal of the plea would substantially prejudice the prosecutor. *People v. Spencer*, 192 Mich App 146 (1991); *People v. Jackson*, 203 Mich App 607 (1994). In the present case involving Mr. Thomas, there could be no viable claim of prejudice alleged by the prosecution and none found

by the trial court. It is apparent that there was no prejudice equivalent to what the Court found insufficient in Spencer:

> The prosecution did argue below that it would be prejudiced by withdrawal of the pleas because the trial was set to commence at the time the pleas were entered and some of the witnesses were from California. Although trial preparations and costs are an appropriate consideration, we do not believe that the prosecution in this case has established substantial prejudice. [Id. at 1521.

Upon information and belief, all the prosecution witnesses (Calvin Archer and Raymond Shackleford) remain available in the instant case, and are physically present in the Oakland County area. By contrast and comparison, Spencer, supra quoting from the ABA Standards for Criminal Justice (2d ed), Standard 14-2.1(a), Commentary, held that the following facts are considered to substantially prejudice the prosecution: **1.** vital physical evidence destroyed; **2.** a chief government witness has died; or **3.** 52 witnesses who have come from all over the United States and from overseas naval bases have been dismissed. ***Spencer, supra at 150***. The court should therefore grant the petition and remand the case to the trial court for withdrawal of the guilty plea.

ARGUMENT III

Defendant was denied due process of law, where he was sentenced on the basis of inaccurate information.

Standard of Review:

The issue before the Court is a mistake of law. Issues of law are reviewed de novo. *U.S. v Griffith,* 17 F3d 865, 877 (CA 6, 1994), *cert denied* 513 US 850; 115 S.Ct. 149; 130 Led 2d 89; *People v Carpentier,* 446 Mich 19, 60 n19 (1994).

Argument:

It is fundamental that a sentence be based only on accurate information. *People v Malkowski,* 385 Mich 244, 249 (1971). The sentencing process is subject to constitutional due process requirements. *Townsend v Burke,* 334 US 736; 68 S.Ct. 1252; 92 Led 2d 1690 (1984); *People v Moore,* 391 Mich 436-437 (1974); *People v Lee,* 391 Mich 618, 636-639 (1974); *U.S. Const Ams V, XIV; Mich Const 1963, Art 1, Section 17.* In, *People v Pulley,* 411 Mich 523, 529-530 (1981), the Supreme Court firmly established that a sentencing judge has a duty to resolve challenges to the accuracy of the information used at sentencing. **The Court held:**

> "An analysis of the character of the sentencing proceeding reveals its kinship to the process of determining guilt or innocence at trial, and the consequent need for defendant's presence and participation. Michigan's sentencing policy requires 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.' *People v McFarlin,* 389 Mich 557 (1973).
>
> To so tailor the sentence, the judge must gather complete and detailed information about the offender. The judge must 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." (footnotes omitted; emphasis added.)

In numerous decisions, the Court of Appeals has prescribed the general manner in which a sentencing judge should insure the accuracy of information provided at sentencing when the defendant or his counsel

alleges an inaccuracy. See e.g., *People v Edenburn,* 133 Mich App 255 (1983); *People v McIntosh,* 62 Mich App 422 (1975), modified 400 Mich 1 (1977); *People v Edenburn,* supra, 257-258, the Court of Appeals stated:

> "Michigan case law has consistently held that a sentencing court has a duty to respond to a defendant's allegations of inaccuracy in the information provided to the judge at sentencing, and that the judge's failure to do so is error mandating resentencing.
>
> In *People v Major,* 106 Mich App 226, 229 (1981), this court interpreted GCR 1963, 785.12 to mean that the trial court must exercise its discretion in determining whether allegations of error were correct and may consider statements of the attorney or defendant;
>
> GCR 1963, 785.12 leaves to the trial judge not only discretion to consider and weigh the contents of the presentence report, objective and subjective, but also discretion as to the means of implementing the due process duty of ascertaining, when the objection is raised, that the Defendant is not prejudiced in sentencing by false information. *United States v Sanders,* 438 F2d 344 (CA 5, 1971). While not compelled to hold an evidentiary hearing, in the exercise of his discretion, he may do so. He may ascertain that the disputed matter is not relevant to this decision, or is of little weight or could be safely disregarded without regard to its accuracy in light of other facts. There are many ways, in the exercise of his discretion, that he may meet the problem.
>
> * * *
>
> We hold that the duty of the trial judge to respond involves something more than acknowledging that he has heard the defendant's claims regarding the contents of a presentence report. He must indicate, in exercising his discretion, whether he believes those claims have merit."

In the instant case, Mr. Thomas challenges the accuracy of critical areas in the presentence report. The critical area being, that the true low end of he's guidelines started at 135 months not 180 months. (Sentencing TR p 15) Mr. Thomas's lawyer told him that his guidelines would be on the low end range of 180-month, which is why he agreed on taking a plea deal. Then one day before sentencing Mr. Thomas reviewed his PSI for the first time and he saw that his true low end started at 135 months, he obviously felt mislead by his lawyer and the court.

Mr. Thomas also objected to reports stating that he had intent to kill or seriously injury victim one. (Sentencing TR p 23) To this objection, the Court responded in the same fashion by simply acknowledging the objection. (TR p 22-23) It is Defendant's contention that the Court in responding in this fashion clearly erred. The Court did not exercise its discretion. It merely abdicated it by merely acknowledging that the Defendant

made an objection. The Court thus abused its discretion by not exercising it.

The Court did nothing to resolve the challenge to the information as it was required to do and did nothing to indicate whether the information was reliable or not whether it was considered in the sentencing. The allegations were certainly serious ones, which merited the Court's attention, and very well could have influenced the Court's sentence. In acting in this fashion, the trial judge denied the Defendant his due process right to be sentenced on the basis of accurate information because it made no ruling whatsoever as to the accuracy of the information contained in Mr. Thomas's presentence report and did not resolve the challenge to the reliability of the information.

ARGUMENT IV

Defendant's right to a preliminary examination within 14 days was violated.

Standard of Review:

Constitutional questions regarding Due Process are reviewed *de novo*. See *People v Smith*, 243 Mich App 657, 682; 625 N.W.2d 46 (2000); *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Argument:

Mr. Thomas's right to a preliminary examination within 14-days was violated without any good cause shown on record. The statute makes no distinction between defendants who are, those who are not, in custody. It requires, without regard to whether the defendant is in custody, that a preliminary examination be held within 14 days of the arraignment. The statute further provides, again without regard to whether the defendant is in custody, that the preliminary examination may be adjourned, continued, or delayed by the magistrate only for "good cause shown." Thus, where there is good cause for delay, the statue does not require that the examination be held within 14-days without good cause, and that a showing, and a finding by the magistrate of good cause, be made on the record. MCL 766.4, which states that the magistrate "shall set a day for a preliminary examination not exceeding 14 days after the arraignment."

> In, *People v. Weston*, 413 Mich. 371, 372, 319 N.W. 2D 537, the court held that because the statute contains an "unqualified statutory command that the examination be held within 12 days," [t]the failure to comply with the statue governing the holding of the preliminary examination entitles the defendant to his discharge." *Weston, 413 Mich at 376.* Therefore, these cases actually undermine *Moore's* assumption that there is no remedy for a statutory violation unless the legislature expressly states that there is a remedy. See also *In re Contempt of Tanksley*, 246 Mich. App. 123, 128-129; 621 N.W. 2d 229 (2000) (Given the clear legislative mandate that a respondent be afforded a hearing on a charged [personal protection order] violation within seventy-two hours, we hold that a violation of the time limit expressed in MCL 764.15b(2)(a) or MCR 3.708(F)(1)(a) demands dismissal of the charge.")

Preliminary examination must be conducted within 14 days of arraignment absent a showing of good cause for delay; simple docket congestion without a showing of unusual circumstances does not constitute good cause of adjournment of preliminary examination beyond the statutory 14-day limit. MCL 766.4 *People v. Twomey,* 173 Mich. App. 247, 433 N.W.2d 418 (1988).

> ***MCL 766.7 Adjournment, continuance, or delay of preliminary examination***
> ***Sec. 7*** A magistrate may adjourn a preliminary examination of a felony to a place in the county as the magistrate determines is necessary. The defendant may in the meantime be committed either to the county jail or to the custody of the officer by whom he or she was arrested or to any other officer; or, unless the defendant is charged with treason or murder, the defendant may be admitted to bail. The defendant may waive the preliminary examination with the consent of the prosecuting attorney. An adjournment, continuance, or delay of a preliminary examination may be granted by a magistrate without the consent of the defendant or the prosecuting attorney for good cause shown. A magistrate may adjourn, continue, or delay the examination of any cause with the consent of the defendant and prosecuting attorney. An action on the part of the magistrate in adjourning or continuation any case does not cause the magistrate to lose jurisdiction of the case.

Issues as to length of time during which delay in concluding preliminary examination may be had in behalf of state has direct bearing on defendant's constitutional and statutory right to speedy trial. *People v. Den Uyl,* 320 Mich. 477, 31 N.W. 2d 699, 1948

The remedy for the failure to arraign the defendant within 14 days, as required by **MCL 766.4** is a dismissal without prejudice. See cases, *People v. Weston,* 413 Mich. 371, 372, 319 N.W. 2D 537; *People v. Gaston, (In re Forfeiture of Bail Bond) 496 Mich. App. 268; People v. Holguin,* 141 Mich. App. 268

ARGUMENT V

Defendant's constitutional right to a speedy trial and to a speedy resolution of all matters was violated, the Defendant is entitled to a reversal of all charges with prejudice.

Standard of Review: SPEEDY TRIAL - 180-day rule

The standard of review for a violation of the 180-day rule, and/or the violation of a defendant's constitutional right to speedy trial is an issues of statutory interpretation and a question of constitutional law are reviewed *de novo*. *People v Barbee,* 470 Mich 283, 285; 681 NW2d 348 (2004); *People v Krueger,* 466 Mich 50, 53; 643 NW2d 223 (2002); *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002); *Ornelas v United States,* 517 US 690, 697, 699, 116 S Ct 1657, 134 L Ed 2d 911 (1996).

Argument:

In the case at hand, Mr. Thomas's constitutional right to a speedy trial and to a speedy resolution was clearly violated. MCR 6.004 Speedy Trial. Mr. Thomas agreed to enter a nolo contendere plea, only after the continued delay of his court proceedings compounded with the lack of his trial attorneys desire to go to trial. His decision wasn't whole hearted, it was pressured by the long extended amount of days of being incarcerated, the continued disagreements about trial strategies with his trial attorney and last but not least his daily mental oppression from having the mandatory 25 years 4th habitual sentence hanging over his head. MCR 6.004 Speedy Trial (A)

The excluded section in MCR 6.004 (C) 1-6 doesn't apply to Mr. Thomas's 180-day clock simply because none of those exclusions are on record. Section (6) speaks about docket congestions and this case fits that example. The trial court had no justified good cause for delaying the courts proceedings. Oakland county has a humongous docket load to process. Docket congestion may be a common practice but the law clearly states the trail court must have justified good cause or it's considered a violation of Mr. Thomas's constitutional right to a speedy trial.

MCR 6.004 Speedy Trial

> (A) Right to speedy trial. The defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before court. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice. (B) Priorities in scheduling criminal cases. The trial court has the responsibility to establish and control a trial calendar. In assigning cases to the calendar, and in so far as it is practicable, (1) the trial of criminal cases must be given preference over the trial of civil cases, and (2) the trial of defendants in custody and of defendants whose pretrial liberty presents unusual risks must be given preference over other criminal cases. (C) Delay in felony and misdemeanor cases; recognizance release. In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community. (1) periods of delays resulting from other proceedings concerning the defendant, including by not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges, (2) the period of delay during which the defendant is not competent to stand trial, (3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer, (4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either, (a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or (b) exceptional circumstances justifying the need for more time to prepare the state's case (5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial within the time limits applicable, and (6) any other periods of delay that in the courts judgement are justified by good cause, but not including delay caused by docket congestion.

Mr. Thomas did raise the 14-day rule and 180-day before trial in Judge Drury's/Nichols court and Jarbou's court on Nov. 30, 2015, so these are preserved issues. Since the speedy trial issue was preserved by oral and written defense motions, and because it implicates a constitutional right, the prosecution bears the burden of proving beyond a reasonable doubt that the error was harmless. The court proceedings required a total of 214 which is well over the 180-day rule. Considering all the issues above please be in favor of Mr. Thomas's request.

The 6th Circuit Court stated that the 180-day rule in MCR 6.004, does not apply to the length of time the prosecutor has to commence trial. Rather, MCR 6.004 applies to the length of time that the prosecutor has to bring charges against an incarcerated inmate upon notice of incarceration. *People v Lown,* 488 Mich 242; 794 NW2d 9 (2011). A court considers the following factors when determining if a defendant's right to a speedy trial has been violated: "(1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *People v Williams,* 475 Mich 245, 261-262; 716 NW2d 208 (2006). There is not a fixed number of days by which a defendant's trial must commence. *People v Rivera,* 301 Mich App 188, 193; 835 NW2d 464 (2013).

In, *United States v. Tinklenberg,* 579 F. 3d 589 the Defendant was indicted on October 20, 2005 and his trial began 287 days later, on August 14, 2006. Tinklenberg's trial violated the Speedy Trial Act, they reversed Tinklenberg's conviction and remanded with instructions to dismiss his indictment with prejudice. The Speedy Trial Act, 18 U.S.C.S. § 3161 et seq., mandates that in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within 70 days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. § 3161(c)(1).

The Speedy Trial Act, 18 U.S.C.S. § 3161 et seq., allows exclusions of time from the 70 day rule, including, inter alia, any period of delay resulting from other proceedings concerning the defendant, including but not limited to (A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant; (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion; and (F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of 10 days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be

unreasonable. 18 U.S.C.S. § 3161(h)(1). The defendant bears the burden of proof to show a violation warranting dismissal. 18 U.S.C.S. § 3162(a)(2).

Furthermore, the Defendant has these additional cases which support his aforementioned issues. *DA's Office v. Osborne,* 557 U.S. 52; *Skinner v. Switzer*, 562 U.S. 521; *People v. Coy*, 243 Mich. App. 283.

REASONS FOR GRANTING THE PETITION

Mr. Thomas requests that this Honorable Court grant his Petition for Certiorari for the reasons stated in issues I, through V above, because the Michigan state court's adjudication of the above claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States", and/or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding", as detailed above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

By: /s/ Terrence Lavaron Thomas

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Date: 4/12/ ,2021